IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD R. WILD and DIANA H. WILD,

Plaintiffs,

v.

SUBSCRIPTIONS PLUS, INC., Y.E.S.! INC., YOUTH EMPLOYMENT SERVICES, INC., KARLEEN HILLERY, CHOAN LANE, JEREMY HOLMES, HEART OF TEXAS DODGE, INC., SCOTTSDALE INSURANCE COMPANY, ACCEPTANCE INSURANCE COMPANIES, PROGRESSIVE NORTHERN INSURANCE COMPANY, MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, and UNIVERSAL UNDERWRITERS OF TEXAS,

Defendants.

OPINION AND ORDER

00-C-0067-C

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Plaintiffs Donald R. Wild and Diana H. Wild have moved for reconsideration of the order entered herein on December 6, 2000, in which I granted the motion for summary judgment of Karleen Hillery in all respects, granted Subscriptions Plus, Inc.'s motion for summary judgment with respect to plaintiffs' breach of agreement and negligence claims against

this defendant, denied defendant Acceptance Insurance Companies' motion for summary judgment as moot, and granted the motions for summary judgment filed by defendants Heart of Texas Dodge, Inc. and Universal Underwriters of Texas. The motion for reconsideration was set for briefing; unfortunately, the briefing schedule was not sent to the dismissed defendants, although several of them are affected directly by the motion for reconsideration.

Given the short amount of time remaining before trial, I will proceed to decide the motions without hearing from the opposing parties. Doing so will not prejudice them. For example, I agree with plaintiffs that I erred in not addressing their allegations that defendant Universal Underwriters could be liable to plaintiffs on any basis other than Heart of Texas's alleged negligent entrustment of the vehicle to Jeremy Holmes. Universal Underwriters briefed this issue fully in connection with its motion for summary judgment; it is not necessary for it to submit anything else in order to enable me to rule on the issues. Other matters raised by plaintiffs concern the various submissions of the parties; these do not require responsive briefs.

I. LIABILITY OF DEFENDANT UNIVERSAL UNDERWRITERS

At the outset, I note that among the objections plaintiffs are raising are objections to certain evidence submitted by defendants Heart of Texas and Universal Underwriters in support of their motion for summary judgment. Specifically, plaintiffs allege that the affidavits

of Matthew R. Boyer, Quentin F. Shafer and Grant Vanaman are inadmissible evidence because they do not show that they are being made on personal knowledge, do not set forth facts that would be admissible in evidence at trial and do not show affirmatively that the affiants are competent to testify to the matters stated therein. It is too late for plaintiffs to object to these submissions, which I considered in deciding the motions for summary judgment. Moreover, plaintiffs do not identify any particular deficiency in any of the three affidavits other than their generalized challenge to them. It is true that the affiants do not say in so many words that they are making the affidavits on personal knowledge and that they are competent to testify to the contents of the affidavits but it is obvious from their positions and the nature of the affidavits that affiants satisfy these requirements. As for not setting forth facts that would be admissible in trial, plaintiffs may be referring to some of the averments that border on conclusions of law. To the extent that some of the proposed findings are really conclusions of law, I did not place any reliance on them.

From the facts proposed by the parties, I find the following material and undisputed.

A. Findings of Fact

Defendant Heart of Texas is a Texas corporation engaged in the business of selling new and used motor vehicles in the state of Texas. It is not licensed as an automobile dealer in any

other state. Universal Underwriters is a Texas corporation with its principal place of business in Plano, Texas. It issued a policy of insurance in Texas to Heart of Texas for the policy period from November 1, 1998 through November 1, 1999. (The relevant portions of the policy are reproduced and attached to this opinion as Appendix A.)

Defendant Heart of Texas Dodge, Inc. entered into a Conditional Sale and Delivery Agreement with defendant Choan Lane on January 16, 1999, for the purchase of a 1998 Dodge Ram 3500 at a price of $22,934.43. (A copy of the agreement is attached to this opinion as Appendix B.) Lane presented a valid driver's license from the state of Iowa as well as a proof of insurance card from Allstate Indemnity Company. (The policy limits on the Allstate policy are $25,000 a person and $50,000 an accident.) Defendant Lane made a down payment of $2500 and took possession of the van on the same day. Three days later, on January 19, 1999, Lane was approved for credit and financing by FirstCity Funding Corporation, for the balance of the van's purchase price.

After January 16, 1999 and before the date of the accident in which plaintiffs' son was killed, defendant Heart of Texas never regained custody, control or possession of the van. However, Heart of Texas never transferred a certificate of title to Lane because the full price was never paid.

