Affirmed and Opinion filed September 6, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01286-CV

FATUMA AMMONS, Appellant

V.

BAKER JACKSON NISSAN, Appellee

On Appeal from the County Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 721,158

O P I N I O N

This is an appeal from an order granting summary judgment in favor of appellee Baker Jackson Nissan. In two points of error, appellant, Fatuma Ammons, complains that fact issues exist precluding summary judgment with respect to whether Baker Jackson Nissan breached the implied warranty of title and whether it breached a contract of sale. We affirm.

I. Introduction

On July 3, 1998, Ammons visited Baker Jackson Nissan in response to an

advertisement she saw for a used 200SX.[1] She eventually decided to purchase it. About three weeks earlier, Baker Jackson Nissan purchased the vehicle from Big H Auto Auction. Baker Jackson Nissan apparently agreed[2] to sell the 200SX to Ammons, subject to Ammons's ability to obtain financing. When the financing was not completed by the end of the day, Baker Jackson Nissan told Ammons she could take the vehicle and return after the Fourth of July. She did, but the financing was still not ready. Ammons told Baker Jackson Nissan that she was planning a trip to New York and would not be able to return to complete the financing "for several days." Baker Jackson Nissan agreed to let Ammons keep the car while she was out of town and to complete the financing when she returned. On July 14, after returning from New York, Ammons was arrested while driving the 200SX to Baker Jackson Nissan because the vehicle had been reported stolen. It is not clear who reported the 200SX stolen, although it may have been repossessed and reported stolen by the previous owner. After confirming with Baker Jackson Nissan that the vehicle was not stolen, the police escorted Ammons to the dealership.

Ammons accepted Baker Jackson Nissan's offer to provide her with a loaner until such time as they could clear up the problem with the title. A few days later, Baker Jackson Nissan called Ammons to notify her that the problem with the title was cleared up and that she should stop by to complete the original transaction. Upon arriving, however, Ammons testified that she was told Baker Jackson Nissan would not sell her the 200SX unless she dropped her lawsuit.[3] When Ammons refused, Baker Jackson Nissan retook possession of the 200SX, returned Ammons's trade-in to her, and refunded her $500.00

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[1] We have condensed the facts provided by Ammons in her brief to help the reader understand the facts of this case, even though Ammons fails to make any record cites, as noted by Baker Jackson Nissan.

[2] The record does not contain a copy of the contract, but Ammons testified she traded-in her other vehicle and also made a $500.00 down payment.

[3] Plaintiff's Original Petition, attached to her response to Baker Jackson's Nissan, bears a file stamp date of August 18, 1999, more than one year after the events made the basis of this suit. It is unclear, therefore, what *lawsuit* Ammons's testimony refers to; however, Ammons later testified that she contacted an attorney the day after her arrest, and her attorney contacted Baker Jackson Nissan soon thereafter.

down payment.

Ammons brought suit against Baker Jackson Nissan, essentially alleging Baker Jackson Nissan breached the implied warranty of title. After nearly nine months passed, Baker Jackson Nissan moved for summary judgment, claiming there is no evidence of an essential element to her claim of breach of warranty of title, *viz.*, that the vehicle was taken and never returned. The trial court granted summary judgment in a signed order dated June 27, 2000. This order was subsequently vacated July 3, 2000. On July 7, Ammons filed an amended petition, this time alleging not only the breach of warranty, but also alleging Baker Jackson Nissan "breached the agreed upon and anticipated contract for sale." Ammons also filed her response to Baker Jackson Nissan's motion for summary judgment, arguing that the 200SX was encumbered when she received it and further arguing that a fact issue existed as to whether Baker Jackson Nissan breached the sales contract. The trial court again granted summary judgment, and this appeal followed.

II. Breach of Implied Warranty

A defendant moving for summary judgment has the burden of establishing that no genuine issue of material fact exists as to one or more essential elements of the plaintiff's cause of action and that the defendant is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985). In her first point of error, Ammons contends that fact issues preclude summary judgment. However, Ammons has not presented this Court with a record sufficient to support a finding of reversible error because her brief fails to provide appropriate *record* cites.[4] The drafters of the rules of appellate procedure thought it so important there be record cites in the briefing, they included three different rules which touch upon this requirement. TEX. R. APP. P. 38.1(d) (statement of the case); TEX. R. APP. P. 38.1(f) (statement of facts); TEX. R. APP. P. 38.1(h)

[4] Appellant's brief does attach documents; however, we may not consider documents attached to briefs unless the documents are also part of the appellate record. *Till v. Thomas*, 10 S.W.3d 730, 733–34 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

(argument). Ammons's brief, on the other hand, makes only two citations to the record. In her statement of facts, she refers us to "Plaintiff's Response to Defendant's Motion for Summary Judgment in Trial Court Record," to support her claim that "she suffered from emotional distress, and suffered economic harm because of the breach of contract by [Baker Jackson]." She also cites to the record by referring us to "Plaintiff's response to Defendant's Motion for Summary Judgment, Sub-paragraph B 1–27, Pages 7–11 in the Courts [sic] Record," in support of her claim that Baker Jackson "did not meet its burden of showing that the appellant's right to an unencumbered good as provided by the TBCC was not violated." Ammons's two record cites do no more than direct this Court to read her summary judgment response, along with its attachment—a response which contains 76 of the trial court's 116-page record. This is not what is contemplated by 38.1(h). It is the appellant's burden—not ours—to demonstrate the record supports her contentions and to make accurate references to the *record* to support her complaints on appeal.[5] *See, e.g.*, *Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302 (Tex. App.—Houston [14th Dist.] 1995, no writ) citing *Elder v. Bro*, 809 S.W.2d 799, 801 (Tex. App.—Houston [14th Dist.] 1991, writ denied)); *Tacon Mechanical Contractors v. Grant Sheet*, 889 S.W.2d 666, 671 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Accordingly, Ammons has waived this point of error.

In any event, we disagree with Ammon's contention that a breach of the implied warranty of title is established merely upon a false allegation that the item was stolen. At a minimum, the plaintiff must establish that what was warranted in the sale has not been returned to the buyer.[6] *Trial v. McCoy*, 553 S.W.2d 199, 200–01 (Tex. Civ. App.—El Paso

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[5] Ammons has been on notice that her brief failed to properly make record references at least since April 2, 2001, when Baker Jackson filed its brief complaining of same and citing to the appropriate rules of appellate procedure and case law.

[6] There are other ways a seller may breach the implied warranty, *e.g.*, by failing to deliver title, *see, e.g.*, *H.E.D. Sales, Inc. v. Szelc*, 596 S.W.2d 299, 302 (Tex. Civ. App.—Houston [14th Dist.] 1980), *rev'd in part on other grounds*, 603 S.W.2d 803 (Tex. 1980). The only allegation Ammons makes regarding Baker Jackson Nissan's alleged breach of warranty, however, is founded upon the traffic stop.

1977, no writ); *Saenz v. Big H Auto Auction, Inc.*, 653 S.W.2d 521, (Tex. App.—Corpus Christi 1983), *aff'd*, 665 S.W.2d 756 (Tex. 1984). Moreover, no Texas court has ever held that a disturbance of quiet possession is established merely upon a false allegation that an item was stolen. In contrast, the common thread sewn through all of the other cases is the fact that the item was never returned to the buyer. *See, e.g., Horta v. R.K. Tennison*, 671 S.W.2d 720, 721 (Tex. App.—Houston [1st Dist.] 1984, no writ) (vehicle stolen before sale); *Saenz*, 653 S.W.2d at 523–24 (vehicles stolen); *Szelc*, 596 S.W.2d at 300 (vehicle seized by original lienholder); *McCoy*, 553 S.W.2d at 201 (gun stolen and returned to original owner). Finally, the Uniform Commercial Code, as adopted by Texas, provides that "goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no notice." TEX. BUS. & COM. CODE ANN. § 2.312.(a)(2) (Vernon 1994). In short, a seller breaches the implied warranty of title where he purports to give good and clear title when he does not actually have good and clear title.[7]

Here, Ammons's own testimony establishes that she was stopped by police on a false report that the 200SX was stolen. The stop lasted "about an hour or so." When they called Baker Jackson Nissan, the manager explained the situation. The police then escorted her back to the dealership in order to ensure she would not be stopped a second time. Ammons was allowed to keep the vehicle. Accordingly, summary judgment on this claim was proper, not only because Baker Jackson Nissan conclusively established that the vehicle was returned to Ammons, an element essential to her cause of action for breach of warranty of title, but also because Ammons's concedes that Baker Jackson Nissan had good and clear title to the 200SX, notwithstanding the false report.[8] Ammons's first point

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[7] As Ammons's recognizes, an implied warranty of title may be modified by the seller at the time of purchase. *See, e.g., Gunderland Marine Sup., Inc. v. Bray*, 570 S.W.2d 542, 545–46 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

[8] Ammons testified that the police were satisfied Baker Jackson Nissan was the lawful owner of the 200SX after officers spoke with Ammons's salesman, and that they "escorted" her back to the dealership so she would not get stopped again.

of error is overruled.

III. Breach of Contract

We also find that Ammons's has waived this point of error by failing to cite to anything in the record showing reversible error and by failing to present any argument or authority in support of reversal. Baker Jackson Nissan argued to the trial court that Ammons could not establish she suffered any damages because she subsequently purchased a car of a different make and model. On appeal, Ammons merely argues that a question of fact exists as to whether Baker Jackson Nissan "*breached* the sales contract . . . . Thus, appellee unilaterally and wrongfully *breached and rescinded* the sales contract. It follows then, that the appellee's *breach* [of the sales contract] is evidence of a disturbance of the appellant's quiet possession to the 200SX." (Emphasis ours.) The problem with this argument—not to mention the briefing itself—is, of course, that Baker Jackson Nissan conceded, for purposes of summary judgment, the breach of contract issue, choosing instead to argue only that Ammons could prove no damages as a result.[9] Therefore, arguing that a fact issue as to whether Baker Jackson Nissan breached the contract does nothing to show reversible error by the trial court. Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

[9] While we find Baker Jackson Nissan's argument to be somewhat dubious, on appeal, it was appellant's burden to point out either where the record raised a fact issue on damages or to cite cases showing how the trial court erred. Otherwise, we become the parties' advocates, deciding not whether the appellant or the appellee has made the better argument, but which of us has. This we cannot do.

Judgment rendered and Opinion filed September 6, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).