

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1168

Filed: 3 July 2018

Mecklenburg County, No. 15 CVS 8568

TOM KRAUSE, Plaintiff

v.

RK MOTORS, LLC, and WESTERN SURETY COMPANY, Defendants

Appeal by plaintiff from order entered 7 June 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Appeal by defendants from order entered 9 August 2017 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 April 2018.

*The Law Offices of Jason E. Taylor, by Lawrence B. Serbin, and Blossom Law PLLC, by Rashad Blossom, for plaintiff-appellant/plaintiff-appellee.*

*Johnston, Allison & Hord, P.A., by Martin L. White and Scott R. Miller, for defendant-appellees/defendant-appellants.*

CALABRIA, Judge.

Tom Krause (“plaintiff”) appeals from the trial court’s order granting defendants’ amended motion for summary judgment and dismissing plaintiff’s complaint. After careful review, we affirm.

RK Motors, LLC and Western Surety Company (collectively, “defendants”) also appeal from an order denying their motion for attorneys’ fees and costs. However, defendants failed to file written notice of appeal within the 30-day time limit established by N.C.R. App. P. 3. Accordingly, we dismiss defendants’ appeal for lack of jurisdiction.

### I. Factual and Procedural Background

On 15 September 2013, plaintiff, a California resident, was seeking to purchase a vintage performance automobile when he saw an online advertisement posted by a North Carolina dealership, RK Motors, LLC (“RK Motors”), offering to sell a 1967 Chevrolet Nova. The advertisement listed several facts about the vehicle. In response to the advertisement, on 16 September 2013, plaintiff contacted Frank Carroll (“Carroll”), an RK Motors employee, about purchasing the vehicle. Based upon the advertisement and various assurances made during his telephone and email contact with Carroll, that same day, plaintiff purchased the vehicle for \$67,000.00. Plaintiff took possession of the Nova on 10 October 2013 and immediately began to experience serious mechanical issues. The vehicle was ultimately determined to be unsafe and unfit to drive.

On 4 May 2015, plaintiff filed the instant action against RK Motors and its insurer, Western Surety Company (“Western”), in Mecklenburg County Superior Court. Plaintiff asserted claims against RK Motors for (1) actual or constructive

fraud; (2) violations of the North Carolina Unfair and Deceptive Practices Act, N.C. Gen. Stat. § 75-1.1; (3) violations of the North Carolina Vehicle Mileage Act, N.C. Gen. Stat. § 20-347; (4) negligent or grossly negligent misrepresentation; and (5) breach of express warranty. Plaintiff also asserted an additional surety liability claim against Western pursuant to N.C. Gen. Stat. § 20-288(e).

On 19 August 2015, defendants moved to dismiss plaintiff's complaint pursuant to Rules 12(b)(6) and (7) of the North Carolina Rules of Civil Procedure. On 4 November 2015, the trial court granted defendants' motion to dismiss with respect to plaintiff's claim for violation of the North Carolina Vehicle Mileage Act, but denied defendants' motion with respect to plaintiff's remaining claims. On 10 November 2015, defendants filed an answer asserting multiple affirmative defenses and a counterclaim by RK Motors for unfair and deceptive trade practices.

On 23 March 2016, defendants filed a motion for summary judgment. On 6 May 2016, defendants filed an amended motion for summary judgment. Following a hearing, on 7 June 2016, the trial court entered an order granting defendants' amended motion for summary judgment. The trial court noted that plaintiff had purchased the Nova without physically inspecting it, and that he signed a Disclaimer of Warranties and Liability, along with a Buyer's Guide and a Bill of Sale acknowledging that the vehicle was being sold "as is." The trial court therefore

determined that plaintiff's remaining claims were precluded and dismissed his complaint.

Plaintiff filed written notice of appeal on 30 June 2016. However, RK Motors' counterclaim remained unresolved, and plaintiff failed to demonstrate a right to immediate review of the summary judgment order. Accordingly, by opinion filed 7 March 2017, this Court dismissed plaintiff's interlocutory appeal for lack of subject matter jurisdiction. *Krause v. RK Motors*, \_\_\_ N.C. App. \_\_\_, 797 S.E.2d 335 (2017).

On 20 June 2017, defendants filed a joint motion for attorneys' fees and costs. RK Motors subsequently voluntarily dismissed its counterclaim without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41. On 9 August 2017, the trial court entered an order denying defendants' motion for attorneys' fees and costs.

On 24 August 2017, plaintiff again filed written notice of appeal from the summary judgment order. On 11 September 2017, defendants filed written notice of appeal from the order denying their motion for attorneys' fees and costs.

## II. Summary Judgment Order

On appeal, plaintiff contends that the trial court erroneously granted defendants' motion for summary judgment on plaintiff's remaining claims. We disagree.

### A. Standard of Review

We review the trial court’s summary judgment order *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). “[S]uch judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” *Id.* (citation and quotation marks omitted).

### B. Analysis

The \$67,000.00 sale of the Chevrolet Nova is governed by Article 2 of the Uniform Commercial Code (“UCC”). In order to be enforceable, any agreement for the sale of goods worth more than \$500.00 must be in writing and signed by the party against whom enforcement is sought. N.C. Gen. Stat. § 25-2-201(1). Such a writing “may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement . . . .” N.C. Gen. Stat. § 25-2-202.

The UCC allows for the exclusion or modification of warranties pursuant to N.C. Gen. Stat. § 25-2-316, which provides, in pertinent part:

- (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (G.S. 25-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
- (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or

*Opinion of the Court*

modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

(3) Notwithstanding subsection (2)

- (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is,” “with all faults” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and
- (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
- (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

N.C. Gen. Stat. § 25-2-316(1)-(3). The reference to the parol evidence rule in subsection (1) “is intended to protect the seller against false allegations of oral warranties.” *Ace, Inc. v. Maynard*, 108 N.C. App. 241, 247, 423 S.E.2d 504, 508 (1992) (citation and quotation marks omitted), *disc. review denied*, 333 N.C. 574, 429 S.E.2d 567 (1993).

In the instant case, the Disclaimer of Warranties and Liability executed by plaintiff contained the following language:

4. CUSTOMER HAS HAD AN OPPORTUNITY TO INSPECT AND EXAMINE THE VEHICLE AS FULLY AS HE/SHE DESIRES, AND, AS SUCH THE VEHICLE IS BEING SOLD BY RK MOTORS TO CUSTOMER IN “AS-IS” CONDITION, WITH ALL FAULTS.

5. RK MOTORS MAKES NO WARRANTIES WHATSOEVER, WHETHER EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR PURPOSE, OR OTHERWISE, WITH RESPECT TO THE VEHICLE, AND CUSTOMER HEREBY DISCLAIMS AND WAIVES ALL SUCH WARRANTIES.

PRIOR TO PURCHASING THE VEHICLE, CUSTOMER ACKNOWLEDGES THAT HE/SHE HAS READ AND UNDERSTANDS THE ABOVE LIMITATIONS AND DISCLAIMERS, THAT THEY ARE TERMS AND CONDITIONS OF SALE AND THAT THEY CONSTITUTE THE ENTIRE AGREEMENT BETWEEN THE PARTIES REGARDING WARRANTIES AND ANY OTHER LIABILITY.

(Emphasis in original).

In *Ace, Inc. v. Maynard*, 108 N.C. App. 241, 423 S.E.2d 504 (1992), this Court held that similar language in a contract for the sale of an airplane effectively disclaimed both express and implied warranties. *Id.* at 247, 423 S.E.2d at 508. The parol evidence rule therefore rendered “legally ineffective” the plaintiff’s evidence of the defendants’ alleged oral statements contradicting the written agreement’s terms. *Id.* at 248, 423 S.E.2d at 508.

Plaintiff also signed a Bill of Sale acknowledging that the Nova was being “Sold As Is.” We have explained that “[t]erms such as ‘as is’ and the like in ordinary

commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved.” *Id.* at 249, 423 S.E.2d at 509 (citation and quotation marks omitted). In *Sain v. Adams Auto Grp., Inc.*, 244 N.C. App. 657, 666, 781 S.E.2d 655, 662 (2016), the plaintiffs signed a Buyer’s Guide which contained similar “As Is – No Warranty” language. The agreement stated, in part: “You will pay all costs for any repairs. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle.” *Id.* On appeal, we determined that “[t]his fact, and the language of the provision itself, directly negate[d] Plaintiffs’ allegations that they relied on any purported misrepresentations [the seller] made about the vehicle to support the remainder of their claims.” *Id.*

As in *Sain*, here, it is undisputed that plaintiff purchased the Nova “as is,” without the benefit of any express or implied warranties. Plaintiff is “unable to establish the making of a false representation,” a necessary element to prevail on his remaining claims. *Id.* at 667, 781 S.E.2d at 662. Plaintiff “cannot avoid responsibility for [the] agreement and prevail on [his] remaining claims” against defendants, because he “admittedly and expressly bought the car ‘as is,’ with no warranty.” *Id.* at 668, 781 S.E.2d at 662. “This fact negates crucial elements” of plaintiff’s remaining claims, *id.*, for (1) fraud; (2) unfair or deceptive trade practices; (3) negligent or grossly negligent misrepresentation; and (4) surety liability pursuant to N.C. Gen. Stat. § 20-



288(e).<sup>1</sup> Accordingly, we conclude that the trial court properly granted defendants' motion for summary judgment.

### III. Denial of Attorneys' Fees and Costs

Defendants appeal from the trial court's order denying their motion for attorneys' fees and costs. The trial court entered its order on 9 August 2017; accordingly, defendants had until 8 September 2017 to file and serve their notice of appeal. See N.C.R. App. P. 3(c)(1) (providing that in civil actions, "a party must file and serve a notice of appeal within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure"). However, defendants did not file notice of appeal until 11 September 2017. Consequently, we must dismiss defendants' appeal for lack of jurisdiction. See *Booth v. Utica Mut. Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983) (holding that "[f]ailure to give timely notice of appeal in compliance with . . . Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed").

### IV. Conclusion

Plaintiff signed multiple documents acknowledging that he purchased the Nova "as is," without the benefit of any express or implied warranties. Accordingly, plaintiff is unable to offer evidence contradicting the terms of the written contract,

---

<sup>1</sup> Plaintiff's claims for unfair or deceptive trade practices and surety liability are based on similar allegations of fraud, breach of express warranties, and willful misrepresentation.

nor can he claim reliance on any purported misrepresentation by RK Motors. Therefore, we affirm the trial court's order granting defendants' motion for summary judgment and dismissing plaintiff's complaint.

Defendants failed to timely appeal from the trial court's order denying their motion for attorneys' fees and costs. Consequently, defendants' notice of appeal violates Rule 3 of the North Carolina Rules of Appellate Procedure. Since this violation is jurisdictional, we dismiss defendants' appeal.

AFFIRMED IN PART; DISMISSED IN PART.

Judges BRYANT and HUNTER, JR. concur.

Report per Rule 30(e).