IN THE COURT OF APPEALS
STATE OF GEORGIA

SUBODH RAYSONI,	§	
	§	
Appellant,	§	
	§	
vs.	§	
	§	APPEAL NO. A13A0714
PAYLESS AUTO DEALS, LLC and	§	
AHSAN UI-HAQUE	§	Fulton County Superior Court
	§	Civil Action 2012-CV-214811
Appellee.	§	

BRIEF OF APPELLANT

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LAW OFFICES OF T. MICHAEL FLINN

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BRIEF OF APPELLANT

COMES NOW, Subodh Raysoni, and for his Brief states as follows:

PART I: STATEMENT OF THE CASE

Plaintiff-Appellant Raysoni brought claims against Payless asserting fraud, violations of the Georgia Fair Business Practices Act (representing a consumer product has qualities or conditions it does not have), and Revocation of Acceptance. The trial court dismissed all counts of the plaintiff's claims as failing to state a claim.[1] Appellant brings this direct appeal as a matter of right under O.C.G.A. §5-6-34.

[1] Because evidence was submitted beyond the pleadings, the case should perhaps have been ruled upon as a motion for summary judgment, not a motion to dismiss.

This important consumer case involves a used car dealer falsely representing that a car has not been wrecked when in fact it had actual knowledge to the contrary, because it was disclosed to the dealer at auction where it acquired the car, and then attempting to disclaim any representation it made in the fine print of a contract. The dealer also knowingly used an inaccurate "clean" report from Carfax, a well known and highly advertised vehicle history service, showing the consumer a clean Carfax, to reassure Raysoni that the car had not been wrecked, all the while knowing the car had suffered frame damage.

In this case, Appellees also used an inaccurate Carfax report *in conjunction with* affirmative, knowing, false statements about the vehicle's condition. Appellees seeks to absolve itself from these fraudulent misrepresentations by using technical language in the fine print of its documents. This fine print "disclaimer" is part of the dealer's scheme to defraud, and is itself evidence of intent.

Aside from the legal errors which this Court is bound to correct, the case is particularly important in the realm of consumer law. Carfax has become a ubiquitous tool used by consumers to evaluate the history of the car, and car dealers advertise using Carfax to represent the quality of their cars. However, as car dealers are aware (but consumers generally are not), Carfax has a lag time between when a wreck

occurs and when it appears on Carfax reports; often Carfax misses wreck histories entirely. This phenomenon invites the deliberate misuse of Carfax by dealers like Appellees, and allows them to affirmatively mislead their customers about the condition of their vehicles.

In dismissing Appellant's claim, the trial court rendered meaningless the Georgia Fair Business Practices Act and the Used Motor Vehicle Dealers Registration Act, by allowing Appellees to cynically engage in conduct which is specifically outlawed in O.C.G.A. §43-47-10. Appellant asks this court to reverse the trial court's ruling and to hold that deliberately obscure fine print does not, as a matter of law, prevent a plaintiff from bringing a claim under the above statutes.

STATEMENT OF FACTS

As alleged in the Complaint, on September 18, 2011, Appellant visited Appellees to purchase a reliable and durable automobile. The Payless salesman showed him a 2008 Honda Odyssey, and Appellant asked if it had anything wrong with it, such as a prior wreck or damage. He was told that nothing was wrong with the vehicle, which was represented to Appellant orally and in the Bill of Sale as being clean and undamaged. Appellant requested a Carfax, and was shown the "clean" report on the salesman's computer.

Over time, Appellant began to notice a musty smell in the vehicle. On November 23, 2011, he took the vehicle to Carmax to trade it in, and was told it had frame damage and that there had been extensive paint work and body work performed on it, and that its value was $7,000.00 (many thousands less than the purchase price). Appellant then learned that the vehicle had suffered significant frame damage in a wreck, and needed $10,000 to $12,000 in repairs to address visible damage (not including mechanical repairs) and even then would suffer a diminution of value of at least $8,000.

The vehicle's prior wreck and frame damage easily observable to anyone in the used car business. Moreover, the vehicle was announced at the auction where it was purchased as a frame damaged car. Appellees knew the vehicle was frame damaged and used the Carfax lag time to misrepresent the vehicle's condition.

Appellant asked Appellees to repurchase the vehicle, but Appellees refused. Appellant sent the required statutory notice under O.C.G.A. §10-1-399. Appellant would not have purchased the Vehicle had he been told that it had been in a prior wreck and sustained significant frame damage.

(R-5-6, Paragraphs 4-10, exhibits attached thereto; R-13)

At the same time the salesman was telling Appellant the car had not been wrecked, and showing Appellant a clean Carfax report, Appellees knew the car had suffered frame damage, because when Payless purchased the vehicle at auction, the auction invoice showed "Unibody Damage." In addition, the auction had the following information available to its purchasers[1]:

The Right "C" pillar had been buckled.

The Right front door and apron had been repaired.

The Right Apron had been replaced.

The Left apron had been repaired and replaced.

The core support had been repaired and replaced.

$3,608.00 of reconditioning work was done at the auction prior to sale.

The grade of the car was "rough."

Unfortunately, this tactic has become widespread. In fact, using an inaccurate Carfax report in the face of such knowledge (i.e., using Carfax's known lag time in

[1] The documents produced by Manhiem Auction Company in response to 3rd Party Request for Production of Documents were attached in their entirety as Exhibit C to Plaintiffs Response to Motion to Dismiss. R-186; 187.

reporting damage history to sell the car while claiming it has a clean Carfax) has come to be known as "Carfax fraud." [2]

In its Answer and Motion to Dismiss, Appellees rely on a disclosure of frame damage in its Buyer's Order.[3] The alleged disclosure is in very small print with nothing therein setting it out as conspicuous. Dealer admits in its answer that it gave Appellant a warranty on the Buyer's Order. The Buyer's Order attached to Dealer's

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[2] It has been reported in the local media here:
http://www.cbsatlanta.com/story/18760392/used-car-dealer-sanctioned-by-state-after-3-years-of-cbs-atlanta-news-investigations

It has been reported in the national news media here:
http://www.cbc.ca/marketplace/2009/vehicle_history_reports/main.html
http://sanfrancisco.cbslocal.com/2011/08/17/consumerwatch-bay-area-car-buyer-finds-holes-in-carfax-report/
http://louismgreen.com/blog/the-trouble-with-carfax/
http://www.consumeraffairs.com/news04/2006/10/carfax_facts.html

[3] The Buyer's Order should not be confused with the Buyer's Guide. The Buyer's Order is similar to a Bill of Sale. (R-52) The Buyer's Guide is the window sticker required by the FTC Used Car Rule. (R-53)

Answer [4] states: 30 days warranty on CV Joints. Payless will replace CV Joints if they go bad in 30 days of purchase. R-51.

In other words, at the same time Appellees falsely told Appellant the car had not been wrecked, and showed him the clean (but inaccurate) Carfax to further divert him from the truth, they attempted to disclaim those very representations in the fine print of an inconspicuous adhesion contractual clause. And, at the same Appellees provided a written warranty on the car, they attempted to disclaim that very warranty in the same document.[5] This conduct constitutes an unfair business practice, it is brazenly fraudulent, and Appellant should be allowed to present his claims.

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[4] It is noteworthy that plaintiff's copy of the buyer's order omits this warranty language. See Exhibit A to complaint. R-12. Compare R-52.

[5] The Federal Trade Commission Used Car Rule requires that if the car is not covered by any warranty, either express or implied, the dealer must check the block labeled "AS-IS-NO WARRANTY." If the car is covered by a written warranty, the dealer must check the box labeled "WARRANTY." **It cannot be both.** 16 C.F.R § 455.2(b)(1)(ii). See also Fed. Trade Commission Staff Compliance guidelines III(B)(3)(b), 53 Fed Reg 17,660, May 17, 1988.

Part II: ENUMERATION OF ERRORS

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S GEORGIA FAIR BUSINESS PRACTICES ACT CLAIMS WHICH ALLEGED THE DEALER ORALLY ASSURED HIM IN RESPONSE TO DIRECT INQUIRY THAT THE CAR HAD NOT BEEN WRECKED WHEN THE DEALER IN FACT KNEW THE CAR HAD BEEN WRECKED

II. THE TRIAL COURT ERRED IN FINDING THAT A DEALER THAT REPRESENTS THAT A CAR HAS NOT BEEN WRECKED WHEN IT KNOWS IT HAS BEEN WRECKED, MAY AVOID FRAUD LIABILITY BY DISCLOSING IN FINE PRINT OF THE CONTRACT THAT THE CAR WAS ANNOUNCED AS UNIBODY DAMAGE

III. THE TRIAL COURT ERRED IN RELYING ON AN AS-IS DISCLOSURE, WHERE THE ATTEMPTED DISCLOSURE WAS NOT ALLOWED DUE TO THE DEALER'S ALSO PROVIDING AN EXPRESS WARRANTY

IV. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT FAILED TO PLEAD SUFFICIENT FACTS TO STATE A CLAIM FOR REVOCATION OF ACCEPTANCE UNDER O.C.G.A. § 11-2-608

JURISDICTIONAL STATEMENT

Jurisdiction is properly vested in this Court because this Appeal involves a subject upon which jurisdiction is not conferred upon the Supreme Court by the Georgia Constitution Article VI, Section VI, Paragraph II, and involves correction of errors of law. Jurisdiction is vested in the Court of Appeals under Article VI, Section V, Paragraph III of the Georgia Constitution.

Part 3: STANDARD OF REVIEW

The standard of review for the dismissal for failure to state a claim upon which relief may be granted is de novo, and "all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor." Southstar Energy Services v. Ellison, 286 Ga. 709, 710 (1) (691 SE2d 203) (2010). "If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied." Anderson v. Flake, 267 Ga. 498, 501 (2) (480 SE2d 10) (1997).

ARGUMENT AND CITATION OF AUTHORITY

I. THE TRIAL COURT ERRED IN DISMISSING RAYSONI'S GEORGIA FAIR BUSINESS PRACTICES ACT CLAIMS WHICH ALLEGED THE DEALER ORALLY ASSURED HIM IN RESPONSE TO DIRECT INQUIRY THAT THE CAR HAD NOT BEEN WRECKED WHEN THE DEALER IN FACT KNEW THE CAR HAD BEEN WRECKED

Raysoni alleges that the Appellees violated the Georgia Fair Business Practices Act in representing the van was of one quality -"clean undamaged"- when in fact the dealer knew the vehicle had another quality -"unibody damage"- had $3,608.00 of reconditioning work performed at the auction and was in "rough" condition per the auction information disclosed to the dealer at the time of the purchase. R-186; R-190.

Used car dealers are regulated specifically by the State of Georgia. O.C.G.A. § 43-47-10 prohibits used car dealers from:

> (C) Making any substantial misrepresentation;
>
> (D) Making any false promises of a character likely to influence, persuade, or induce;
>
> (E) Pursuing a continued and flagrant course of misrepresentation or the making of false promises through agents, salespersons, advertising, or otherwise;
>
> (I) The intentional use of any false, fraudulent, or forged statement or document **or the use of any fraudulent, deceitful,**

dishonest, or immoral practice in connection with any of the licensing requirements as provided for in this chapter;

(L) **The performance of any dishonorable or unethical conduct likely to deceive, defraud, mislead, unfairly treat, or harm the public**;

Any person damaged as a result of a violation of these provisions by a used car dealer may bring an action for damages in any superior court to recover damages and punitive damages. O.C.G.A. § 43-47-20(c).

Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce are hereby declared unlawful. O.C.G.A.§ 10-1-393. It is the intent of the General Assembly of Georgia that such practices be stopped swiftly and that this statute be **liberally construed and applied** to promote the purposes and policies. O.C.G.A.§ 10-1-391(a).(emphasis added) A consumer transaction means the sale, purchase, lease or rental of goods, services, or property, real or person, primarily for personal family or household purposes. Consumer acts and practices means acts or practices intended to encourage consumer transactions. O.C.G.A.§ 10-1-392(a)(2), O.C.G.A.§ 10-1-392(a)(3).

Any person who suffers injury or damages as a result of consumer acts or practices in violation of this part may bring action against the person or persons engaged in such unlawful consumer acts or practices to recover his general and exemplary damages sustained in the consequence thereof. A violation of the act requires no knowledge of the deception or intent to deceive by the defendant. Crown Ford v. Crawford, 221 Ga. App. 881 (1996); O.C.G.A. § 10-1-399.

> It is deceptive to say half the truth and omit the rest, to omit qualifying information necessary to prevent the statement from creating a misleading impression, or to remain silent if under the circumstances there is a false implied representation. Criteria for determining unfairness are whether there is substantial consumer injury, not outweighed by the benefits to competition, and where the consumer could not reasonably have avoided the practice. A pure omission of information is unfair if the consumer benefit from disclosure of information outweighs disclosure costs.

See N.C.L.C. Autofraud, Sheldon, § 4.2.14.3.

The prohibited unfair or deceptive acts and practices in O.C.G.A. § 10-1-393 include:

(2) Causing actual confusion or actual misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(5) **Representing** that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;

(7) **Representing** that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another.

O.C.G.A. §10-1-393. This broad prohibition recognizes that deception "is infinite in variety. The fertility of man's invention in devising new schemes of fraud is so great" and unfair business practices acts allow proscription of new forms of deception. National Consumer Law Center, Unfair and Deceptive Acts and Practices (7th Ed.

2008) The code provides no definition of "representing" as used in this statute.[6] Black's Law Dictionary defines "Representation" as "any conduct capable of being turned into a statement of fact", including "deeds, acts, or artifices calculated to mislead another, as well as words or positive assertions." This includes "A statement express or implied made by one of two contracting parties to the other, before or at the time of making of the contract, in regard to some past or existing fact, circumstance or state of facts pertinent to the contract, which is influential in bringing about the agreement." Black's Law Dictionary 5th Edition. It is clear that "representing" includes oral statements.

Certainly, telling a consumer that a car has not been wrecked and is a clean vehicle is deceptive when the vehicle is then known to have unibody damage. Telling a consumer a car had not been wrecked, granting a warranty, and waving a clean

[6] However, the code defines "representing" in 10-1-392(a)(27.1):

> Representation regarding "kosher food" means **any direct or indirect statement, whether oral or written**, including but not limited to an advertisement, sign, or menu and any letter, word, sign, emblem, insignia, or mark which could reasonably lead a consumer to believe that a representation is being made. (Emphasis supplied)

Carfax while at the same time knowing full well that the car had suffered unibody damage and reconditioning charges over $3600 while at auction is deceptive. **Even the "disclosure" relied upon by the trial court is erroneous in that it does not disclose the extent of the repairs conducted while at auction**. Nothing the dealer has put in its documents can change the deceptive nature of these acts. Nothing the dealer has put in its documents makes a difference under law. In fact, contrary to the trial court's reliance on provisions of the contract to absolve the dealer on motion to dismiss, this Court has specifically ruled contrary. In Johnson v. GAPVT, 292 Ga. App. 79 (2008) the court held:

> GAPVT's argument that the merger clause in the purchase agreement prevents Johnson "from standing on any representation allegedly made by a salesman" directly contradicts the express provisions of the Act. In particular, OCGA § 10-1-393 (c) provides that "[a] seller may not by contract, agreement, or otherwise limit the operation of this part notwithstanding any other provision of law."

In Catrett v. Landmark Dodge, 253 Ga. App. 639 (2002), the dealer argued that certain documents which contradicted the salesman's lies and an "as is" statement negated the consumer's reliance on the salesman's lie. The Court of Appeals

disagreed and allowed the claims to go to the jury on Motion for Summary Judgment. In the instant case the attempted disclaimer in the contract cannot prevent the GFBPA claim for misrepresenting the vehicle.

The Governor's Office of Consumer Protection (GOCP) has adopted this standard in its publication "Governor's Office of Consumer Protection Auto Advertising and Sales Practices Enforcement Policies", 3rd Edition, 2007.[7] Therefore, GOCP states:

> Statements susceptible to both a misleading and a truthful interpretation shall be construed to be deceptive...
>
> The FBPA is violated if the first contact with a consumer is secured by deception, even though the true facts are made known to the buyer before he enters into the contract of purchase or lease. If an advertisement makes express or implied representations that have the capacity, tendency or effect of misleading consumers without certain qualifying information, the failure to disclose the information is a violation of the Fair Business Practices Act. **Any necessary qualifying information must be clearly and conspicuously disclosed**. The term "clear and conspicuous" means that the statement or representation is

[7] http://consumer.georgia.gov/business-services/motor-vehicle-dealers-motor-vehicle-manufacturers/auto-advertising-and-sales-practices-enforcement-policies

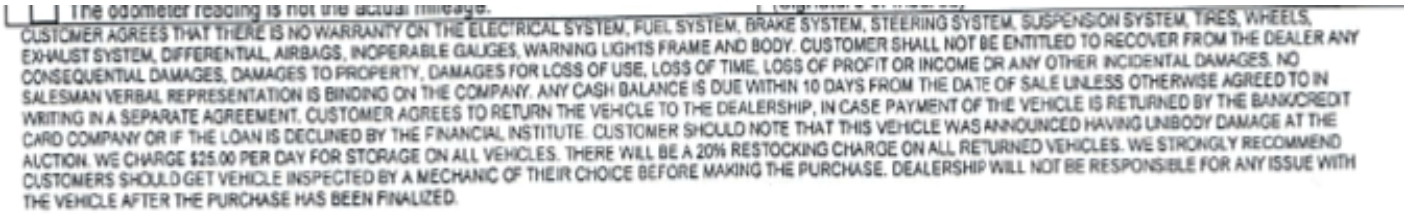
> presented in a reasonably understandable form. A disclosure is clear and conspicuous, and therefore is effectively communicated, when it is displayed in a manner that is **readily noticeable, readable** and/or audible (depending on the medium), and understandable to the audience to whom it is disseminated. Representations will be considered deceptive if necessary disclosures or disclaimers are not made, if material facts are not stated, and/or if disclosures or disclaimers are inconspicuous. **A representation will be considered inconspicuous if consumers are required to search for disclosures or disclaimers in fine print** or on the opposite side of an advertisement. **Disclosures and disclaimers that attempt to modify the message should not be listed in the fine print**, but instead in immediate proximity to the message.

Auto Sales Practices, pages 5-6 (emphasis supplied).

In the instant case, the dealer told Raysoni the car had not been wrecked, that it was clean, that it had a clean Carfax, and that it was providing a warranty. The dealer then attempted to disclose the truth, which it knew all along, inconspicuously in the middle of a very fine print paragraph. The trial court based its entire order on these minuscule "mouse type" "disclosures". The trial court further relied upon the

fact that the dealer does not control the information in the Carfax. This misses the point- the point is that the dealer knew the Carfax was wrong but intended for Raysoni to rely upon it.

The actual paragraph measuring 7 1/4 inches across is pasted below and looks exactly like this:


The odometer reading is not the actual mileage.

CUSTOMER AGREES THAT THERE IS NO WARRANTY ON THE ELECTRICAL SYSTEM, FUEL SYSTEM, BRAKE SYSTEM, STEERING SYSTEM, SUSPENSION SYSTEM, TIRES, WHEELS, EXHAUST SYSTEM, DIFFERENTIAL, AIRBAGS, INOPERABLE GAUGES, WARNING LIGHTS FRAME AND BODY. CUSTOMER SHALL NOT BE ENTITLED TO RECOVER FROM THE DEALER ANY CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFIT OR INCOME OR ANY OTHER INCIDENTAL DAMAGES. NO SALESMAN VERBAL REPRESENTATION IS BINDING ON THE COMPANY. ANY CASH BALANCE IS DUE WITHIN 10 DAYS FROM THE DATE OF SALE UNLESS OTHERWISE AGREED TO IN WRITING IN A SEPARATE AGREEMENT. CUSTOMER AGREES TO RETURN THE VEHICLE TO THE DEALERSHIP, IN CASE PAYMENT OF THE VEHICLE IS RETURNED BY THE BANK/CREDIT CARD COMPANY OR IF THE LOAN IS DECLINED BY THE FINANCIAL INSTITUTE. CUSTOMER SHOULD NOTE THAT THIS VEHICLE WAS ANNOUNCED HAVING UNIBODY DAMAGE AT THE AUCTION. WE CHARGE $25.00 PER DAY FOR STORAGE ON ALL VEHICLES. THERE WILL BE A 20% RESTOCKING CHARGE ON ALL RETURNED VEHICLES. WE STRONGLY RECOMMEND CUSTOMERS SHOULD GET VEHICLE INSPECTED BY A MECHANIC OF THEIR CHOICE BEFORE MAKING THE PURCHASE. DEALERSHIP WILL NOT BE RESPONSIBLE FOR ANY ISSUE WITH THE VEHICLE AFTER THE PURCHASE HAS BEEN FINALIZED.

R-12. There is absolutely nothing conspicuous about this paragraph. The text is smaller not larger than other text on the page, is not bolder or of different color and is not designed to stand out from other printed material on the contract. This disclaimer language is even further buried in a hodgepodge of sentences dealing with everything from Bankruptcy to storage fees. There is no header for the paragraph which might disclose to the consumer that disclaimers are contained therein.

The FTC guidelines for conspicuous disclosure of disclaimers state that when the disclosure of qualifying information is necessary to prevent a representation from being deceptive, the information should be presented clearly and conspicuously so

that consumers can actually notice and understand it. A fine-print disclosure at the bottom of a print ad, a disclaimer buried in a body of text unrelated to the claim being qualified, a brief video superscript in a television ad, or a disclaimer that is easily missed on a website are not likely to be effective. Nor can advertisers use fine print to contradict other statements in an ad or to clear up misimpressions that the ad would leave otherwise. To ensure that disclosures are effective, advertisers should use clear and unambiguous language, place any qualifying information close to the claim being qualified, and avoid using small type or any distracting elements that could undercut the disclosure. FTC Deception Policy Statement, appended to Cliffdale Associates, Inc.,103 F.T.C. 110, 180-81 (1984).

The Georgia Supreme Court dealt with a disclaimer contained in a contract on an argument of it being deceptive as follows:

> Disclaimers and qualifications are not deceptive if they are "sufficiently prominent and unambiguous to change the apparent meaning of [other unconditional] claims and to leave an accurate impression." (citation omitted)(construing the FTCA).

Tiismann v. Linda Martin Homes, 281 Ga. 137 (2006). This dealer's disclaimer language certainly fails to meet this standard. Moreover, O.C.G.A. § 11-1-201 (10)

provides that a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals ... is conspicuous. Language in the body of a form is `conspicuous' if it is in larger or other contrasting type or color.... Whether a term or clause is `conspicuous' or not is for decision by the court. This dealer's writing, the actual disclaimer language itself, was non-conspicuous. This disclaimer language is in smaller size and same color type as the remainder of the contract. There is not even any conspicuous introductory language. O.C.G.A. § 11-2-316 (2) requires that the actual warranty disclaimer language itself be conspicuous. That requirement is not satisfied if the disclaimer provision contains only general introductory language which is conspicuous. "[If] the disclaimer [is] contained in a paragraph headed in capital letters as `WARRANTY and AGREEMENT' ... [and] the disclaimer language itself [is] printed in the same type size and face as the rest of the contract[,]" there is no effective disclaimer under O.C.G.A. § 11-2-316 (2). See Leland Indus. v.Suntek Indus., 184 Ga. App. 635, 637 (1) (362 S.E.2d 441) (1987) (where "warranty" appears in all capital letters but disclaimer in lower case letters, disclaimer not effective.) *Compare* Webster v. Sensormatic Electronic Corporation, 193 Ga. App. 654 (1989)(language is printed in type which is bolder and larger than that generally used

in the document, and is further emphasized by the capitalization and by being within a dark bordered rectangle found to be conspicuous).

As a final proof that the dealer cannot absolve itself from responsibility for its representations, the "as is"[8] clause defense is ineffective as against the FBPA claims. "A seller may not by contract, agreement or otherwise limit the operation of this Chapter notwithstanding any other provision of law." Thus, an "as is" clause would not preclude a consumer from recovery under the Fair Business Practices Act. O.C.G.A. § 10-1-393(c); Attaway v. Toms Auto Sales, Inc., 144 Ga.App. 813, 242 S.E.2d 740); Campbell v. Beak, 256 Ga. App. 493 (2002); Johnson v. Gapvt Motors, 292 Ga. App. 79 (2008).

[8] The trial court relied upon the as is clause in making its decision below: "Finally, the Court also notes the "AS-IS NO WARRANTY" box is positioned prominently on the Bill of Sale and is ticked, indicating that there are no warranties with regard to the condition of the vehicle and that it was being sold "as is." This ruling is directly contradictory to established Georgia precedent as cited above. Further, the language in the "disclosure" is directly contradicted by the admission that the dealer provided a warranty.

(a) The Dealer Violated the Federal Trade Commission Used Car Rule

Further, in this case, the granting of a warranty at the same time as attempting to exclude a warranty in the same document is a deceptive business practice. The Federal Trade Commission Used Car Rule requires that each used car offered for sale contain prominently and conspicuously on the vehicle so that both sides are readily readable, a "Buyer's Guide", also known as a window sticker.[9] The Buyer's Guide must include:

1) The vehicle make, model, year and Vehicle Identification Number;

2) The name and address of the dealer;

3) A description of the meaning of "as is";

4) A clear disclosure of any warranty coverage and the terms and conditions of any warranty coverage. 16 C.F.R. § 455.2. 15 C.F.R. § 455.3(b) requires that the buyer's order or contract for sale include the language of the "Buyer's Guide" by reference and provide that the "Buyer's Guide" terms override any contract terms. Here, the Buyer's Order also fails to include the required statement:

[9] Ga Adm. Rules, Rules of the State Board of Registration of Used Car Dealer, 681-9-.02 (k) require that dealers "Display a properly completed buyer's guide on each vehicle offered for sale, as prescribed by the Federal Trade Commission at16 C.F.R. Part 455."

> The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale.

16 C.F.R. § 455.3(b) of the Rule requires this provision to be placed in the sales contract in a **conspicuous** manner.[10] Section 455.4 of the Rule prohibits dealers from making "**any statements, oral or written**, or tak[ing] other actions which alter or contradict the disclosures required by §§ 455.2 and 455.3 (of the Rule)." "For example, [the dealer] may not write that there is a warranty on the Buyers Guide, but disclaim all warranties in the contract of sale." FTC Sale of Used Motor Vehicles, Final Staff Compliance Guidelines, Sales Contracts and Warranty Disclosures, 53 Fed. Reg 17660 (1988).

The FTC Used Car Rule states that it is deceptive for a used car dealer to:

1) misrepresent the mechanical condition of a used vehicle; or,

2) misrepresent the terms of a warranty offered in connection with the sale of a used vehicle; or,

3) represent the used vehicle is sold with a warranty when the vehicle is sold without a warranty; or,

4) fail to disclose, prior to sale, that a used vehicle is sold without a warranty; or,

[10] Contrast this minuscule type disclosure with the BOLD CAPITAL disclosure in Weinstock v. Novarre Group, 309 Ga. App. 351 (2011)

5) fail to make available, prior to sale, the terms of any written warranty applicable to the used vehicle. 16 C.F.R. §455.1 A violation of the FTC Used Car Rule would be a violation of Georgia's Fair Business Practices Act. 1st Nationwide Collection v. Werner, 288 Ga. App. 457 (2007)(A violation of the FTC act, Title 15, is a violation of the GFBPA).

If the car is not covered by any warranty, either express or implied, the dealer must check the block labeled "AS-IS-NO WARRANTY." on the "Buyer's Guide". If the car is covered by a written warranty, the dealer must check the box labeled "WARRANTY." 16 C.F.R § 455.2(b)(1)(ii). See also Fed. Trade Commission Staff Compliance guidelines III(B)(3)(b), 53 Fed Reg 17,660, May 17, 1988[11]. Illustration 3.7 of the Staff Compliance Guidelines states:

[11] OCGA § 10-1-391 (b) provides that [i]t is the intent of the General Assembly that [the FBPA] be interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5 (a) (1) of the Federal Trade Commission Act (15 U.S.C. Section 45 (a) (1)) [the "FTC Act"], as from time to time amended.

You are a dealer who is offering a used car for sale "as is" in a state that permits such sales. The Buyers Guide displayed on the vehicle indicates that the car is offered "as is." However, after negotiating with the buyer, you agree to warrant the vehicle's engine for 90 days or 3,000 miles, whichever comes first, and to pay 75% of the cost of parts and labor involved in necessary repairs during the warranty period. Do you have to change the Buyers Guide before you give it to the buyer?

Yes. Before you give the buyer a copy of the Buyers Guide, you must change it to indicate the warranty you have agreed to provide. In the alternative, you may simply fill out a new Buyers Guide with the new information. If, however, you choose to change the "old" Buyers Guide, first cross out the "As Is -- No Warranty" box. Next, fill in the warranty portion of the Buyers Guide just as you would if you were originally offering the car with that warranty. Remember that the final warranty terms must be included in the sales contract for the car. An example of the front of a Buyers Guide like the one described in this illustration is included as Appendix D to these guidelines. Sections 455.2(a)(2)(v) (paras. 2-3), and 455.4.

In this case, the dealer provided Raysoni with a Buyer's Order indicating there was a warranty while attempting to use a "Buyer's Guide" window sticker and an "as is" clause in the Buyer's Order to deny warranty application. This is exactly the conduct and confusion the Used Car Rule was designed to prevent. This unlawful warranty exclusion language was improperly relied upon by the trial court in its ruling. In addition, in this case, we have the Respondent providing Raysoni with a copy of the Buyer's Order without the Warranty in the Comment Section (Exhibit A to the Complaint (R-12)) while it retained the Buyer's Order providing the warranty in the Comment section. See Exhibit to Respondent's Answer. R-51. All these facts are indicia of the deceptive scheme perpetrated by the dealer.

II. THE TRIAL COURT ERRED IN FINDING THAT A DEALER THAT REPRESENTS THAT A CAR HAS NOT BEEN WRECKED WHEN IT KNOWS IT HAS BEEN WRECKED, MAY AVOID FRAUD LIABILITY BY DISCLOSING IN FINE PRINT OF THE CONTRACT THAT THE CAR WAS ANNOUNCED AS UNIBODY DAMAGE

First, an **As Is Clause Does Not Prevent Claim for Fraud**. The predominant rule is that "as is" contract provisions are irrelevant to a claim of fraud in the inducement of a contract because **"it is inconsistent to apply a disclaimer provision**

of a contract in a tort action brought to determine whether the entire contract is invalid because of alleged prior fraud which induced the execution of the contract." City Dodge, Inc. vs. Gardner, 232 Ga. 766, 208 SE 2d 794, 797-798 (1974)(emphasis supplied). See del Mazo v. Sanchez, 186 Ga. App. 120, 125 (366 SE2d 333) (1988) ("If the party elects to rescind the contract as voidable, he is not bound by the provisions of the rescinded contract. If the defrauded party elects to affirm the contract and sue for damages for fraud and deceit he is bound by the contract provisions.") Nearly every court that has addressed the issue has found that in a "as-is" clause does not preclude a fraud act based on a problem with a car.[12] As

[12] Mattern Hatchery, Inc. vs. Bayside Enterprises, Inc., 775 F.Supp. 803(MD PA 1991)(common law fraud claim not barred by warranty disclaimer); Danley vs. Murphy, 658 S.O. 2nd 483(Ala. Civ. App. 1994)(buyer of used car was not precluded from fraud claim despite "as-is" clause in contract for purchase); Reveles vs. Toyota By the Bay, 57 CAL. App. 4th 1139, 67 CAL. Rptr. 543 (1997)("as is" disclaimers does not necessarily confer on seller of used vehicle a general immunity from liability for fraud, such a provision does not prevent fraudulent representations relied on by buyer from constituting fraud which invalidates the contract or is a ground for damages); Tinker vs. DeMaria Porsche Audi, Inc., 459 SO 2nd 487(FLA. Dist. Ct. App. 1984)(disclaimer clause cannot shield seller from misrepresentations regarding car); DeLong vs. Hilltop

disclaimers are exclusions of express and implied contract warranty provisions, they do not address tort or other non-warranty theories of liability.[13] Tort concepts are viewed with public policy considerations that make them especially inappropriate for contractual disclaimers. A seller cannot use contractual warranty disclaimers in the parties' agreement as a shield against claims of fraud or misrepresentation arising from the seller's actions towards the buyer.[14] Some courts have held that the existence of an "as is" clause is not even admissible in an automobile fraud case as a fraud case is not based on the contract.[15] "As Is" clauses are irrelevant since under Georgia law if a contract is induced by fraud the contract never came into being. City

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Lincoln-Mercury, Inc., 812 SW 2d 834(MO. Ct. App. 1991)("as is" clause in sales contract could not be admitted to disprove seller's reliance on dealer's misrepresentation that car was an individual trade-in, defense to this sort of fraud cannot be founded on the contract); Kopischke vs. First Continental Corp, 610 P. 2d 668 (Mont. 1980)(negligence action, "as is" clause did not absolve dealer from tort liability for accidents caused by defects in the car sold).

[13] See Morris vs. Mack's Used Cars, 824 SW 2d 538, (Tenn. 1992).

[14] See Leavitt vs. Stanley, 132 NH 727, 571 A2d 269 (1990) (Use of "as is" clause does not relieve used car seller of liability for fraud).

[15] Delong vs. Hilltop Lincoln Mercury, Inc., supra; Slusher vs. Jack Roach Cadillac, Inc., 719 SW 2d 880 (Mo. Ct. App. 1986). National Consumer Law Center, Automobile Fraud 2d edition.

Dodge, Inc. v. Gardner, 232 Ga. 766, 208 So. 2d 794, 15 U.C.C. Rep. Serv. 598 (1974) (evidence that seller had misrepresented that car had never been wrecked held admissible to prove fraud despite both an "as is" clause and a merger clause in the contract); Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E.2d 533, 35 U.C.C. Rep. Serv. 419 (1982) (fraud); Rogers-Farmer Metro. Chrysler-Plymouth, Inc. v. Barnett, 125 Ga. App. 494, 188 S.E.2d 122, 10 U.C.C. Rep. Serv. 792 (1972) (disclaimer of warranty of odometer reading ineffective to overcome alleged fraud in turning back odometer)[16]

In the instant case, the dealer orally, and as inducement to Raysoni entering into the contract, told Raysoni that the car was clean and undamaged in response to a question whether the car had been wrecked. The dealer additionally provided plaintiff a clean Carfax when the dealer itself knew that the car had been damaged and suffered unibody damage. This antecedent fraudulent statement voids the contract and nothing contained in the contract can vitiate the fraud. The trial court erred in relying on statements in the contract such as the "as is" language to find that

[16] Raysoni cited a host of cases from across the United States affirming this principle in his brief in Response to Motion to Dismiss. R-173-176.

the actions of the dealer were not deceptive since the antecedent fraud voids the very language upon which the trial court relied. City Dodge, Inc. v. Gardner, 232 Ga. 766, 769-770, n. 1 (1974). City Dodge states:

> We believe the better view is that the question of reliance on the alleged fraudulent misrepresentation in tort cases cannot be determined by the provisions of the contract sought to be rescinded but must be determined as a question of fact by the jury. It is inconsistent to apply a disclaimer provision of a contract in a tort action brought to determine whether the entire contract is invalid because of alleged prior fraud which induced the execution of the contract. If the contract is invalid because of the antecedent fraud, then the disclaimer provision therein is ineffectual since, in legal contemplation, there is no contract between the parties. In this case, parol evidence of the alleged misrepresentation was admissible on the question of fraud and deceit. As the antecedent fraud was proven to the satisfaction of the jury, it vitiated the contract.

Id. The trial court erred in relying on the void contract provisions to disallow the fraud claims.

This case is similar in some respects to Isbell v. Credit Nation Lending Service, LLC, A12A1360 (Ga.App. 11-29-2012). In Isbell, the buyer (as was Raysoni) was told the vehicle had not been wrecked though the seller (as did Payless) knew it had been wrecked from Manheim records. Isbell asked for but did not receive prior to execution a Carfax so he could verify the car had not been previously wrecked.[17] Id. p 4. Isbell returned home and virtually immediately pulled his own Carfax and discovered the wreck history damage. Isbell demanded rescission which the dealer refused. Id. p 5. The Court found that the Manheim Auction records provided sufficient proof to establish knowledge on the part of the dealer. However, the Court found that Isbell was at fault for relying on the salesman's representation where he had asked for and failed to receive a Carfax which would have disclosed the damage to him. Id. p 15. In the instant case, Raysoni asked for and received a Carfax while the dealer knew the car was wrecked lied to Raysoni about it. This case is stronger than Isbell and this court should find Raysoni has stated a claim for fraud.

[17] As indicated above, absolute reliance on a Carfax is inappropriate due to lag times for Carfax picking up accident histories.

III. THE TRIAL COURT ERRED IN RELYING ON AN AS IS DISCLOSURE WHERE THE ATTEMPTED DISCLOSURE WAS NOT ALLOWED DUE TO THE DEALER'S ALSO PROVIDING AN EXPRESS WARRANTY

Raysoni was provided an express written warranty in writing by the dealer. The written warranty, admitted to in defendant's answer, warrants the CV joints. The Magnuson Moss Act allows consumer remedies based on a violation by a supplier or warrantor. Respondent Payless is a supplier as it is engaged in the business of making a consumer product available to consumers. 15 U.S.C. § 2301(4). Respondent Payless is also a warrantor as it is a supplier and it gave a written warranty. 15 U.S.C. § 2301(5). Suppliers are prohibited from disclaiming implied warranties when they give a written warranty on the product. 15 U.S.C. 2308 (a). Where the warrantor makes "any written warranty", the warrantor is prohibited from disclaiming or modifying "any implied warranty." 15 U.S.C. § 2308(a). The Act puts some teeth into this restriction by providing that **"[a] disclaimer, modification or limitation made in violation of this section shall be ineffective for purposes of this title [15 USC § 2304(a)] and State law**." Id., § 2308(c) [emphasis added]. So foisted by its own

petard, the defendant is unable to use the alleged as is disclaimer, where as here, it granted a written warranty.

IV. THE TRIAL COURT ERRED IN FINDING RAYSONI FAILED TO PLEAD SUFFICIENT FACTS TO STATE A CLAIM FOR REVOCATION OF ACCEPTANCE UNDER O.C.G.A.§ 11-2-608

Plaintiff may revoke acceptance of a vehicle where it contains a non conformity which substantially impairs the value of the vehicle to him. O.C.G.A. §11-2-608 provides:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:
>
> (a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not

caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Mauk v. Pioneer Ford Mercury, 308 Ga. App. 864 (2011); Hub Motor Company v. Zurawski, 157 Ga. App. 850(1981)(Revocation under Code Ann. s 109A-2-608 is an available remedy even where the seller has attempted to limit its warranties); See also Whaley, Tender, Acceptance, Rejection and Revocation-The UCC's TARR -Baby, 24 Drake L. Rev 52, 70 (1974)(Comment 1 explains that revocation of acceptance is a statutory replacement for the equitable right of "rescission".)

Raysoni alleged there was a defect in the car not known to him at the time of his purchase of the van. Raysoni revoked as soon as possible after he learned of the previously wrecked history of the car. The trial court failed to address Raysoni's revocation claim in its order dismissing all claims

OCGA § 11-2-106 (2) provides: "Goods or conduct including any part of a performance are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract." "Contract" means the total legal obligation which results from the parties' agreement as affected by this title and any other

applicable rules of law. O.C.G.A. § 11-1-201(11). "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this title. O.C.G.A. § 11-1-201(3). OCGA § 11-2-106 (2) provides: "Goods or conduct including any part of a performance are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract." "Nonconformity cannot be viewed as a question of the quantity and quality of goods alone, but of the performance of the totality of the seller's contractual undertaking. Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement. O.C.G.A. § 11-1-203.

The van in this case has a defect, it has been wrecked. The damage as described in the Manheim documents would certainly meet the definition of non conforming. In this case, the defendant represented as part of the agreement between the parties that the car had not been wrecked and provided the clean Carfax. This agreement has been breached. And in the contract documents drafted by the defendant certainyl violate the covenant of good faith.

Revocation of acceptance under O.C.G.A. § 11-2-608 "is an available remedy even where the seller has attempted to limit its warranties." Esquire Mobile Homes, Inc. v. Arrendale, 182 Ga.App. 528 (1987); Hub Motor Co. v. Zurawski, 157 Ga.App. 850, 851(1981)

This 8th day of January, 2013.

LAW OFFICES OF T. MICHAEL FLINN

/s/ T. Michael Flinn
T. Michael Flinn
Attorney for Appellant
Georgia State Bar No. 264530

CERTIFICATE OF SERVICE

I, T. Michael Flinn, Counsel for the Plaintiff, in the within entitled matter, do hereby certify that I have this day served a copy of the foregoing **APPELLANT'S BRIEF** in the above matter by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage affixed thereon to assure delivery to Appellee:

W. Kevin Kincheloe
Attorney for Payless Auto

This 8th day of January, 2013.

LAW OFFICES OF T. MICHAEL FLINN

BY: /s/ T. Michael Flinn
T. Michael Flinn
Attorney for Appellant
State Bar No. 264530