STATE OF MICHIGAN

COURT OF APPEALS

DANIEL L. WILLIAMS,

Plaintiff-Appellant,

v

JAMA, INC., a Michigan corporation, and J & M DAIRY COMPANY, a division of JAMA, INC.,

Defendants-Appellees.

UNPUBLISHED
March 17, 1998

No. 201293
Hillsdale Circuit
LC No. 95-025519-NZ

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's February 4, 1997 order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). We reverse.

Plaintiff, a dairy farmer, purchased milking equipment from defendants in an effort to modernize the equipment on his dairy farm and improve the productivity of his dairy herd. Defendants installed the equipment in December 1987. At the time of installation, defendants orally agreed to service the equipment annually for the price of labor and materials, which defendants did from 1987 through 1991. Plaintiff first experienced problems with the new equipment within thirty days after installation. On October 6, 1992, in an effort to determine the source of the problems he was experiencing with the production and reproduction of his dairy herd, plaintiff disassembled a portion of the milking equipment and discovered a washer that had become lodged in the "trap" of the milking system.

On September 29, 1995 plaintiff filed a complaint against defendants, alleging that the displaced washer caused the milking equipment to function erratically and less efficiently when used to milk plaintiff's dairy cows. Plaintiff claims that, based on the parties' oral service agreement, defendants breached their duty to exercise reasonable care in inspecting, servicing and maintaining the milking equipment by failing to locate and correct the displaced washer. Defendants contend that the service agreement was incidental to the sale of goods and that plaintiff's suit is barred by the four-year statute of limitations imposed by the Uniform Commercial Code (UCC). The trial court found that the agreement between plaintiff and defendants was governed by the UCC and that plaintiff had failed to file his

complaint within the four-year statute of limitations. Therefore, the trial court granted defendants' motion for summary disposition.

I.

Plaintiff contends that the trial court erred in granting defendants' motion for summary disposition because a question of fact exists as to whether the oral service agreement between plaintiff and defendants was (a) incidental to a contract for the sale of goods, and, therefore, was governed by the statute of limitations set forth in the UCC, or (b) a separate contract for services involving a different limitations period.

Article 2 of the UCC applies to transactions in goods. MCL 440.2102; MSA 19.2102. A contract that calls merely for the rendition of services is not subject to the sales provision of the UCC. *Wells v 10-X Mfg Co*, 609 F2d 248, 254 (CA 6, 1979). The trial court found that plaintiff's tort claim is based on a contract for the sale of *goods* and is therefore barred by the UCC's four-year period of limitation found in MCL 440.2725(1); MSA 19.2725(1). An action to recover for breach of warranty under the UCC must be commenced within four years of tender of delivery of the goods, regardless of when the breach was discovered. *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 520; 486 NW2d 612 (1992); MCL 440.2725(2); MSA 19.2725(2).

Defendants installed plaintiff's milking system in December 1987, and plaintiff filed this action against defendants on September 29, 1995. Therefore, if this action were governed by the UCC, plaintiff's claim is barred by the four-year statute of limitations. Plaintiff argues, however, that his tort action should survive because his negligence claim stems from a contract for *services* outside the scope of the UCC and is therefore subject to the three-year statute of limitations for product liability actions set forth in the Revised Judicature Act, MCL 600.5805(9); MSA 27A.5805(9). Moreover, this limitations period does not begin to run until the cause of action was discovered or reasonably should have been discovered.

In *Neibarger, supra*, our Supreme Court considered the applicability of the UCC and its four-year statute of limitations in two consolidated cases involving actions by dairy farmers against the sellers and installers of milking equipment. In both cases, the plaintiffs argued that the UCC did not apply to their cases because they were seeking to recover for injuries caused by the *services* that the defendants provided rather than for any defect in the *products* provided. *Id*. at 533. The Court found that plaintiffs' claims were not timely filed within the four-year statute of limitations under the UCC because although the plaintiffs alleged negligent service by the defendants, such service was merely incidental to the contract for the sale of goods. *Id*. at 535. The Court reasoned that "the purchase agreements included no mention of installation or service, nor was any separate price stated for installation or service." *Id*. Thus, the services were incidental to the contract for purchasing the milking system. *Id.*

This case is distinguishable from *Neibarger* because a separate oral contract was entered into between plaintiff and defendants regarding service and payment for service of the milking equipment. Unlike *Neibarger, supra* at 535, the services that defendants provided were not incidental to the sale of the equipment but were governed by a separate oral agreement. Indeed, as opposed to service

contracts where a flat fee is paid in advance to ensure that the equipment will be maintained for an extended period of time, the oral agreements at issue here only required defendants to inspect the milking equipment every year. Each visit was treated as a separate event, and the cost of these visits varied according to the amount and type of work defendants' service personnel had to perform. Further, plaintiff does not claim faulty design or installation but he does allege negligent service in failing to detect the dislodged washer. Accordingly, we do not believe that plaintiff's claim is governed by the UCC or its statute of limitations because it does not involve a contract for the sale of goods and the service agreements at issue were not merely incidental to the purchase of the goods. Cf. *Neibarger, supra* at 535.

Therefore, an issue of material fact remains regarding whether defendants owed plaintiff a duty of care in the servicing of the milking system, and whether defendants breached that duty. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 528-529; 538 NW2d 424 (1995). Plaintiff alleges he was relying on defendants to maintain the system after installation and make the system operable after servicing. *Id*. Defendants, through their representative, acknowledged that their annual maintenance program should have discovered the dislodged washer. Plaintiff further alleges that defendants knew or should have known that plaintiff was relying on defendants' service after installation to make the milking system operable. Accordingly, defendants were not entitled to judgment as a matter of law and the trial court's order granting defendants' motion for summary disposition should be reversed.

II.

Next, plaintiff argues that the trial court erred in ruling that even if plaintiff's claim were not barred by the UCC's four-year statute of limitations, plaintiff's claim was barred because it was not filed within three years of the time plaintiff discovered, or should have discovered, that he had a possible cause of action.

Michigan's discovery rule states that "the period of limitation does not begin to run until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, that he had a possible cause of action." *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 142; 530 NW2d 510 (1995), citing *Thomas v Process Equipment Corp*, 154 Mich App 78, 88; 397 NW2d 224 (1986). Once a plaintiff is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action. *Moll v Abbott Laboratories*, 444 Mich 1, 24; 506 NW2d 816 (1993).

We addressed a case similar to this in *Cartmell v The Slavik Co*, 68 Mich App 202, 203-204; 242 NW2d 66 (1976). In *Cartmell, supra,* the plaintiffs brought an action against the installer of the roof on their home after observing damage to their home caused by leaks in the roof. In holding that the trial court properly submitted to the jury the issue of when plaintiffs' cause of action accrued, we stated:

> But for there to have been sufficient knowledge for the cause of action to accrue the plaintiffs would have had to have known or should have known that there were leaks that were caused by a failure of the tile or its installation. Knowing that there are leaks

> and knowing that there are leaks caused by faulty material or workmanship in the roof are two different things. Plaintiffs may have *suspected* that the leaks were the fault of the defendant, but they did not *know* this until 1974. [*Id*. at 206; emphasis in original.]

In this case, the trial court stated that although plaintiff did not discover the dislodged washer until 1992, plaintiff "was well aware of defects within thirty days of purchase of this particular product [and] that he continued to have problems throughout his use of this product and these products from 1987 up to and including 1992 when he found this stuck washer." Therefore, the trial court concluded that even if the three-year statute of limitations applied, plaintiff failed to file his claim within three years of the time that he "should have known or discovered the defect."

Plaintiff testified during his deposition that he began having problems "with not getting vacuum to the milkers" within the first thirty days after the milking system was installed by defendant. Plaintiff temporarily fixed this problem by removing the "trap" himself. Plaintiff stated that he did not have problems with the system again until December 1988 after defendants performed their annual maintenance service. Plaintiff then testified that sometime after the December 1988 servicing call, he began experiencing "sentinel problems." Plaintiff could not recall the date on which these problems began. On October 6, 1992, plaintiff discovered a dislodged washer in the "trap" of the milking system. Defendants' agent testified that the loose washer could result in a slowdown of the washing action of the water in the pipeline, which would increase the chances of bacteria building up in the pipe line.

A factual question exists regarding when plaintiff discovered or should have discovered a potential negligence claim against defendants. As in *Cartmell*, it is one thing for plaintiff to know that he is having problems with the milking system and another to know that the problems persisted because of negligent service by defendants. It was not until plaintiff discovered the dislodged washer that he knew the source of the problems. Because a factual question exists as to when plaintiff discovered or should have discovered that he had a possible cause of action against defendants, defendants were not entitled to judgment as a matter of law and the trial court's order granting defendant's motion for summary disposition is reversed.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Richard A. Bandstra