

NOT DESIGNATED FOR PUBLICATION

REVELLE SHIPPING AGENCY, INC.

NO. 04-CA-1274

VERSUS

FIFTH CIRCUIT

BENT'S MARINE INC. A/K/A BENT
ENTERPRISES, INC., ABC INSURANCE
COMPANY

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 531-643, DIVISION "G"
HONORABLE ROBERT A. PITRE, JR., JUDGE PRESIDING

March 15, 2005

COURT OF APPEAL,
FIFTH CIRCUIT

FILED

MAR 15 2005

SUSAN M. CHEHARDY
JUDGE

Susan M. Chehardy
CLERK

Panel composed of Judges Edward A. Dufresne, Jr.,
Marion F. Edwards, and Susan M. Chehardy

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**AMENDED IN PART, AFFIRMED AS
AMENDED, AND REMANDED FOR
FURTHER PROCEEDINGS**

SMC
EAD
MFK

In this redhibition lawsuit, after trial, the trial judge found that the vessel was redhibitorily defective, rescinded the sale, and award damages. For the following reasons, we amend in part, affirm as amended, and remand for further proceedings.

Facts and Procedural History

On November 1, 1996, Revelle Shipping Agency("RSA"), through its President, Dale Revelle ("Revelle"), purchased a boat from Bent's Marine, Inc. ("BMI") for \$97,864.00. The boat, a 1997 Proline Model 2950, was manufactured by American Marine Holdings, Inc. ("AMH") and powered by twin 1997 MerCruiser 250-horsepower inboard engines with two Bravo-3 outdrives, which were manufactured by Brunswick Corporation ("Brunswick")¹ and installed by AMH. According to Revelle, he purchased this boat for offshore fishing. Revelle told Greg Bent, the co-owner of BMI, that he planned to keep the boat in the water and asked for "everything" he would need.

On November 6, 1996, Revelle and Greg Bent took the boat out on Lake Pontchartrain for a sea trial. That day, the "low oil pressure" alarm on the port

¹ Brunswick Incorporated is the parent company of SeaRay, Quicksilver, Mercury, and MerCruiser, which manufactured the engines at issue in this case. In this opinion, "Brunswick" will be used to refer the parent company and its subsidiary, MerCruiser, and their representatives. "MerCruiser" will be used to refer to the specific engine at issue.

engine sounded during the trial. Nevertheless, Revelle took delivery of the vessel that day with assurances from Bent that BMI would diagnose and correct the problem that triggered the low oil pressure alarm. At that time, Revelle docked the boat at South Shore Harbor.

Revelle brought the vessel to BMI for routine maintenance on several occasions from that day through the Spring of 1997. Revelle reported that he saw corrosion on the tip of one of the outdrives at the 20-hour check. In May of 1997, Revelle attempted his first offshore fishing trip on the boat. Revelle did not make it offshore because the vessel's port engine quit running in Breton Sound. Revelle used the starboard engine to return to a nearby dock. George Bent of BMI testified that, on May 20, 1997, BMI replaced the knock module on the port engine. The port engine began to run again.

In July of 1997, Revelle bought a house with water access and a boat dock so he began docking his boat at his home in Slidell. On August 7, 1997, during a voyage, the boat's starboard engine died. BMI replaced the fuel pump relay and the starboard engine began to run again. BMI also provided Revelle with an extra relay to use in the event the relay failed during a subsequent voyage. At that time, George Bent noticed corrosion of the outdrives, reported the corrosion to Revelle, and, according to Revelle, stated that BMI would replace the outdrives. George Bent testified at trial that he did not see corrosion on the outdrives at that point but rather on the anodes.

On September 6, 1997, during a voyage, the starboard engine died again. Revelle replaced the fuel pump relay himself. Revelle reported that both engines were having problems on October 1, 1997. When Revelle threatened legal action in early October of 1997, Brunswick authorized replacement of the port engine's longblock. On or about October 14, 1997, Brunswick shipped a longblock to BMI.

By all accounts, replacing the port engine's longblock solved the oil pressure alarm issue.²

While the vessel was in dry dock having the longblock replaced, BMI discovered that the vessel's Mercathode system, which was its only corrosion protection, was disconnected.³ According to George Bent, BMI replaced the zinc anodes and connected the Mercathode system. BMI returned the vessel to Revelle on October 24, 1997. According to Chuck Wagner, Vice-President of Customer Service for AMH, its customer service records, reveal that Revelle requested and received "rubber trim" for the hatch on or about November 10, 1997.

On February 9, 1998, Revelle reported that the vessel experienced another engine breakdown during a voyage. Revelle further reported that he was still having engine problems in April of 1998. On April 28, 1998, Revelle brought the vessel to Pontchartrain Boat Works ("Pontchartrain") in Slidell to have the oil changed.⁴ Mechanics at Pontchartrain reported that they could not change the oil in the outdrives because the mechanics could not remove the plugs, which were extremely corroded. Further, Brunswick would not authorize repairs because Pontchartrain was not an authorized MerCruiser repair facility. Revelle paid boat storage fees to Pontchartrain while the vessel was in dry dock at the facility.

