

STATE OF MICHIGAN
COURT OF APPEALS

TELLY'S, INC. and ALEXANDER
CHRISOPOULOS,

UNPUBLISHED
June 22, 2001

Plaintiffs-Appellees/Cross-
Appellants,

v

LAND ROVER NORTH AMERICA, INC. and
FRED LAVERY COMPANY,

No. 216562
Oakland Circuit Court
LC No. 96-532771-NZ

Defendants-Appellants/Cross-
Appellees.

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

Defendants appeal as of right following the district court's grant of plaintiff's¹ partial motion for summary disposition and entry of judgment for plaintiff. We reverse and remand.

In October 1995, plaintiff purchased from defendants a Land Rover vehicle. Plaintiff allegedly experienced many mechanical difficulties with the Land Rover. By October 1996, plaintiff filed in the Oakland Circuit Court a complaint alleging various counts, including Lemon Law claims, MCL 257.1401 *et seq.*, several claims invoking the Uniform Commercial Code (UCC) (revocation of acceptance, breach of warranties and breach of defendants' duty of good faith), MCL 440.1101 *et seq.*, and complaints under the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, among other counts.²

¹ The opinion will refer to "plaintiff" in the singular because plaintiff Alexander Chrisopoulos is the president and sole shareholder of plaintiff entity Telly's, Inc., d/b/a Telly's Restaurant.

² Plaintiff also asserted the following claims: violations of the Magnuson-Moss Warranty Act, 15 USC 2301 *et seq.*; misrepresentation; violations of the Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq.*; conversion; and claims against his finance company, which is not a party to this appeal.

Plaintiff filed a motion for partial summary disposition under MCR 2.116(C)(10) regarding his Lemon Law claim, revocation of acceptance claim, breach of warranty claims and consumer protection act claim. The circuit court denied summary disposition on the basis that disputed factual issues existed regarding plaintiff's allegations of defects. Specifically, the circuit court found questions of material fact whether the alleged Land Rover defects substantially impaired the Land Rover's use or value. The circuit court ordered the case into mediation, which ultimately failed. The circuit court then reassigned the case to the district court pursuant to Oakland Circuit Court Administrative Order 1997-01J.³

In the district court, plaintiff filed a second partial motion for summary disposition, including more repair orders as exhibits and making additional arguments that defendants had made a reasonable number of unsuccessful attempts to repair the Land Rover. The district court granted plaintiff's motion for summary disposition under MCR 2.116(C)(10) with respect to the Lemon Law claim and the Uniform Commercial Code revocation and breach of warranty claims. Because this disposition effectively addressed the issues under all remaining counts of the complaint, the district court entered judgment for plaintiff and awarded plaintiff attorney fees and costs.

Of the many issues raised by the parties on appeal, we first address the dispositive question whether the circuit court properly denied plaintiff's initial motion for summary disposition. We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. In reviewing a (C)(10) motion, we must consider in the light most favorable to the nonmoving party all relevant pleadings, admissions, affidavits, depositions and other documentary evidence submitted by the parties, to determine whether the evidence raises any genuine issue of material fact or the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

The Lemon Law provision at issue provided as follows at the time of the underlying events and the filing of plaintiff's suit:

(1) *If a defect or condition* which was reported to the manufacturer or new motor vehicle dealer [within one year of the vehicle's delivery to the purchaser] . . . *continues to exist and the new motor vehicle has been subject to a reasonable number of repairs as determined under subsection (3)*, the manufacturer shall within 30 days have the option to either replace the new motor vehicle . . . or accept return of the vehicle and refund to the consumer the full purchase price

³ This interim order, applying to cases mediated between December 2, 1996 and December 31, 1997, provided that circuit judges could assign cases to district judges for trial when the involved damages were determined to constitute less than \$10,000 and mediation efforts had failed.

* * *

(3) *It shall be presumed that a reasonable number of attempts have been undertaken to repair any defect or condition if 1 of the following occurs:*

(a) *The same defect or condition that substantially impairs the use or value of the new motor vehicle to the consumer has been subject to repair a total of 4 or more times by the manufacturer or new motor vehicle dealer and the defect or condition continues to exist. . . .* The consumer or his representative, prior to availing himself or herself of a remedy . . . and any time after the third attempt to repair the same defect or condition, shall give written notification, by return receipt service, to the manufacturer of the need for repair of the defect or condition in order to allow the manufacturer an opportunity to cure the defect or condition. . . .

(b) *The new motor vehicle is out of service because of repairs for a total of 30 or more days or parts of days during the term of the manufacturer's express warranty, or within 1 year from the date of delivery to the original consumer, whichever is earlier.* It shall be the responsibility of the consumer . . . prior to availing himself or herself of a remedy . . . to give written notification . . . to the manufacturer of the need for repair of the defect or condition in order to allow the manufacturer an opportunity to cure the defect or condition. . . . [MCL 257.1403 (emphasis added).]

As the italicized language explains, the Lemon Law affords relief for defective conditions existing within a new vehicle if either (1) due to repairs the vehicle remains undriveable for a minimum of thirty days during the first year of the purchaser's ownership, MCL 257.1403(3)(b), *Ayer v Ford Motor Co*, 200 Mich App 337, 343; 503 NW2d 767 (1993), or (2) the same serious defect has undergone at least four unsuccessful service attempts, MCL 257.1403(3)(a).

Subsection (3)(b) does not apply in this case because it is undisputed that during the first year plaintiff possessed the Land Rover it spent only twenty-two days undergoing service attempts. Accordingly, to establish the Land Rover's qualification as a lemon plaintiff had to demonstrate that substantial Land Rover impairments existed through at least four repair attempts.

Plaintiff extensively catalogued alleged Land Rover defects including a crushed seat cover; pulsating antilock brakes; rattling windows and various other parts of the vehicle; problems with the remote entry device; improperly functioning turn signals, windows, rear wipers and lights; a tailgate that closed improperly; a slippery transmission and loose gear shift; squeaking brakes; leaking valve covers; an exhaust leak; engine knock or noise; an engine that would not start; an alternator with worn bearings; an intermittently inoperative rear window defroster and hazard and turn signals; smoke rising from the vehicle's underside; a worn out wiper blade; and a tape player that ate cassettes, among numerous other complaints. The Land Rover also underwent several repairs suggested by manufacturer recall campaigns. The repair records reflect that defendant dealership addressed and investigated virtually every complaint

plaintiff raised, either making some repair to cure the defect or expressing an inability to detect a problem.⁴

While many of plaintiff's complaints surely warranted some concern, subsection 1403(3)(a) plainly demands a showing of a *substantial impairment* that persisted through at least four repair attempts. The four-time complaints of plaintiff, when the circuit court ruled on plaintiff's first motion, consisted of a malfunctioning cigarette lighter and various rattles throughout the vehicle. Incorporating plaintiff's various complaints made through April 1998, which the district court apparently considered in addressing plaintiff's second motion for partial summary disposition, we note additional four-occasion complaints concerning various engine noises, brake noises, and turn signal malfunctions. Plaintiff produced affidavits in support of his motions alleging that the repeated problems caused him annoyance and "substantially impair[ed] its value to me." The record also indicates, however, that plaintiff drove the vehicle for approximately two and one-half years, from its October 1995 delivery until April 1998, and that the Land Rover's odometer showed 43,325 miles when plaintiff last dropped it off for repairs in April 1998.

The circuit court correctly noted our Supreme Court's definition of "substantial impairment" in *Colonial Dodge, Inc v Miller*, 420 Mich 452; 362 NW2d 704 (1984).⁵ The Supreme Court explained that for a buyer to establish a substantial impairment, they "must show that the nonconformity has a special devaluing effect on him and that the buyer's assessment of it is factually correct." In light of the vague nature of many of plaintiff's complaints involving various noises emanating from different parts of the vehicle, i.e., brake noise, engine noise and rattling; the record evidence that many of plaintiff's repeated complaints regarding these and other alleged defects revealed no observable problem; and the fact that notwithstanding the Land Rover's placement within the repair shop for an alleged, ultimate total of eighty-one days plaintiff drove the vehicle beyond 42,000 miles, we cannot conclude as a matter of law that the asserted noises and cigarette lighter malfunctions substantially impaired the value or use of the Land Rover to plaintiff.⁶

⁴ The record reflects that through October 1997 when the circuit court ruled on the motion for partial summary disposition, defendant dealership found no problem in response to approximately thirty complaints by plaintiff. Taking into account the five or six repair visits that occurred after the circuit court's ruling and before plaintiff filed its second motion for partial summary disposition before the district court, a total of approximately thirty-five complaints when investigated revealed no problem or required no repair.

⁵ Although the Supreme Court defined and discussed substantial impairment in the context of a revocation of acceptance claim, see MCL 440.2608(1), we detect no basis for distinguishing the meaning of substantial impairment within subsection 2608(1) of the UCC from its similar utilization within subsection 1403(3)(a) of the Lemon Law. Both subsections address whether a product's defect or nonconformity substantially impairs the product's value to the purchaser.

⁶ While plaintiff argues that "a fair reading of the entire [Lemon Law] statute indicates establishing the presumption [within subsection 1403(3)] is not the only avenue to relief," i.e., showing that defects continue to exist after a reasonable number of repair attempts, we note that subsection 1403(1) clearly and unambiguously requires a showing of "a reasonable number of

(continued...)

We conclude that the circuit court properly found that the instant circumstances created genuine issues of fact whether four-time repairs substantially impaired the Land Rover's value to plaintiff, and correctly denied plaintiff's motion for partial summary disposition.⁷ Because genuine issues of fact exist whether the claimed defects substantially impaired the Land Rover's value, plaintiff was not entitled to judgment as a matter of law that he may revoke his acceptance of the Land Rover. MCL 440.2608(1). We need not address the propriety of summary disposition concerning plaintiff's consumer protection act or breach of warranty claims because the circuit court did not specifically address these claims in denying plaintiff's first motion for partial summary disposition. *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999) ("Appellate review is generally limited to issues decided by the trial court."). We note, however, that questions of fact likewise exist whether defendants failed to comply with the terms of their warranties.⁸

Our determination that the circuit court correctly denied plaintiff's first motion for partial summary disposition pursuant to MCR 2.116(C)(10) renders unnecessary our consideration of the parties' other, various arguments on appeal and cross appeal.

We affirm the circuit court's denial of plaintiff's initial motion for partial summary disposition pursuant to MCR 2.116(C)(10), and reverse the district court's grant of plaintiff's second motion for partial summary disposition pursuant to subsection (C)(10). We vacate the judgment for plaintiff entered by the district court, and remand to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Brian K. Zahra
/s/ Michael R. Smolenski

(...continued)

repairs *as determined under subsection (3)*." [Emphasis added.] *Ayer, supra* at 342. As we have discussed, subsection (3) presumes a reasonable number of repair attempts only when either the vehicle remains under repair for at least thirty days during the first year the purchase possesses it or the purchaser demonstrates defects existing through at least four repair attempts that substantially impair the vehicle's value to the purchaser.

⁷ Because we find issues of fact regarding substantial impairment, we note that the circuit court properly denied defendants' request for judgment as a matter of law pursuant to MCR 2.116(I)(2).

⁸ Consequently, the district court erred in finding, pursuant to MCR 2.116(C)(10), the instant record supportive of summary disposition for plaintiff regarding the lemon law, revocation and breach of warranty claims. We note that the district court did not explain the basis for its ruling, but merely stated at the motion hearing, "I'm convinced that summary disposition should be issued and I'll sign an order to that effect."