STATE OF MICHIGAN

COURT OF APPEALS

DAN FORSTER,

Plaintiff-Appellant,

v

NAVISTAR INTERNATIONAL TRANSPORTATION CORP., and TRI COUNTY INTERNATIONAL TRUCK, INC.,

Defendants-Appellees.

UNPUBLISHED
August 27, 2002

No. 233048
Wayne Circuit Court
LC No. 98-831343-CK

DAN FORSTER,

Plaintiff-Appellee,

v

NAVISTAR INTERNATIONAL TRANSPORTATION CORP., and TRI COUNTY INTERNATIONAL TRUCK, INC.,

Defendants-Appellants.

No. 234995
Wayne Circuit Court
LC No. 98-831343-CK

Before: White, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals as of right the grant of summary disposition to defendant Navistar of his breach of express warranty claim (No. 233048). In Docket No. 234995, defendants appeal as of right the circuit court's determination to grant approximately one-half the attorney fees they sought under the mediation sanctions rule, MCR 2.403(O). This appeal is being decided without oral argument pursuant to MCR 7.214(E). We reverse and remand in Docket No. 233048. Our disposition renders moot defendants' appeal in No. 234995.

Plaintiff is a sole proprietor of a bread delivery service. On October 25, 1996, plaintiff took delivery of a new International 4700 4 x 2 truck from Tri County, a truck dealer. Defendant Navistar manufactures engines, chassis, and other components, and sells "incomplete" trucks;

buyers can choose various components. Plaintiff chose a Navistar engine, cab and chassis.[1] Plaintiff paid over $44,000 for the truck, and the truck was his only business delivery vehicle.

The sale of the truck was accompanied by a Navistar written Limited Warranty,[2] which was adopted by Tri County when it serviced and repaired the vehicle. Plaintiff took the truck to

[1] Plaintiff chose an Allison transmission and a Morgan box. Navistar assembled the cab, engine and chassis of the truck. Morgan Box Company then mounted the body on the chassis.

[2] Navistar's written "limited warranty" provided "basic vehicle coverage" for 12 months/unlimited mileage, which included the cab and chassis, and additional warranty coverage on the engine (36 months and 150,000 miles), and on certain other components, as stated below:

LIMITED WARRANTY FOR MEDIUM DUTY MODELS

BASIC VEHICLE COVERAGE:

> Navistar International, at its option, will repair or replace any part of this vehicle which proves defective in material and/or workmanship in normal use and service, with new or ReNEWed parts, for the first 12 months from new vehicle delivery date, regardless of distance traveled. Exceptions are listed below under *What Is Not Covered.*
>
> * * *

COMPONENT COVERAGE:

> The components described below are given additional warranty coverage of variable time periods and distance traveled limitations, as shown in the *Warranty Coverage Schedule.*
>
> 1. Frame Side Rails [60 months/unlimited mileage]
>
> 2. Cab/Cowl Structure (on-highway applications) [60 mos, unltd miles]
>
> 3. The Cab/Cowl is warranted against perforation due to corrosion, except for perforation caused by industrial chemicals and/or corrosion caused by use in a corrosive industrial environment. [60 mos, unltd miles]
>
> 4. International Diesel Engines including Fuel Injection Pump, Electronic Control Modules, and Nozzles; excluding attaching accessories, thermostats, and electrical and filtration systems. Glow plugs are covered for 12 months/unlimited mileage. [36 mos, 150,000 miles]
>
> 5. Five-part Spicer System (front & rear axles, clutch, propshaft and transmission); or, Three-part Spicer System (front & rear axles and propshaft when used with Allison transmission). [24 mos, unltd miles]
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> * * *

(continued…)

Tri County for repairs approximately 11 times in the first year he owned it. On October 27, 1997, the truck had to be towed to Tri-County, where it was kept for 8 days because of water

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(…continued)

WHAT IS NOT COVERED

Items warranted by their respective manufacturers (e.g., non-International brand engines, tires & tubes, Allison Transmissions, lubricants, etc.)

* * *

Maintenance and/or service items/repairs, including tune-ups, brake/clutch lining, windshield wiper blades, lubrication and other similar procedures/parts required to keep vehicle in good working condition.

* * *

Repairs to any part of the vehicle subjected to misuse, negligence, improper maintenance, improper operation, or which are the result of an accident.

* * *

Loss of time or use of the vehicle, loss of profits, inconvenience, or other consequential or incidental damages or expenses.

* * *

Repairs as a result of normal wear and tear.