On May 23, 1998, Travis Hayes, Brunswick's service representative at that time, told Revelle that Brunswick would replace the outdrives at its cost pursuant to the warranty if Revelle brought the vessel to Slidell Marine, an authorized

² At trial, Revelle reported that, even after the longblock was replaced, the port engine still failed between 50 and 100 times during attempts to restart the engine after running it for a while.

³ George Bent reiterated that he did not notice corrosion on the outdrives when BMI replaced the longblock. He also testified that BMI reconnected the Mercathode system because a BMI mechanic must have inadvertently disconnected the Mercathode system while removing the port engine from the vessel to replace the longblock. John "Jack" Deck, who was accepted as an expert in marine engineering and surveying, testified that, due to the configuration of the engine hold, it was very unlikely that the Mercathode system had been inadvertently disconnected while the engine was being removed. He opined that the Mercathode had not been properly connected at the time the boat was sold and/or delivered ten months earlier.

⁴ At this point, Revelle begins a "port log" to document the problems he experiences with the vessel. This port log was introduced at trial.

MerCruiser repair facility. Revelle brought the vessel to Slidell Marine and Slidell Marine replaced both outdrives.

On June 30, 1998, during a test run, the vessel's port engine failed. According to Revelle, Brunswick's service representative was aboard the vessel when the engine failed. Over the next 6 months, the port engine died unexpectedly during one voyage. During the same time frame, the starboard engine was very hard to start once and died unexpectedly on another voyage. Further, the onboard generator failed twice during this period.

On August 3, 1998, Revelle called BMI about the vessel's problems. On August 13, 1998, Revelle attempted to return the vessel to BMI but BMI refused to accept the vessel. On September 27, 1998, during Hurricane Georges, Revelle needed to move the boat but had a very difficult time getting the starboard engine started. On October 31, 1998, the vessel's starboard engine fails during a voyage. On November 9, 1998, RSA filed suit against BMI alleging that the vessel was redhibitorily defective and seeking rescission of the sale, attorney fees, and damages pursuant to La. C.C. art. 2545.1.⁵

On February 10, 1999, mechanics from Slidell Marine picked up the vessel. On February 11, 1999, once the boat was out of the water at Slidell Marine, Revelle noticed that the zinc anodes, which were only seven months old, were completely gone or sacrificed. On June 2, 1999, Revelle dropped by Slidell Marine to replace a cushion on the boat and discovered 12 to 18 inches of water in the cabin. He learned that Slidell Marine's mechanics had failed to remove the plug from the hull of the boat, which allowed rainwater to collect in the cabin or

⁵ On April 19, 1999, BMI answered RSA's petition, denying the allegations. Further, BMI also filed a third-party demand against the Proline vessel manufacturer and engine installer, AMH, and the MerCruiser engine manufacturer, Brunswick. On June 25, 1999, RSA amended its petition alleging that the vessel was redhibitorily defective to add AMH as an original defendant.

cockpit of the boat.⁶ Revelle demanded that Slidell Marine remove the plug and clean the vessel's interior. The vessel remained in dry dock at that facility until November 10, 1999.⁷

On November 11, 1999, Revelle rented a crane to remove the vessel from dry dock and place it on a trailer to transport the vessel to Pontchartrain Marine. According to the record, the crane rental cost Revelle \$548.00. Mechanics at Pontchartrain effected repairs to the vessel, including the generator.

On November 30, 1999, Revelle picked up the vessel from Pontchartrain Marine and attempted to drive the vessel to the boat dock at this house in Slidell. On that voyage, the port engine died twice.

By January 26, 2000, Revelle was keeping the vessel at the boat dock at his home but was not connecting the vessel to shore power. On March 15, 2000, after numerous tests and discussions trying to solve exterior corrosion problems on the vessel, Revelle installed a galvanic isolator. It is undisputed that corrosion on the outdrives and other exterior areas of the vessel was minimal after Revelle installed the galvanic isolator. At trial, Greg Bent admitted that he knew about galvanic isolators but stated that "none of the other boats in South Shore Harbor needed a galvanic isolator." He clarified that his statement only referred to boats that his company serviced.

At trial, Greg Bent also maintained that galvanic isolators were not offered from AMH as an option for their boats that year. Greg Bent did admit that the manufacturer's installation manual for the engines on the 1997 Proline Model 2950 stated:

⁶ Michael Nunmaker of Nunmaker Yachts testified that it is standard practice in a boat yard to remove the hull plug when the boat is in dry dock.

⁷ At some point before November 10, 1999, Slidell Marine was purchased by SS Marine. SS Marine demanded that Revelle remove the vessel from its yard at his expense on or before the end of November, 1999.

Boats which are connected to AC shore power, require additional protection to prevent destructive low voltage galvanic currents from passing through the shore power ground wire. A Quicksilver galvanic isolator can be installed to block the passage of these currents while still providing a path to the ground for dangerous fault, shock currents. Refer to Quicksilver Accessories Guide for part number.

Greg Bent further admitted that Mercathode systems and zinc anodes are standard on the MerCruiser engines and Bravo III outdrives so the only “additional protection” that he knew of, and that the manual could be referring to, was a galvanic isolator. Greg Bent admitted that he never offered Revelle the option of purchasing a galvanic isolator.

On May 17, 2000, when Revelle took the vessel from Slidell to the Rigolets for fuel, the port engine failed four times and the generator would not start. On June 16, 2000, during a voyage, the port engine was difficult to start and the engine died twice. On June 18, 2000, during a voyage on Lake Pontchartrain, the port engine died six times.

On July 5, 2000, Revelle brought the boat to Casadaban Marine, which was not a MerCruiser authorized repair facility. Robert Casadaban testified that he discovered numerous problems when the vessel was at his yard. He discovered a disconnected zinc anode, corrosion on the top of the engines, and a faulty engine coupler. He reconnected the zinc anode and repaired the coupler.

Casadaban also found corrosion on the top of the vessel’s engines, which he opined was caused by saltwater draining from the hatches over the engine and the washdown in the sole of the boat. Casadaban opined that the saltwater drained through the hatches because of a faulty seal, which was a design defect. He opined that the saltwater drained from the washdown because the drain was not properly seated and sealed, which likely existed at the time of manufacture. The vessel stayed at Casadaban’s yard until October 2, 2000.

On October 2, 2000, the vessel ran well in “the Sound.” On October 4, 2000, the port engine died in the Rigolets. On October 10, 2000, the port engine died within a few yards of the boat dock. The next day, Rob Casadaban and another mechanic repaired the port engine’s fuel pump at Revelle’s boat dock. From October 13, 2000 to October 27, 2000, the vessel was at Casadaban Marine for a “bottom job” and to investigate the cause of the port engine failures.

On October 27, 2000, Revelle took the vessel back to Slidell and the engines ran well. Revelle took the vessel out four times over the next eight days and the engines ran well.

On November 5, 2000, Revelle attempted a voyage but the starboard engine would not engage. On November 7, 2000, Rob Casadaban examined the vessel at Revelle’s boat dock and asked Revelle to bring the vessel to his boat yard. On November 10, 2000, when Revelle tried to drive the boat to Casadaban’s yard, the vessel’s port engine failed and the vessel had to be towed.⁸ The vessel remained at Casadaban’s yard until February 24, 2001.

After Revelle picked up his vessel from Casadaban at the end of February, it ran well, except for excessive vibrations from the engines,⁹ until the middle of April that year. On April 14, 2001, Revelle took the vessel on Lake Pontchartrain from Slidell to Madisonville Harbor. After visiting with friends for a few hours, Revelle tried to start the port engine to no avail. When a mechanic from Casadaban’s Marine came to examine the vessel that day, Revelle watched the mechanic disconnect the port engine’s fuel line and Revelle saw “white foam” pour out of the line. When the mechanic reconnected the fuel line, the engine started and Revelle was able to return the vessel to his boat dock in Slidell.

⁸ It is undisputed that Brunswick refused to reimburse Casadaban for repairs made to Revelle’s vessel, which was still under warranty, because Casadaban Marine was not an authorized MerCruiser repair facility.

⁹ Casadaban diagnosed the engines as the cause of the excessive vibrations on April 12, 2001.

After this incident, Casadaban opined that the port engine failures were caused by "vapor lock," which occurs when the engine does not get fuel because the gasoline has become vapor that the engine cannot burn. When asked whether "trash" in the fuel line's selector valve could have caused the port engine failure on April 14, 2001, Casadaban explained that his mechanics had cleaned out the lines before Revelle took the vessel out for a trial.

When Revelle reported this event to the Brunswick's service representative later that summer, Revelle was told to bring the vessel to Nunmaker's Yachts in Madisonville, which primarily sold SeaRay boats but is also an authorized MerCruiser repair facility and premier MerCruiser dealership. According to Michael Nunmaker, Brunswick contacted Nunmaker's on August 3, 2001 to request that Nunmaker's examine Revelle's boat and diagnose the problem. On August 8, 2001, Revelle brought his vessel to Nunmaker's Yachts.

Nunmaker reported that, after Revelle explained that his engines would fail after operation, "[w]ell this was a real common problem at that time. Many boats that we had sold ourselves...had the same type of...problem. And we pretty much knew that it was vapor lock on the engines." Nunmaker testified that vapor lock was "so common that MerCruiser sent out a [service bulletin] to all dealers on how to rectify the problems with vapor lock."

Nunmaker reported that "within three or four days" after Revelle brought the boat to his yard his mechanics had diagnosed the problem¹⁰ and transmitted a warranty report to Brunswick. The warranty report stated that the vapor lock occurred because "the fuel lines were too long" and were hampered by restrictions caused by the fuel selector valves that permitted both engines and the generator to be fueled by either fuel tank. Nunmaker opined that this combination caused a

¹⁰ When the Nunmaker mechanics test drove the vessel, the engines "vapor locked."

change in the temperature of the gas between the fuel tank and the electronic fuel pump on the “EFI engines,” which resulted in vapor lock. Nunmaker stated that the fuel system on SeaRay boats had formerly had the same configuration and he had seen the problem many times.

According to Nunmaker, even though Brunswick had called and requested his shop to diagnose the problem, Brunswick told him not to repair the boat. Further, although Brunswick pledged to pay Nunmaker, Brunswick refused to pay the expenses Nunmaker incurred in diagnosing the problem.

On June 24, 2002, when the vessel had been at Nunmaker’s yard for almost ten months, Revelle called Nunmaker to inquire about his boat. Nunmaker reported that Brunswick would not authorize repairs and further refused to reimburse his shop for expenses that it had incurred in diagnosing the problem.

At Revelle’s request and expense, on September 13, 2002, mechanics at Nunmaker’s Yachts reconfigured the vessel’s fuel system by shortening the fuel lines and removing the fuel selector valves.¹¹ Nunmaker testified that he saw the fuel lines and valves that his mechanics removed and, because of their age and mountings, the lines and valves looked like they were original to the boat. Nunmaker stated that the length of the fuel lines and presence of fuel selector valves would have been determined by the boat manufacturer.

Nunmaker also opined that “the vapor lock problem developed because the temperature of the water at the time that we’re talking about, especially in 2001, and a couple of years before then, created a bigger vapor lock situation than we had ever seen in years past.” Nunmaker admitted that vapor lock occurred more often in hot weather but stated that “the biggest problem was that in 1995,

¹¹ Nunmaker stated that his mechanics had received instruction at training seminars for SeaRay and MerCruiser mechanics that indicated that the fuel selector switches and the length of the fuel lines on EFI engines were “a problem” that led to vapor lock.

especially '96 and '97, [MerCruiser] started going to fuel injected engines only, EFI engines.”

Nunmaker specifically testified that the vapor lock problem did not surface until MerCruiser began exclusively using electronic fuel injection in its engines. Importantly, Nunmaker stated that AMH had utilized the same fuel supply system configuration for MerCruiser’s carburetor engines without vapor lock problems.

During the 14 months that the boat was at Nunmaker’s boat yard, Nunmaker also saw water drain through the hatch onto the engines. He advised Revelle to purchase a cover for the hatch to prevent moisture from draining through the hatch onto the engines. Nunmaker also stated that, in his experience, a vessel of this size is generally connected to shore power at all times when it is docked because the battery that runs the vessel’s bilge pump must remain charged or the vessel could take on water and sink.

At trial, Revelle reported that, since November 1, 2002, the port engine “hasn’t stopped running yet.” Revelle testified that he does take the vessel around Lake Pontchartrain but that he would not take the vessel offshore, which was his intended purpose, because, after experiencing so many engine failures, he is “scared of the boat.” Revelle also stated that he feels that it is dangerous to take the vessel offshore with the re-configured fuel system because he is unable to switch from one gas tank to the other in the event that water gets into the fuel line.

John “Jack” Deck, III, who was accepted as an expert in marine engineering and surveying, inspected Revelle’s boat in August of 2003. When he took the vessel out for a sea trial, he noticed that the port engine ran roughly. He also saw rainwater leaking from the hatch troughs into the engine compartment, which has a small drain that did not allow the water to evacuate quickly. Deck also examined the washdown in the sole of the boat. He opined that the hose from the washdown

could not have been accidentally disconnected when the port engine was removed. He opined that the disconnection was either caused by vibration or a loose fitting but either way was a “design issue because you have the source of salt water that can drain directly on top of your engine.”

Deck speculated that, during a voyage, a few inches of accumulated water in the engine compartment is harmful. Further, if that situation occurred and the bilge pumps were not operational, the vessel would be in a “very dire situation.” Moreover, if the vessel was taking on water and the engine vapor locked, the outcome could be tragic. In sum, Deck opined that the vessel was unseaworthy and, thus, not fit for its intended purpose of traveling offshore.

Defendant, Brunswick, called its employee, Carl Parham, who is a Product Application Technician with Brunswick and was accepted as an expert MerCruiser mechanic. Parham explained that vapor lock occurs when the fuel in the system turns from liquid to vapor before it enters the engine. In some instances, vapor lock occurs when operators inadvertently use winter-grade fuel, which is formulated to start easier in cold weather, during hot weather months. The winter-grade fuel vaporizes at a lower temperature, which causes vapor lock. Parham testified that vapor lock repairs would not be covered under the MerCruiser’s engine warranty because vapor lock is a fuel supply system problem.

Parham testified Brunswick recommends galvanic isolators to protect engines and outdrives from corrosion. He also explained that failure to install a galvanic isolator was not a factory defect but rather an option that the dealer should have offered.

Defendant, AMH, called its employee, Randolph “Chuck” Wagner, who is Vice-President of Customer Service for Proline and was accepted as an expert in servicing and selling recreational watercraft. Wagner testified that, since 1996,

Proline has manufactured more than 500 Proline Model 2950s and he is unaware of any complaints of vapor locking in any of those boats.

Wagner explained that the fuel supply system of that model was configured based on Coast Guard regulations and industry standards. Wagner further stated that he did not believe that the vessel at issue had a vapor lock problem because only one engine was continually affected. He felt that, since both engines were connected to both tanks, both engines would have exhibited vapor lock if the fuel supply system configuration was the cause. Wagner admitted that the vessel manufacturer installed the engines with oversight from the engine manufacturer's technician.

When Wagner was asked about the engine hatch design, he replied that the hatch is designed to be weathertight, not watertight.¹² He opined that, unless the drains are not clogged and the bilge pumps are working, the boat would not "even come close to even thinking about sinking or being so-called unseaworthy."

