[Cite as *Neeld v. Am. Isuzu Motors, Inc.*, 2004-Ohio-6358.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joseph Neeld,	:	
Plaintiff-Appellee,	:	No. 04AP-75 (C.P.C. No. 02CVH-03-3055)
v.	:	(REGULAR CALENDAR)
American Isuzu Motors, Inc.,	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on November 30, 2004

Krohn & Moss, LTD., *David B. Levin* and *Mitchel E. Luxenburg*, for appellee.

Dinsmore & Shohl, LLP, Jeffrey P. Hinebaugh, H. Toby Schisler and *Michael J. King*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DESHLER, J.

{¶1} Defendant-appellant, American Isuzu Motors, Inc. ("Isuzu"), appeals from a judgment of the Franklin County Court of Common Pleas pursuant to a jury verdict in favor of plaintiff-appellee, Joseph Neeld, in his claim under Ohio's motor vehicle lemon law, R.C. 1345.71 et seq.

{¶2} This action arises out of a lease agreement between appellee and auto dealer Ricart Properties, Inc., for a 2001 Isuzu Rodeo manufactured by appellant.

Appellant is not a party to the lease agreement, and Ricart is not a party to this action. Appellee initiated the case with a complaint naming appellant as a defendant and asserting claims based on violations of Ohio's motor vehicle lemon law and for breaches of expressed and implied warranties under the Federal Magnuson-Moss Warranty Act. Appellee alleged that appellant had failed to repair or rectify various non-conformities and defects in the vehicle after having been provided a reasonable number of opportunities to do so.

{¶3} Appellant filed a motion for summary judgment in the trial court, to which appellee responded with his own affidavit and that of an expert describing the allegedly defective conditions that impaired the use, value, or safety of the vehicle, and appellant's failure to rectify the conditions. The trial court overruled appellant's motion for summary judgment, and the matter proceeded to a jury trial. Issues pertaining to an award of attorney fees and damages under Ohio's lemon law were bifurcated and the jury was presented only with lemon-law liability, and liability and damages under the federal claims. Appellant moved for directed verdict at the close of appellee's evidence, and the motion was overruled by the trial court.

{¶4} The jury returned a verdict in favor of appellee on his Ohio motor vehicle lemon-law claim, finding in response to specific interrogatories that appellee had not demonstrated a substantial impairment of the vehicle's use or safety, but that appellee had demonstrated a substantial impairment of the vehicle's value. The jury returned verdicts in favor of appellant, however, on appellee's federal claims. The trial court then denied motions by appellant for judgment notwithstanding the verdict or for a new trial.

{¶5} Appellee has not filed an appeal from the trial court's judgment pursuant to the adverse verdict on the federal claims. Appellant has timely appealed from the trial court's judgment on the Ohio motor vehicle lemon-law claim, and brings the following two assignments of error:

> FIRST ASSIGNMENT OF ERROR - THE TRIAL COURT ERRED, AS A MATTER OF LAW, BY DENYING AMERICAN ISUZU'S MOTION FOR SUMMARY JUDGMENT.
>
> SECOND ASSIGNMENT OF ERROR - THE TRIAL COURT ERRED BY DENYING AMERICAN ISUZU'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR MOTION FOR A NEW TRIAL.

{¶6} Appellant's first assignment of error asserts that the trial court erred in denying appellant's motion for summary judgment prior to trial. "Any error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the party against whom the motion was made." *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, syllabus. As this case is now postured, therefore, arguments related to the trial court's denial of summary judgment are not properly before this court and appellant's first assignment of error is overruled. Any arguments made thereunder regarding the state of the evidence, however, will be incorporated where appropriate into our discussion of appellant's second assignment of error, addressing the trial court's denial of appellant's motion for judgment notwithstanding the verdict and motion for a new trial.

{¶7} A motion for judgment notwithstanding the verdict may be granted where the movant is entitled to judgment as a matter of law, the evidence being construed most strongly in favor of the non-moving party. *Texler v. D.O. Summers Cleaners & Shirt*

Laundry Co. (1998), 81 Ohio St.3d 677. The motion will be denied when reasonable minds could reach different conclusions on the evidence. Id. The standard for granting a motion for a new trial under Civ.R. 50(B) is the same as that for granting a motion for directed verdict pursuant to Civ.R. 50(A) or for judgment notwithstanding the verdict. Id. at 679. The decision of a trial court to grant or deny a new trial rests within the trial court's sound discretion and will not be reversed on appeal absent an abuse of discretion. *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, 448.

{¶8} Appellant in the present matter essentially argues that, even where the evidence is construed most strongly in favor of appellee, reasonable minds could not have found in favor of appellee on his lemon-law claim. The elements of a lemon-law claim in Ohio are clearly set forth in the statute. R.C. 1345.72(A) and (B) states:

> (A) If a new motor vehicle does not conform to any applicable express warranty and the consumer reports the nonconformity to the manufacturer, its agent, or its authorized dealer during the period of one year following the date of original delivery or during the first eighteen thousand miles of operation, whichever is earlier, the manufacturer, its agent, or its authorized dealer shall make any repairs as are necessary to conform the vehicle to such express warranty, notwithstanding the fact that the repairs are made after the expiration of the appropriate time period.
>
> (B) If the manufacturer, its agent, or its authorized dealer is unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any nonconformity after a reasonable number of repair attempts, the manufacturer, at the consumer's option and subject to division (D) of this section, either shall replace the motor vehicle with a new motor vehicle acceptable to the consumer or shall accept return of the vehicle from the consumer and refund each of the following:
>
> (1) The full purchase price;

> (2) All incidental damages, including, but not limited to, any fees charged by the lender or lessor for making or canceling the loan or lease, and any expenses incurred by the consumer as a result of the nonconformity, such as charges for towing, vehicle rental, meals, and lodging.
>
> R.C. 1345.73 states:
>
> It shall be presumed that a reasonable number of attempts have been undertaken by the manufacturer, its dealer, or its authorized agent to conform a motor vehicle to any applicable express warranty if, during the period of one year following the date of original delivery or during the first eighteen thousand miles of operation, whichever is earlier, any of the following apply:
>
> (A) Substantially the same nonconformity has been subject to repair three or more times and either continues to exist or recurs;
>
> (B) The vehicle is out of service by reason of repair for a cumulative total of thirty or more calendar days;
>
> (C) There have been eight or more attempts to repair any nonconformity;
>
> (D) There has been at least one attempt to repair a nonconformity that results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven, and the nonconformity either continues to exist or recurs.

{¶9} The presumptions created by R.C. 1345.73, however, are not required elements of proof to be established by a plaintiff before prevailing on a lemon-law claim, but, rather, establish a statutory presumption in favor of recovery by the plaintiff that supports the plaintiff's burden of showing that the vehicle's defect constitutes a non-conformity to an express warranty. *Royster v. Toyota Motor Sales, U.S.A., Inc.* (2001), 92 Ohio St.3d 327, 331; *Lesjak v. Forest River*, *Inc*., Tusawarcas App. No. 2003AP050037, 2003-Ohio-6482.

{¶10} R.C. 1345.71, the definitional section of the lemon law, provides that a " 'nonconformity' means any defect or condition that substantially impairs the use, value, or safety of a motor vehicle to the consumer and does not conform to the express warranty of the manufacturer or distributor." R.C. 1345.71(E).

{¶11} Appellee presented his own testimony and documentary evidence to establish that, within 12 months of the commencement of his lease and before 18,000 miles of operation of the vehicle, appellee returned the vehicle to several different dealers on a number of occasions for service on a variety of defects: slipping transmission, a popping noise in the engine, creaks in the rear end, a squeak in the driver's door, vibration in the steering wheel, and a rubbing noise in the steering column. Most of these complaints, including a problem with the air bag that was leading to the steering column difficulties, were resolved by the dealers' service departments, but the slipping transmission and various "clunking" or knocking noises in the motor were never diagnosed. In particular, the engine noise complained of by appellee continued after the first 12 months and 18,000 miles of operation had elapsed, and, on November 6, 2002, the service department for Hatfield Isuzu replaced the short block of the engine. This resolved the engine noise, but some of the steering noises and transmission concerns were not repaired, despite the fact that the Rodeo was in Hatfield's service department for 44 days.

{¶12} Appellee presented the testimony of an expert witness, William Beltzer, who has 35 years experience as an automobile mechanic, service supervisor and independent diagnostic expert. Beltzer testified that he road tested appellee's vehicle and identified two principal problems. The most immediately identifiable was a "flare shift," a condition

in which, as an automatic transmission shifts, the tachometer will indicate a sudden and extraordinary increase in engine speed, followed by a sudden drop. This is indicative of a transmission clutch or friction band that is not engaging at the correct time, and can lead to premature clutch failure and eventual need to replace the transmission, at a cost of $4,300. Beltzer identified the flare-shift condition principally from appellee's description of the driving problem, and from Beltzer's own experience in test driving the vehicle which revealed a "mushy" shift condition. Although the temperature conditions on the day of the test drive, Beltzer testified, were not conducive to revealing the flare-shift condition directly, Beltzer was able to view a videotape produced by appellee depicting the sudden jumps in the tachometer needle as the vehicle shifted, which was consistent with Beltzer's diagnosis of a flare-shift condition. His expert opinion to a reasonable degree of certainty was that a defect existed with the transmission, and that this defect was not the result of any abuse or neglect by the owner, due to the absence of other diagnostic indicia that would reflect poor maintenance or overloading.

{¶13} With respect to the knocking in the engine, and the subsequent short block replacement, Beltzer testified as follows:

> Q. If there was an engine – I'm going to give you a hypothetical here, but you have got a vehicle which has a knocking or popping sound which is consistent over time and eventually increases in nature and eventually a portion of the engine is replaced, and that noise is no longer there, would you be able to, within a reasonable degree of professional certainty in the automobile industry, draw a causal relationship between the noise and the engine that was replaced?
>
> A. Well, I would say with a high degree of probability that the knock, whatever the knock was, was something out of a tolerance problem to begin with. Normally engines don't knock. They have clicking noises from fuel injectors and they

> have pulleys that occasionally rattle. There are belt noises that you can hear at certain times, but knocking is not a common noise in an engine. And if there is a knock – and I have seen myself a knocking on and on and on for a long period of time, and suddenly you get an engine failure. That's not unusual.
>
> Q. A knocking sound like you are describing is a symptom of some larger problem?
>
> A. Yeah, it is a - -
>
> MR. SCHISLER: Objection, your Honor. Leading.
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> THE COURT: Sustained.
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> Q. (BY MR. LUXENBURG) Is the knocking sound a symptom of a larger problem?
>
> A. Well, as I stated earlier, knocking is normally due to a tolerance problem where something has got too much gap in it, too great of a tolerance to maintain a quiet, smooth operating engine. Most of the time it is found in the bearings and connecting rod area with the crankshaft. Now, occasionally, to a lesser degree, you will see pistons that don't fit the cylinder walls properly, and they will knock; they will make a knocking type noise as well.

{¶14} Appellee presented documentary evidence that the warranty repairs for the Rodeo totaled over $6,000 within the first 33,000 miles, most of these expenses relating to the above-outlined complaints. This did not include the potential expenditure on a new transmission, as that problem was never repaired by any Isuzu dealer. Appellee testified that, due to the incessant problems with the Rodeo, he eventually secured another vehicle and the concomitant additional car payment.

{¶15} Appellant attempted to rebut the above-outlined evidence with expert testimony as to the absence of any serious non-conformity in the vehicle. Appellant advances alternative theories for appellee's complaints, principally insinuating that

appellee was using the vehicle at a far higher mileage rate than provided for in the lease, and that appellee would therefore incur a heavy mileage penalty at the term of the lease. Appellant also posits that this high mileage use by appellee is indicative, of itself, that appellee has not suffered any impairment in the normal use of the vehicle.

{¶16} It is unrebutted that appellee complained, at the very least, of continuing transmission problems early and often in his ownership of the vehicle, well within the 12 months or 18,000 miles required by statute. Appellee's expert diagnosed the probable cause of this ongoing problem with some specificity. The expert also opined that the "flare shift" condition would likely lead to early transmission failure and would substantially impair the cost of the vehicle. The expert also opined that the amounts expended on warranty repairs, and the nature of those warranty repairs, including the short block replacement, would be a red flag to a potential buyer of the vehicle.

{¶17} It is undisputed that Ohio's lemon law applies to lease contracts as well as to purchases; in fact, R.C. 1345.71(F)(2) provides a specific measure of damages in the case of leasing contracts for consumers who choose to receive a refund of the vehicle. The evidence presented by appellee was sufficient, both with respect to the transmission defect and the engine knock, and eventual engine failure, for reasonable minds to conclude that a non-conformity in the vehicle had been proven. These non-conformities were brought to the attention of dealer service departments, according to appellee's evidence, within the 12 month and 18,000 mile limitation of the statute. Finally, appellee presented evidence that the resale value of the vehicle would be impaired, particularly by the uncorrected transmission defect. Since purchase of the residual value of the vehicle is typically one option at termination of the lease for the leasing party, particularly one

faced with a heavy mileage penalty, the diminished resale value of such a purchased vehicle would be a "nonconformity" under R.C. 1345.71(E) that "substantially impairs the use, value, or safety of a motor vehicle to the consumer." Construing the evidence most strongly in favor of appellee, therefore, there was evidence to support all elements of the jury verdict on appellee's lemon-law claim, and the trial court did not abuse its discretion in denying the motion for a new trial, and properly denied the motion for judgment notwithstanding the verdict. We accordingly find that appellant's second assignment of error does not have merit, and is overruled.

{¶18} In accordance with the foregoing, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas in favor of appellee on his lemon-law claim is affirmed.

Judgment affirmed.

BOWMAN and BRYANT, JJ., concur.

DESHLER, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.