Defendant Heart of Texas never had any contact with defendant Jeremy Holmes or had

any knowledge that Holmes would be driving the van.

B. Opinion

In the complaint, plaintiffs alleged that defendant Heart of Texas did not actually sell a van to defendant Lane on January 16, 1999, but instead entered into a "Conditional Sale and Delivery Agreement," that was never completed. According to plaintiffs, this means that defendant Heart of Texas still owned and controlled the van at the time of the accident and could be held liable for negligently entrusting the van to person who were not fit or qualified to drive it. Also, plaintiffs alleged that the insurance policy that Heart of Texas had purchased from defendant Universal Underwriters provided coverage for plaintiffs' damages. In the order entered December 6, I addressed only the negligent entrustment claim, concluding that plaintiffs could not prevail on it because they could not show that Heart of Texas knew or should have known that the entrustment of the van to defendant Lane would create an unreasonable risk of harm to others.

Plaintiffs contend that it is still necessary to decide whether Universal provided coverage to Lane, Holmes or YES! as well as whether Universal insured the van and the driver thereof for all times material to this litigation. They argue that Coverage Part 900 of the policy issued to Heart of Texas would provide coverage *if* Heart of Texas still owned the van at the time of

the accident and Jeremy Holmes was using the van within the scope of Heart of Texas's permission. In addition, they contend that Coverage Part 980 of the policy provides coverage in addition to what is provided in Part 900. Alternatively, they contend that if neither Coverage Parts 980 or 900 provide coverage to plaintiffs and if the Allstate Insurance policy issued to Choan Lane has a policy limit of only $20,000, then the van becomes an uninsured vehicle. Assuming the vehicle was owned by Heart of Texas at the time of the accident, they argue, plaintiffs' deceased son would be an insured under the policy (because he was occupying a covered vehicle) and Universal would be required to pay the amounts plaintiffs would be able to recover from the vehicle's operator.

Plaintiffs' arguments rise or fall on plaintiffs' ability to show that Texas law would recognize defendant Lane or someone driving with his permission such as Holmes as additional insureds under the Universal Underwriters policy. Texas law governs because under the choice of law analysis that the forum state of Wisconsin uses, Texas has the most significant relationship to the insurance transaction and the parties. See, e.g., Handal v. American Farmers Mutual Casualty Co., 79 Wis. 2d 67, 74 n.2, 255 N.W.2d 903, 906 n.2 (1977). Heart of Texas and Universal Underwriters contracted for the insurance coverage in Texas; the policy was delivered there; and Texas was the only place in which Heart of Texas did business.

Under Texas law, a conditional vendee of an automobile is not covered by the seller's

insurance policy; the seller has no responsibility for the vendee's tortious acts. See, e.g., Rush v. Smitherman, 294 S.W.2d 873 (Tex. Civ. App. 1956) (car dealer not responsible for accident caused by unlicensed driver who was buying car from dealership; although driver defaulted on his agreement to purchase after accident, crucial factor was that as of date of accident, no one but buyer controlled vehicle or had sole right to control it). Plaintiffs try to distinguish Lane's situation from that in Rush by describing the conditional agreement that Lane signed as a contract *to* sell and not a contract *of* sale, but their effort is unpersuasive. The agreement that Lane signed is a contract of sale: it describes the conditions that must be met before the entire sale is consummated but it assumes that those conditions will be met. It is not distinguishable in that respect from the agreement in Rush. See also Gulf Insurance Company v. Bobo, 595 S.W.2d 847 (Tex. 1980) (seller agreed to sell his pickup truck to buyer provided buyer would obtain insurance; buyer failed to obtain insurance before wrecking truck and injuring Bobo and another; court held that buyer was conditional vendee who was not using the insured vehicle with the consent of the owner and therefore was not covered under seller's insurance policy). Even if Lane had given Heart of Texas counterfeit money or a bad check as down payment, once he took the van from the dealership, it was under his control and not Heart of Texas's. See, e.g., Weatherford v. Aetna Insurance Co., 385 S.W.2d 381 (Tex. Civ. App. 1964) (buyer of car who paid for it with NSF check and was returning car to dealership at dealership's

direction when involved in accident was not an additional insured under dealership's insurance policy; court rejected plaintiffs' argument that buyer's act of returning car to dealership on demand made buyer person using vehicle with permission of named insured). In Weatherford, the Texas court relied upon an Indiana case, Farm Bureau Mutual Insurance Co. of Indiana v. Emmons, 104 N.E.2d 413 (1952), in which the court held that a car buyer's default in payments did not mean that the seller was liable for damages caused by the buyer's negligent driving. "[B]ecause of the default in payment, [the seller's] right or power as to the automobile, was limited to the retaking of its possession and control after demand. In the absence of such a retaking, the fact of [the buyer's] default was immaterial as affecting the rights of [the buyer] under the policy of insurance." Id. at 416. Heart of Texas never reclaimed the van before the date of the accident. As of that date, Lane was the person in control of the automobile.

Plaintiff argues that the transaction between Lane and Heart of Texas was never completed because Heart of Texas never conveyed the certificate of title to Lane. Under Texas law, the buyer need not have the certificate in hand in order to be deemed the person in actual control of the car. Whether the buyer has the certificate or not, so long as he has actual possession of the car, Texas law bars recovery from the seller or its insurer for any damages caused by the negligent use of the car. See Rush, 294 S.W.2d at 878 (holding that failure to convey certificate of title to buyer did not make seller liable for buyer's accident; "[T]he

Certificate of Title act was never intended to enlarge the tort liability of a seller . . . ."). See also Gulf Insurance Company, 595 S.W.2d at 848 ("seller might retain legal title as a security interest, but between the buyer and seller, the seller has no right to possess or control the vehicle").

Because Heart of Texas had no ownership interest for insurance purposes in the van that Lane purchased once Lane agreed to the terms of the sale and taking possession of the van, it is unnecessary to explore the provisions of the Universal Underwriters policy to determine whether they would provide coverage. All of the provisions cited by plaintiffs apply only if plaintiffs can prove that Heart of Texas owned the van at the time of the accident at issue. It might have been premature to dismiss Universal Underwriters from this case before discussing all aspects of the motion, but it was not incorrect. Universal has no liability to plaintiffs.

II. ACCEPTANCE INSURANCE COMPANY

Plaintiffs' objections to defendant Acceptance Insurance Company's motion for summary judgment focus on alleged deficiencies in defendant's proposed findings of fact. I am at a loss to understand why plaintiffs are raising these objections. Acceptance Insurance Company's motion for summary judgment was denied as moot because the entities it insured are no longer part of this lawsuit.

Even if there were some significance to plaintiffs' objections, the time to raise them has passed. Plaintiffs could have made these objections when it opposed Acceptance's motion. (It is irrelevant that I rejected plaintiffs' brief and proposed findings of fact because they were untimely; plaintiffs never said anything in their untimely brief about its objections to Acceptance Insurance Company's submissions.)

In any event, plaintiffs' objection to Acceptance Insurance's proposed findings is meritless. Plaintiffs list a number of instances in which Acceptance set out findings of fact in its brief that did not correspond to the facts it had proposed in its document entitled Proposed Findings of Fact. I never pay any attention to the "facts" set out in the brief, but rely only on the separately stated proposed findings.

In addition, plaintiffs object to an affidavit of Barbara O'Brien, to which is attached portions of a deposition of Kaila Blaine Gillock. The file includes two affidavits of O'Brien but neither of them has attached to it any deposition testimony of Kaila Blaine Gillock.

IV. SUBSCRIPTIONS PLUS, INC.

Finally, plaintiffs argue that newly discovered evidence shows that the court erred in relying on defendant Subscriptions Plus's proposed finding that neither it nor Karleen Hillery owned any of the vehicles used by the YES! crew or Lane. In support of this argument,

plaintiffs have submitted the affidavit of their counsel, to which are attached what appears to be a communication sent to defendant Lane by Allstate, advising him that his insurance was going to be cancelled because the company had learned that his vehicles were registered to "Prescriptions Plus"; a portion of a deposition of plaintiff Diana Wild, in which she testifies that her son told her that he would not need a car when he started selling magazine subscriptions because he would be driven in cars owned by Subscriptions Plus; a portion of a deposition taken of Jeremy Holmes, in which he describes a white van; and an assertion by plaintiffs' counsel that the records of Gateway Ford would show that Choan Lane and Subscriptions Plus purchased the vehicle described by Holmes in his deposition. This evidence is far from sufficient to show that Subscriptions Plus owned the van involved in the accident that killed plaintiffs' son.

ORDER

IT IS ORDERED that the motion of plaintiffs Donald R. Wild and Diana H. Wild for reconsideration of the dismissal of defendants Universal Underwriters, Subscriptions Plus and Acceptance Insurance Company is DENIED. The briefing schedule previously set on the motion for reconsideration is VACATED.

Entered this 8th day of January, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge