# STATE OF MICHIGAN

# COURT OF APPEALS

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KEITH BROOKS,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION and WILLIAMSON CHEVROLET-GEO-CADILLAC, INC.,

Defendants-Appellees.

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UNPUBLISHED
January 7, 2000

No. 209701
Wayne Circuit Court
LC No. 97-702381 CK

Before: Jansen, P.J., and Saad and Gage, JJ.

JANSEN, P.J. (concurring).

I concur with the majority opinion insofar as it reverses the trial court's grant of summary disposition in favor of defendants, although I do not join in the analysis.

When defendants moved for summary disposition in the lower court, their sole argument was that, because plaintiff had failed to prove that he had any problem with the vehicle since the last repair visit, which took place on January 10, 1997, plaintiff had also failed to establish his claims for breach of warranty. I would hold that there was a question of fact as to whether the vehicle was defective so that there could be a breach of warranty. Moreover, I would also hold that the trial court's decision with respect to the revocation of acceptance claim was incorrect as a matter of law.

With respect to the breach of warranty claims, the only claims attacked by defendants in the lower court, defendant argued that plaintiff was required to prove that a nonconformity was not cured within a reasonable period of time. Defendants attached an affidavit to the brief contending that a mechanic examined the vehicle on August 26, 1997, and that the starting, charging, and electrical systems were all working. Plaintiff rebutted this by attaching two affidavits averring that the battery failed again after his fourth repair attempt; that he purchased a new battery after the fourth repair attempt, but had to disconnect the battery cables and reconnect them when he wanted to use the vehicle, and that the problem with the battery and electrical system was never corrected when he returned the vehicle in September 1997. Plaintiff also attached an affidavit of a mechanic who examined the vehicle on September 5, 1997, shortly before it was returned to the dealer, and that mechanic

concluded that the electrical charging system did not produce an adequate amount of current and that it was not operating properly.

It is clear based on these conflicting affidavits that there is a question of fact as to whether the vehicle continued to have problems after plaintiff's fourth attempt at fixing it in January 1997 until it was returned in September 1997. A jury would have to resolve this factual dispute and the breach of warranty claims cannot be decided as a matter of law.

Plaintiff's revocation of acceptance claims were brought pursuant to the Michigan Consumer Protection Act, MCL 440.2608; MSA 19.2608 and MCL 440.2967; MSA 19.2A517. Because the record does not indicate whether plaintiff actually knew of the defect involving the battery and electrical system when he accepted the vehicle, he was required to prove that the vehicle's defect substantially impaired its value to him, that his acceptance of the truck was reasonable induced by the difficulty of discovery of the defect before acceptance or by defendant Williamson's assurances, and that plaintiff revoked acceptance within a reasonable time after he discovered or should have discovered the defect and before any substantial change in the condition of the truck. MCL 440.2608(1)(b), (2); MSA 19.2608(1)(b), (2), MCL 440.2967(1)(b), (4); MSA 19.2A517(1)(b), (4). Plaintiff was also required to prove that the limited remedy provided in the lease agreement failed in its purpose or deprived him of the bargain in order to pursue other remedies under the Uniform Commercial Code, such as revocation. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich 94, 102; 593 NW2d 595 (1999); *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105, 111; 394 NW2d 17 (1986).

The trial court did not address any of the elements concerning a revocation of acceptance claim. Rather, it found that plaintiff's continued use of the vehicle after giving notice of revocation operated to bar plaintiff's claims for revocation. This ruling was wrong as a matter of law. This Court has held that because revocation of acceptance gives a buyer a security interest in the goods in the buyer's possession or control for the purchase price, the buyer may continue to use the goods in order to mitigate damages. *Henderson v Chrysler Corp*, 191 Mich App 337, 340-341; 477 NW2d 505 (1991). Whether plaintiff acted reasonably in his attempts to mitigate damages is a question of fact for the jury to decide. See, e.g., *Rasheed v Chrysler Corp*, 445 Mich 109, 121-122; 517 NW2d 19 (1994). Further, plaintiff presented sufficient evidence to create a material factual dispute as to whether he reasonably attempted to mitigate his damages. Plaintiff has documented the telephone calls he made to defendants before the revocation letter of January 23, 1997, asking that defendants take back the vehicle because of the battery and electrical system problems. Defendants did not take the vehicle, thus, plaintiff was within his legal rights to mitigate his damages by using the truck.

Further, it was improper for the trial court to dismiss the entire complaint, where there are several different theories of liability, upon finding that one theory, revocation of acceptance, was not proved. Accordingly, I would reverse the trial court's grant of summary disposition in favor of defendants and remand for further proceedings.

/s/ Kathleen Jansen