* * *

DISCLAIMER:

NO WARRANTIES ARE GIVEN BEYOND THOSE DESCRIBED HEREIN. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. THE COMPANY SPECIFICALLY DISCLAIMS WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ALL OTHER REPRESENTATIONS TO THE USER/PURCHASER, AND ALL OTHER OBLIGATIONS OR LIABILITIES. THE COMPANY FURTHER EXCLUDES LIABILITY FOR INCIDENTAL AND CONSEQUENTIAL DAMAGES, ON THE PART OF THE COMPANY OR SELLER. No person is authorized to give any other warranties or to assume any liabilities on the Company's behalf unless made or assumed in writing by the Company; and no other person is authorized to give any warranties or to assume any liabilities on the seller's behalf unless made or assumed in writing by the seller.

leaking in to the oil. At that time, plaintiff requested and was given an extended engine warranty, to 84 months (7 years) from three years. Between October 27, 1997 and July 31, 1998, plaintiff took the truck to Tri-County 7 more times.

Plaintiff filed a complaint on September 28, 1998, alleging revocation of acceptance[3] and breach of express warranty, among other things. After mediation,[4] defendants filed a motion for summary disposition. By this time, plaintiff had taken the truck to Tri-County 8 more times, beginning in October 1998 (at 73,469 miles) and ending in June 2000 (at 128,523 miles), bringing the total number of visits to Tri-County for repairs to 27 in 3½ years of ownership.

The circuit court granted defendants' motion on both claims.[5] Plaintiff appeals solely the dismissal of the breach of express warranty claim under MCR 2.116(C)(10).

This Court reviews the circuit court's grant of summary disposition under MCR 2.116(C)(10) de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The moving party must support its position by documentary evidence; the burden then shifts to the nonmoving party to establish that a genuine issue of fact exists. *Id.* at 455.

Michigan adopted the Uniform Commercial Code and it is codified at MCL 440.1101 to 440.11102. See 2002 supplement to MCL Sections 440.1 to 440.3805, pp 6-7, *Table of Jurisdictions Wherein Code Has Been Adopted.* Breach of warranty is addressed in § 440.2714:

> (1) Where the buyer has accepted goods and given notification (subsection (3) of section 2607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under the next section[6] may also be recovered.

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[3] By letter dated September 1, 1998, plaintiff's counsel notified defendants that plaintiff was revoking acceptance of the truck, noting that, since taking delivery, the truck had been in for repairs at least nineteen times, and that the problems/defects included engine oil leak, defective warning lights, windshield reservoir leaks, defective brake lights, exhaust noise, blower motor noise, inoperative tail-lights, and an inoperative air conditioner.

[4] The case was mediated in June 1999 and resulted in a $1,500 award against defendants, jointly and severally; defendants accepted the award and plaintiff rejected it. Trial was adjourned several times, and ultimately scheduled for January 2001.

[5] The circuit court seemed persuaded at the hearing, at which time only the breach of warranty and revocation of acceptance claims remained, that plaintiff's breach of warranty claim failed because plaintiff drove the vehicle for 140,000 or so miles, i.e., plaintiff waited "too long."

MCL 440.2719 provides:

> (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
>
> (b) resort to a remedy is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.

Both parties rely on *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 212-213; 457 NW2d 42 (1990), in which the plaintiff bought a demonstration 1981 Plymouth car from the defendant dealer in May 1981. The car had been driven about 3,000 miles by a salesperson, but had no previous owner. The salesman handling the plaintiff's purchase wrote on the purchase order "full new car warranty" and told the plaintiff the car would be rustproofed and the paint chips touched up. When the plaintiff picked up the car, neither had been done, and in fact neither was ever done. The plaintiff began experiencing problems with the car in the first week she had it, and drove the car for about ten months, until mid-March 1982 (for 6,000-7,000 miles), but then placed it in storage and rented a different car:

> The temperature light began to go on and off sporadically, the temperature and fuel gauges malfunctioned, and the car began to stall periodically. Plaintiff also

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(…continued)

[6] MCL 440.2715 provides:

> (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, and commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incidental to the delay or other breach.
>
> (2) Consequential damages resulting from the seller's breach include:
>
> (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
>
> (b) injury to person or property proximately resulting from any breach of warranty.

had problems with the power antenna, the right rear storage latch, the stereo tuner knob, the rear door lock, the molding, and the transmission. Eventually the speedometer broke and the transmission began leaking.

Plaintiff brought the car to defendant for service approximately eight times before she stopped driving the car on March 12, 1982. Although many of the problems were repaired, the paint, stalling, speedometer, speed control and transmission leakage problems were never corrected. Plaintiff and her husband stored the car in their one–car garage and started it every other day. Plaintiff rented a 1979 Granada from her father . . . between April 4, 1982, and January 27, 1983, and continued to insure her car at a cost of $500 per year. Plaintiff had driven her car approximately 6,000 to 7,000 miles before storing the vehicle.

The jury returned a verdict in favor of plaintiff finding a revocation of acceptance by plaintiff and breach of warranties by defendant. A damage award of $16,580 was rendered.