Wagner did, however, agree that if he was taking this vessel offshore to fish that "I would probably look into making something more watertight." Wagner admitted that, at the time of trial, Proline had received six customer complaints about water intrusion through the hatch into the engine compartment, which had been repaired pursuant to Proline's warranty agreement with its customers.

Regarding the galvanic isolator, Wagner testified that, installation of a galvanic isolator may be recommended, but the vessel, as manufactured, had adequate corrosion protection. He did admit that the manufacturer's installation manual stated that boats connected to shore power require "additional protection" against corrosion, and that the only additional protection was a galvanic isolator. Wagner also admitted that, although the model in question is no longer in

¹² Wagner noted that some customers do not want water-tight hatches because they are too difficult to open.

production, Proline includes galvanic isolators as standard equipment on current, comparable models.

AMH also called Hjalmar Brett, III, who was accepted as an expert marine surveyor for recreational water craft. Brett stated that, when he went to examine the boat, Revelle told him that there was nothing wrong with the boat. Brett did not examine the outdrives because he was told that there was nothing wrong with them. Brett also observed that Revelle was keeping rubber mats over the weathertight hatches, which seemed to solve the water intrusion problem.

On cross examination, Brett admitted that he did not try to create conditions that may lead to water intrusion because he did not bring a hose. He also admitted that he examined the drains and did not notice any "trash" or clogs in the drain. Brett also admitted that the current fuel system configuration is unacceptable for offshore use because it does not have a shut-off valve at the tanks as required by the American Boat and Yacht Council.

After a three-day bench trial, the trial judge found in favor of Revelle and against BMI, rescinded the sale and awarded Revelle a refund of the purchase price of the vessel totaling \$99,048.00; all costs incidental to the sale; repair costs of \$17,525.20; attorneys fees; damages for non-use totaling \$40,000.00; and costs and interest. The trial judge also found in favor of third-party plaintiff, BMI and against the engine manufacturer, Brunswick, for \$40,000.00. Finally, the trial judge found in favor of third-party plaintiff, BMI, and against the vessel manufacturer, AMH, for \$100,000.00.

In his lengthy reasons for judgment, the trial judge found that the evidence at trial overwhelmingly showed that the boat was redhibitorily defective, unfit for its intended purpose, and has never been used for its intended purpose of offshore fishing. Specifically, the trial judge found that the fuel supply system

configuration was defective, was “unquestionably [AMH’s] design and installation,” and “existed at the time of sale but did not become apparent immediately because of other problems with the engine.” The trial judge also found that water intrusion into the engine compartment through the closed hatches was caused by a design flaw that was AMH’s responsibility. The trial judge further found that the outdrive corrosion problem was “caused by [AMH’s] failure to follow the Mercruiser installation manual and install a galvanic isolator.”

Moreover, the trial judge found that BMI failed to recommend a galvanic isolator at the time of sale even though BMI clearly knew that the boat would be kept in the water. The trial judge also noted that BMI delivered the boat to Revelle with its only corrosion protection device, the Mercathode system, “unhooked and useless.” The trial judge further found that BMI knew of a defect in the boat, which was evidenced by “low oil pressure” alarm sounding, before the sale and delivered the vessel to Revelle in bad faith.

Law and Argument

On appeal, BMI assigns five assignments of error: the trial court erred in finding that BMI was a bad faith seller; the trial court erred in finding that plaintiff’s vessel was redhibitorily defective when sold; the trial court erred in finding only BMI liable to plaintiff; the trial court erred in failing to award full indemnification to BMI pursuant to the third-party demands asserted against Brunswick and AMH; and the trial court erred in failing to order Revelle to return the vessel to BMI.

In its appellate brief, AMH asserts seven assignments of error: the trial court erred in finding that the plaintiff met its burden of proving redhibitory defects in the pleasure craft that is the subject of this litigation; the trial court erred in finding that the subject boat contained redhibitory defects; the trial court erred in

finding that any redhibitory defects existed in the subject boat when it was delivered and sold; the trial court erred in rescinding the sale for redhibitory defects that were repaired prior to the filing of suit; the trial court erred in awarding plaintiff damages for “non-use;” the trial court erred in failing to articulate the redhibitory defect or vice that required rescission; and the trial court erred in awarding judgment against AMH in favor of BMI, a “bad faith” seller with actual knowledge of alleged defects.

Finally, Brunswick argues five assignments of error in its appellate brief: the trial court erred in finding that plaintiff’s vessel was redhibitorily defective when sold; the trial court erred in finding Brunswick responsible for any redhibitory defect(s) in Revelle’s vessel; the trial court erred in holding Brunswick liable to BMI; the trial court erred in awarding \$40,000.00 in damages for “non-use” of the vessel at issue; and the trial court erred in holding Brunswick liable to BMI for \$40,000.00 because the amount is excessive and manifestly erroneous.

Redhibition

Louisiana law on redhibition begins with La. C.C. art. 2520, which provides:

The seller warrants the buyer against redhibitory defects, or vices, in the thing sold.

A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.

A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of the buyer to a reduction of the price.

On all sales in Louisiana, there is an implied warranty that the thing sold is fit for its intended purpose. *Williams v. Ring Around Products, Inc.*, 344 So.2d

1125 (La.App. 3rd Cir.1977). This warranty can only be avoided by an express and explicit waiver. *Id.*

In a redhibition suit, the plaintiff must prove that the product contained a hidden defect at the time of sale, which was not apparent on inspection, and which rendered the thing unfit for the use intended or that its use became so inconvenient that the purchaser would never have purchased the product had he known of the defect. *Moreno 's, Inc., v. Lake Charles Catholic High Schools, Inc.*, 315 So.2d 660, 662 (La. 1975). When the redhibitory action is against the manufacturer who is not the immediate seller, proof need only be made that the defect complained of was a defect in the manufacture of the product. *Id.* These elements must be proved by a preponderance of the evidence. *Paulk Bros. Enterprises, Inc. v. Sierra Chemical Co.*, 599 So.2d 484 (La.App. 3 Cir.1992), *writ denied*, 604 So.2d 1311 (La. 1992).

“Proof by a preponderance of the evidence simply means that taking the evidence as a whole, such proof shows that the fact or cause sought to be proved is more probable than not.” *Ross v. Premier Imports*, 96-2577 (La.App. 1 Cir. 11/7/97), 704 So.2d 17, 20, *writ denied*, 97-3035 (La. 2/13/98), 709 So.2d 750. Uncontroverted evidence should be taken as true to establish a fact for which it is offered, as long the record is void of any circumstances to question the reliability of any testimony and there are no sound reasons given for its rejection. *Id.*

A defect is presumed to have existed before the sale if it manifests itself within three days immediately following the sale. La. C.C. art. 2530. Nonetheless, “in the absence of other explanations, later appearing defects may be inferred to have pre-existed the sale, when such defects do not usually result from ordinary use.” *Rhodes v. All Star Ford, Inc.*, 599 So.2d 812, 814 (La.App. 1st Cir.1992). The existence of a redhibitory defect is a question of fact, which should not be

disturbed in the absence of manifest error. *Green v. Benson and Gold Chevrolet*, 01-1161 (La.App. 5 Cir. 2/26/02), 811 So.2d 970, 975, citing *Reid v. Leson Chevrolet, Co., Inc.*, 542 So.2d 673, 675 (La.App. 5 Cir. 1989).

First, BMI, AMH, and Brunswick all argue that the trial court erred in finding that the vessel was redhibitorily defective when it was sold. We have thoroughly reviewed the extensive record in this case. We find, taking the evidence as a whole, that RSA proved by a preponderance of the evidence that redhibitory defects existed in this vessel at the time of sale, which entitled RSA to rescission of the sale.

We see no error in the trial court's finding that the fuel system, as designed and installed by AMH, was defective. First, AMH's expert, Chuck Wagner testified that AMH designed and installed the vessel's fuel supply system with oversight from Brunswick's technicians. Mike Nunmaker testified that the length of the fuel lines and presence of fuel selector switches would have been determined by the vessel manufacturer. Both Rob Casadaban, who initially diagnosed the vapor lock problem, and Mike Nunmaker, whose boat yard also diagnosed the vapor lock problem and reconfigured the fuel supply system, testified that the fuel lines and fittings looked original to the vessel, which supports the finding that the faulty configuration existed at the time of sale.

RSA purchased this vessel on November 6, 1996. The first engine failure occurred in May of the following year. Our review of the record reveals that the engine failures on RSA's vessel occurred predominantly from March through November of the years that the boat was in the water. This supports the finding that the defect existed at the time of sale but was not immediately apparent.

Finally, Rob Casadaban testified that the fuel supply system as configured when the vessel was manufactured by AMH was not suitable for off shore fishing,

its intended purpose. Moreover, even Hjalmar Brett, AMH's expert, testified that the fuel system as reconfigured did not meet industry standards and was unsafe for offshore use. Thus, we find no manifest error in the trier-of-fact's conclusion that the vessel was redhibitorily defective because of a faulty fuel supply system configuration at the time of sale.

We also find no error the trial court's finding that water intrusion into the engine compartment through the closed hatches was a design flaw that was the vessel manufacturer's responsibility. First, according to AMH's customer service records, which were authenticated by Chuck Wagner, Revelle ordered and received "rubber trim" for the engine hatches on or about November 11, 1997. Wagner further testified that photographs of the vessel introduced into evidence reflect that the trim was installed on the vessel.

Next, Rob Casadaban, an experienced marine mechanic, stated that he found corrosion on top of the vessel's engines on or about July 5, 2000. He opined that the corrosion was caused by saltwater draining onto the engines through the hatches above the engines because of a faulty seal, which he explained was a design defect.¹³

Mike Nunmaker also testified that he observed water dripping onto the top of the vessel's engines immediately after the boat was hosed down. He stated that the hatches had been closed while the boat was being washed. He recommended that Revelle purchase a covering for the engines to prevent moisture from draining through the hatches onto the engine. These facts support the trial court's finding that the defect existed at the time of sale but was not immediately apparent.

¹³ Casadaban stated that water also intruded into the engine compartment in a second way: saltwater drained from the washdown in the sole of the vessel over the engines because the drain was not properly seated and sealed. Jack Deck, RSA's marine surveying expert explained that the defect likely existed at the time of sale because it is highly unlikely that the drain would become unseated even when the port engine was removed and reinstalled.

Jack Deck, RSA's marine engineering expert, testified that the fact that water drained from the hatches and washdown, which were design "issues," into an engine compartment with small drains caused the vessel to be unseaworthy and, thus, not fit for its intended purposes. Further, none of the defense experts controverted this testimony. In fact, the defense experts supported Casadaban's statement that the flaw was a design defect by stating that the hatches were designed to be "weathertight," not watertight. Moreover, Chuck Wagner, AMH's expert on recreational watercraft, stated that if he was taking this vessel offshore to fish that "I would probably look into making something more watertight." Thus, we find no manifest error in the trier-of-fact's conclusion that the vessel was redhibitorily defective because of a faulty hatch design at the time of sale.

With regard to the galvanic corrosion issue, the trial judge found that the corrosion problem on the vessel's outdrives was caused by BMI's failure to recommend a galvanic isolator at the time the boat was ordered and AMH's "failure to follow the Mercruiser installation manual and install a galvanic isolator."¹⁴ At trial, Greg Bent, the salesman who sold RSA the vessel, admitted that he knew that Revelle planned to keep the boat in the water and asked for "everything" he would need. At trial, Greg Bent admitted that he knew about galvanic isolators but stated that "none of the other boats in South Shore Harbor needed a galvanic isolator." He admitted that his statement regarding the lack of use of galvanic isolators only referred to boats that his company serviced.

At trial, Greg Bent also maintained that galvanic isolators were not offered by AMH as an option for their boats that year. Greg Bent did admit that the engine manufacturer's installation manual for the 1997 Proline Model 2950 stated:

¹⁴ We have already found that AMH delivered to vessel to BMI with redhibitory defects so we do not need to comment further on its liability.

Boats which are connected to AC shore power, **require** additional protection to prevent destructive low voltage galvanic currents from passing through the shore power ground wire. A Quicksilver galvanic isolator can be installed to block the passage of these currents while still providing a path to the ground for dangerous fault, shock currents. Refer to Quicksilver Accessories Guide for part number. (Emphasis added).

Greg Bent further admitted that Mercathode systems and zinc anodes are standard on the MerCruiser engines and Bravo III outdrives so the only “additional protection” that he knew of, and that the manual could be referring to, was a galvanic isolator. Greg Bent admitted that he never offered Revelle the option of purchasing a galvanic isolator.

On March 15, 2000, after numerous tests and discussions trying to solve exterior corrosion problems on the vessel, Revelle installed a galvanic isolator.¹⁵ It is undisputed that corrosion on the outdrives and other exterior areas of the vessel was minimal after Revelle installed the galvanic isolator.

Furthermore, George Bent, the service manager for BMI, admitted that the only corrosion protection available on the vessel, the Mercathode system, was disconnected in August of 1997, within one year from the date the boat was purchased. Bent stated that the Mercathode system must have been inadvertently disconnected when his mechanics removed the port engine. Jack Deck, RSA’s marine engineering expert, testified that it is highly unlikely that the Mercathode system was inadvertently disconnected because of the configuration of the hull and engine room. We conclude that BMI delivered the vessel to RSA without a functioning corrosion protection system, which BMI knew or should have known.

Further, BMI knew that the vessel would be housed on the water and connected to AC shore power yet knowingly failed to order protection against

¹⁵ We do not find merit in BMI’s argument that the failure to install a galvanic isolator should not be considered a redhibitory defect because the outdrives were replaced before RSA filed suit. Replacement of the corroded outdrives did not correct the redhibitory defect, which was failure to deliver the vessel with corrosion protection. Replacement of the outdrives only corrected the symptom of the problem.

galvanic corrosion that was required by the engine manufacturer. For these reasons, we agree with the trial court that BMI knowingly delivered the vessel to RSA in a condition that was unfit for its intended purpose and was, thus, a bad faith seller.

With regard to the trial court's finding that BMI was a bad faith seller because it delivered this vessel with knowledge that the "low oil pressure" alarm was sounding, we cannot agree. We note, however, that the alarm revealed a casting defect in the longblock of the port engine, which was attributable to the engine manufacturer, Brunswick.

We further note that the record reflects that Brunswick knew that vapor lock became a problem once it switched to electronic fuel injection engines in 1995, 1996, and 1997. Nunmaker, who was authorized by Brunswick as a repair facility for its engines, specifically testified that the vapor lock problem did not surface until MerCruiser began exclusively using electronic fuel injection in its engines. Nunmaker further testified that vapor lock was "so common that MerCruiser sent out a [service bulletin] to all dealers on how to rectify the problems with vapor lock." Importantly, Nunmaker stated that AMH had utilized the same fuel supply system configuration for MerCruiser's carburetor engines without vapor lock problems. Nunmaker stated that the vapor lock problem was worse in 1999, 2000, and 2001 because of water and weather conditions.

Thus, we find no manifest error in the trier-of-fact's conclusion that the vessel had redhibitory defects that were attributable to the vessel manufacturer and the seller.¹⁶ Having found no error in the trial court's findings with regard to redhibition, we will address defendants' numerous arguments regarding damages.

Damages

¹⁶ Because we have found no error in the trial court's finding with respect to three redhibitory defects, we decline to address the trial court's findings regarding the "low oil pressure" alarm.

The law is well settled that a buyer has a right to rely on an implied warranty that the thing sold is suitable for its intended use, and if this warranty is not waived the seller warrants the thing sold as fit for the purpose intended. *J.B. Beaird Co. v. Burris Bros.*, 216 La. 655, 44 So.2d 693 (1949); *Williams v. Ring Around Products, Inc.*, *supra*. A buyer may bring an action against all sellers in the chain of sale back to the primary manufacturer to rescind the sale for breach of an implied warranty. *Rey v. Cuccia*, 298 So.2d 840, 845 (La.1974).

La. C.C. Art. 2545 provides:

A seller who knows that the thing he sells has a defect but omits to declare it, or a seller who declares that the thing has a quality that he knows it does not have, is liable to the buyer for the return of the price with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the sale and those incurred for the preservation of the thing, and also for damages and reasonable attorney fees. If the use made of the thing, or the fruits it might have yielded, were of some value to the buyer, such a seller may be allowed credit for such use or fruits.

A seller is deemed to know that the thing he sells has a redhibitory defect when he is a manufacturer of that thing.

In this case, the trial judge found in favor of RSA and against BMI, rescinded the sale and awarded RSA a refund of the purchase price of the vessel totaling \$99,048.00; all costs incidental to the sale; repair costs of \$17,525.20; attorneys fees; damages for non-use totaling \$40,000.00; and costs of trial proceedings and judicial interest from the date of demand. The trial judge also found in favor of third-party plaintiff, BMI, and against the engine manufacturer, Brunswick, for \$40,000.00. Finally, the trial judge found in favor of third-party plaintiff, BMI, and against the vessel manufacturer, AMH, for \$100,000.00.

There is no question that RSA is entitled to rescission of the sale of the vessel from BMI due to the redhibitory defects in the vessel of which the seller knew or should have known. Accordingly, we affirm the trial court's award to

RSA of a refund of the purchase price of the vessel. We do, however, amend the trial court's judgment to order RSA, through its representative, Dale Revelle, to immediately return the vessel to BMI.

Both AMH and Brunswick argue that the trial court erred in awarding RSA damages for non-use totaling \$40,000.00. The record reflects that the vessel was in dry dock due to redhibitory defects for at least 34 of the 60 months between October 1997 and October 2002. Accordingly, we see no error in the trial court's award of damages for non-use and will not disturb it on appeal.

BMI argues that the trial court erred in failing to award full indemnification to BMI pursuant to its third-party demands against AMH and Brunswick. Both AMH and Brunswick argue that the trial court erred in awarding judgment against them in favor of BMI since BMI was a bad faith seller and, thus, not entitled to indemnification.

We reiterate that the manufacturer of a product is presumed to know the product had a redhibitory defect and, as such, is liable under La. C.C. art. 2545. While we agree that BMI was in bad faith with regard to the sale of the vessel to RSA for delivering the vessel with no corrosion protection, the record does not support finding that BMI was in bad faith with regard to the other redhibitory defects that were present in this vessel. We agree with the trial court's finding that the defective fuel supply system design and hatch design were the sole responsibility of the vessel manufacturer, AMH. The record also reflects that Brunswick was responsible for redhibitory defects because it manufactured the engine with the defective longblock and, further, knew that its EFI engines were incompatible with the fuel supply system designed by the vessel manufacturer.

These defects were not, in fact, connected. In essence, BMI was a good faith seller with respect to the vessel and engines manufacturers' defects and,

therefore, the trial court was correct in ordering AMH and Brunswick to indemnify BMI. *See, Evangeline Medical & X-Ray Distributors Corp. v. Coleman Oldsmobile, Inc.*, 402 So.2d 208, 212 (La.App. 1. Cir. 1981).

For the foregoing reasons, we affirm the trial court judgment in favor of RSA and against BMI awarding a refund of the purchase price totaling \$99,048.00; all costs incidental to the sale; repair costs of \$17,525.20; damages for non-use totaling \$40,000.00; attorneys fees; and costs of the lower court proceedings and judicial interest from the date of demand. We amend the trial court judgment and order RSA to return the vessel immediately to BMI. We also affirm the trial court's award in favor of third-party plaintiff, BMI, and against the engine manufacturer, Brunswick, for \$40,000.00 and the award in favor of third-party plaintiff, BMI, and against the vessel manufacturer, AMH, for \$100,000.00.

Finally, it appears from the record that there is an outstanding motion to fix attorneys fees, costs, expert fees, and costs incidental to the sale of the vessel so we remand to the trial court for a hearing on that motion and further proceedings consistent with this opinion. Costs of this appeal are taxed equally to BMI, AMH, and Brunswick.

**AMENDED IN PART, AFFIRMED AS
AMENDED, AND REMANDED FOR
FURTHER PROCEEDINGS**

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

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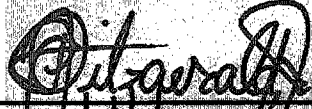
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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY MARCH 15, 2005 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:


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