* * *

[D]efendant argues that, because the written new warranty expressly excludes incidental and consequential damages, the issue was not properly before the jury and defendant is entitled to a new trial as to damages. We disagree.

Although MCL 440.2719(a). . . allows a warranty agreement to "limit or alter the measure of damages recoverable under this article as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts," § (b)(2) provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act."

* * *

Incidental and consequential damages are allowable under [MCL 440.2714 and 2715]. *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105; 394 NW2d 17 (1986). Moreover, the seller must repair or replace the defective part or condition within a reasonable time, which depends on the nature and circumstances of the case. *Id.*

In the present case, the evidence showed that plaintiff took the car to defendant for repair of the stalling problem seven times over a period of nine months. The repairs were unsuccessful and, as a result, plaintiff became fearful of driving the car.

Thus we find that evidence was presented that the limited warranty failed in its essential purpose and plaintiff was entitled to pursue other remedies. Having placed this issue before the jury, plaintiff was entitled to present evidence of consequential damages, which are allowable under MCL 440.2714-440.2715. . . [*Id.* at 213.]

Both parties also rely on *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105, 110-111; 394 NW2d 17 (1986), in which the plaintiff purchased a motorcyle from the defendant. Less than two months later, when the vehicle had been driven 3,115 miles, it developed "a tapping noise in the engine." The plaintiff stopped operating it and returned it to the dealer, who told him five days later that the engine had seized up while a mechanic was working on it, but not to worry because the problem was not serious and would be covered by warranty. The plaintiff wrote the financing bank a letter advising that he was stopping payment because of breach of warranty, had filed a complaint with the attorney general, and that an action was pending in the matter. The dealer took almost three months to repair the motorcycle, for a variety of reasons, including misdiagnosis of problems. There was no dispute that the vehicle was in fact in working order at the end of the three months. The plaintiff refused to accept the vehicle, and attempted to revoke the sales contract on the ground that the repairs were not made within a reasonable time and his faith in the motorcycle had been destroyed. The defendant refused to take the motorcycle back and return the purchase money. The bike was later sold, the bank paid off, and the plaintiff received a partial refund of the purchase price. The plaintiff then brought suit alleging several claims, including under the UCC. The case was tried, and the trial court concluded that the limited warranty of repair or replacement had failed in its essential purpose, thereby permitting the plaintiff to seek remedies provided by the UCC, and that the plaintiff had properly revoked his acceptance because the nonconformity substantially impaired its value to him. *Id.* at 110-111. The trial court awarded the plaintiff the unrefunded balance of his purchase money, court costs and attorney fees. The defendant appealed, arguing that the trial court erred in finding that there was a proper and timely revocation of acceptance, and that awarding attorney fees as consequential damages was error where the warranty excluded consequential damages. This Court affirmed on both bases, noting in pertinent part:

> The purchase agreement between plaintiff and defendant contained a limited warranty that provided [for repair or replacement of any part adjudged defective by Yamaha due to faulty workmanship or material from the factory, and for repairs made necessary by faulty workmanship or material from the factory].
>
> While the terms of this provision would generally restrict plaintiff's remedies to replacement of the defective part, we agree with the finding of the trial court that in this case the limited warranty failed in its essential purpose and plaintiff was therefore entitled to pursue other remedies. MCL 440.2719. . .
>
> Here, plaintiff had the motorcycle in his possession for only ten weeks before it became totally inoperable. He immediately returned it to the dealer where it remained for over three months. By the time the motorcycle was returned to him, it was late November and the weather precluded its use.
>
> While we do not dispute defendant Yamaha's contention that it acted in good faith, it's good faith efforts do not excuse its failure to have the motorcycle repaired and returned to plaintiff within a reasonable time. "Commendable efforts alone do not relieve a seller of his obligation to repair." *Jacobs v Rosemone* [sic] *Dodge-Winnebago South*, 310 NW2d 71, 75 (Minn, 1981). Where a manufacturer or dealer has limited its obligation under the sales agreement to repair or replace defective parts the seller does not have an unlimited time to make the repairs, but rather must repair or replace the parts within a reasonable

time. See Anno: *Construction and effect of new motor vehicle warranty limiting manufacturer's liability to repair or replacement of defective parts*, 2 ALR4th 576, § 5[d], pp 602-604 and cases cited therein; 67A Am Jur 2d, Sales, § 923, pp 326-327. Further, the manufacturer's or dealer's failure to make repairs need not be willfully dilatory or even negligent for the damage to the buyer is the same whether the seller acts in good faith or in bad. In either case, the buyer loses the substantial benefit of his bargain. *Cayuga Harvester, Inc v Allis-Chalmers Corp*, 95 App Div 2d 5; 465 NYS2d 606 (1983).

What is a reasonable time for taking any action depends on the nature and circumstances of the case. Here plaintiff's motorcycle remained inoperable for more than three months. Moreover, the court found that the cause of the delay was the misdiagnosis by defendant's employee. Under the circumstances of this case, we are not persuaded that the court erred in finding the delay unreasonable. We conclude that, since defendant failed to repair the motorcycle within a reasonable time, plaintiff was deprived of his exclusive remedy and the limited warranty failed in its essential purpose. [*Kelynack, supra* at 111-113.][7]

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[7] Plaintiff also relies on *Walker Ford Sales v Gaither*, 265 Ark 275; 578 SW2d 23 (1979), in which the plaintiff automobile retailer sold the defendant buyer a demonstrator car with 4,250 miles on it. The manufacturer and dealer extended the new car warranty, under which the car was warranted for twelve months/12,000 miles, and repair or replacement of parts was the only remedy. After the dealer had attempted several times without success to fix a vibration in the car (that occurred at speeds of 50 mph or more), the defendant refused to make further payments on the car. The dealer initiated suit against the defendant twenty-two months after the car was purchased. The defendant drove the car for more than 3 years and over 60,000 miles. Following a bench trial, the trial court found in the defendant's favor and awarded $2,000. The Arkansas Supreme Court affirmed, but remanded for a redetermination of damages:

> The measure of damages for a breach of warranty is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have if they had been as warranted . . ." [] Here, appellees paid $6,300 for the automobile. However, admittedly, they have driven the car 60,000 miles in the 3 years since their purchase. The car does not vibrate until it reaches speeds in excess of 50 m.p.h. Therefore, we cannot say that the car was of no value to the appellees. Even so, they argue that the testimony given by appellant Noil Walker, the retailer, indicating he was willing to give them $2,000 credit, was relied upon by the trial court in determining the correct amount of damages. The record shows, however, that Mr. Walker testified that at one time he offered to purchase the automobile for its market value and deduct $2,000 still due him from appellees. . . We hold there is no evidence to support the finding that the damages were $2,000. Upon remand, the actual market value of the car when sold in its defective condition can be determined and the appropriate figure for damages established. [*Walker Ford, supra*, 265 Ark at 280.]

See also 67A Am Jur 2d, Sales, §§ 921-925, pp 325-330, noting that "[w]hether an exclusive or limited remedy has failed of its essential purpose is a question of fact and consideration must be given to the facts of the case," and that

> [w]hen a seller does not repair or replace in order to cure a nonconformity. . . the limited remedy stated in terms of repair or replacement has failed of its essential purpose. Such remedy also fails of its essential purpose when a seller is simply unable to cure the nonconformity notwithstanding that the seller's failure to cure was neither willful nor negligent. Moreover, the nonconformity must be removed within a reasonable time. The buyer is not bound to permit the warrantor to tinker with the goods indefinitely in the hope that it ultimately may be made to conform.

We conclude that a genuine issue of fact existed whether Navistar's limited remedy failed of its essential purpose by virtue of defendant not repairing multiple defects within a reasonable time, which is a factual question to be determined by a consideration of the circumstances. Plaintiff presented evidence that he took the truck for repairs approximately 29 times in 3 ½ years, 11 of them in the first year of ownership. Repeated repairs were needed regarding engine oil leaks, warning and brake lights, air conditioner, and windshield reservoir leaks, among others.

Defendant argues that many items on plaintiff's repair list were not within the 12 month warranty period, but fails to acknowledge that a number of defendant's warranties extended beyond the 12 month period. The UCC and the cases discussed above do not support defendants' argument that plaintiff's breach of warranty claim failed because plaintiff kept the truck "too long." In *King, supra,* the plaintiff drove the car for ten months and then stored it for another ten months. In *Walker Ford, supra* at n 7, the plaintiff drove the auto at issue for more than three years and over 60,000 miles. Plaintiff presented numerous repair orders below that clearly stated that the repairs done were "warranty" items, contrary to defendants' argument that plaintiff has not met his obligation to show that the alleged problems were covered by Navistar's warranty. Plaintiff argued below that the other points defendants raised, including whether the frequency of repairs on plaintiff's truck was not excessive, whether plaintiff's misuse of the truck caused certain problems, whether all the repairs performed were not properly considered "warranty" repairs (despite the repair orders so stating), and whether the number of days plaintiff stated the truck was in the shop was exaggerated, simply raised questions of fact and did not preclude recovery. We agree that those arguments are properly considered by the fact-finder.

Nor does plaintiff's deposition testimony that he suffered no business losses preclude his warranty claim. As discussed above, "the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." MCL 440.2714(2).

We reverse the grant of summary disposition and remand. Our disposition renders defendants' appeal in No. 234995 moot. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell