IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HENRY A. STENTA	)	
	)	
Plaintiff,	)	
v.	)	
	)	C.A. No. 05C-03-328 RRC
GENERAL MOTORS CORPORATION, a corporation of the State of Delaware, and DELAWARE MOTOR SALES, INC., T/A DELAWARE CADILLAC, a corporation of the State of Delaware,	)	
	)	
Defendants.	)	

Submitted: April 22, 2009
Decided: May 29, 2009

On Defendants' "Motion for Leave to File an Amended Answer with Affirmative Defenses to Plaintiff's Amended Complaint"
GRANTED.

On Defendants' "Motion for Summary Judgment"
GRANTED.

On Plaintiff's "Motion for Protective Order Against Defendants' Motion for Summary Judgment"
DENIED.

On Defendants' "Motion for Return of Vacated Net Settlement Proceeds"
DENIED.

On Plaintiff's "Motion *In Limine*—Opposing Offer of Settlement"
DENIED AS MOOT.

On Plaintiff's "Motion *In Limine*—Affidavit of Richard Masiello"
DENIED AS MOOT.

On Plaintiff's "Motion *In Limine* or Summary Judgment on the Issue of Elder Victim Enhance Penalty Act, Deceptive Trade Practices Act"
DENIED AS MOOT.

On Defendant's "Motion *In Limine* to Preclude the Expert Testimony and/or Opinion of Plaintiff's Expert, Howard Reamer, as it Relates to Mechanical Diagnosis and Repair"
DENIED AS MOOT.

MEMORANDUM OPINION

Christopher J. Curtin, Esquire, MacElree Harvey, Ltd., Centreville, Delaware, Attorney for Plaintiff.

Robert T. Aulgur, Esquire, and Kristi J. Doughty, Esquire, Whittington & Aulgur, Wilmington, Delaware and Polly N. Phillippi, Esquire, Kantrowitz & Phillippi, LLC, Philadelphia, Pennsylvania, Attorneys for Defendants.

COOCH, J.

I. INTRODUCTION

This overly-litigated case, with its lengthy and unusual procedural history, arises from a complaint filed by Henry A. Stenta ("Plaintiff") in March 2005 against General Motors Corporation and Delaware Cadillac, Inc. ("Defendants"). Plaintiff alleged that the Cadillac that he had purchased from Defendants in July 2000 was defective in that it had a strong and persistent musty smell of mold in the interior, about which Plaintiff complained on the date of delivery. Almost five years after purchasing the Cadillac, Plaintiff filed suit against Defendants alleging violations of Delaware's Lemon Law, the Consumer Fraud Act, the Uniform Deceptive Trade Practices Act, the Elderly Victims Act, and breaches of the dealer's express written labor warranty, the implied warranty of good workmanship, and the implied labor warranty of fitness for intended purpose.

For the reasons explained below, Defendants' Motion for Leave to File an Amended Answer with Affirmative Defenses (to assert a statute of limitations defense) is **GRANTED**. Defendants' Motion for Summary Judgment is **GRANTED** because the Court finds that all of Plaintiff's claims are barred by applicable statutes of limitations. Defendants' Motion for Return of Vacated Net Settlement Proceeds stemming from a failed effort to partially settle the case in December 2007 is **DENIED** because

return of the settlement proceeds to Defendants will not restore the parties to their pre-settlement positions.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff purchased a new Cadillac Deville in July 2000 from Defendants.[2] Plaintiff was a long-time Cadillac owner and had purchased previous Cadillacs from Defendants. Plaintiff filed his original complaint on March 31, 2005[3] and an amended complaint on September 13, 2005.[4] Plaintiff alleges that from the date of purchase, the Cadillac had a "strong, persistent musty smell of mold in the interior."[5] Plaintiff testified that he complained of the musty/moldy smell on July 28, 2000, the day he purchased the Cadillac, and that a technician attempted to fix the problem with a freshener.[6] Mr. Stenta testified that every time he took the Cadillac in

[1] The parties believed in November 2007 that they had partially settled the case (the Lemon Law component), and Defendants paid $41,199.60 to Plaintiff. This Court later found their settlement agreement to be unenforceable because the parties had not reached a meeting of the minds as to the terms of that settlement. *See infra* at 6-7.

[2] Am. Compl., Docket Item ("D.I.") 5 at ¶ 4. Since this Court holds that Plaintiff's claims are barred by the statute of limitations, the facts are set forth only to the extent to provide necessary context.

[3] Compl., D.I. 1.

[4] Am. Compl. (amending the Complaint to properly reflect Delaware Motor Sales, Inc's correct corporate name).

[5] *Id.* at ¶ 8.

[6] Stipulation of Facts, D.I. 28 at ¶ 15.

for service after the day he took delivery, including oil changes, he complained to the service department about the musty/moldy smell, including on November 20, 2000 (3,601 miles), February 26, 2001 (6,178 miles), April 23, 2001 (7,380 miles) and August 16, 2001 (10,449 miles).[7] Plaintiff returned to the dealership on several other occasions after the first year seeking correction of the musty/moldy smell.[8]

Prior to filing suit, Plaintiff demanded that the Cadillac be replaced, pursuant to Delaware's "Lemon Law." Instead, Plaintiff was offered a non-Lemon Law trade-in, which he rejected. Plaintiff filed suit on March 31, 2005, alleging violations of Delaware's Lemon Law, the Consumer Fraud Act, the Deceptive Trade Practices Act, the Elderly Victims Act, and breaches of the express labor warranty, the implied warranty of good workmanship, and the implied labor warranty of fitness for intended purpose.[9] (No breaches of the Uniform Commerical Code are alleged in the Complaint.)

The parties convened for a trial scheduling conference on April 18, 2007, wherein the Court set several deadlines: 1) Motions to Add a Party or Amend a Pleading: May 18, 2007; 2) Discovery Cut-Off: September 7,

[7] *Id.* at ¶ 16 (citing Plaintiff's deposition).

[8] Am. Compl. at ¶ 10.

[9] Am. Compl. at p. 4-12.

2007; 3) Dispositive Motions: September 14, 2007; and 4) Pretrial Stipulation and Pretrial Conference: November 5, 2007. A four day trial was scheduled to begin on December 3, 2007.

On November 15, 2007, Defendants filed a motion for summary judgment, contending that Plaintiff's claims were barred by the statute of limitations. Defendants also filed a Motion for Leave to File an Amended Answer (including a statute of limitations defense) on November 16, 2007. Both motions were filed after the appropriate deadlines. This Court denied both motions as on November 21, 2007 as untimely, never reaching the merits of either motion.

During the pretrial conference on November 5, 2007, the parties had discussed the possibility of "limiting trial" by "reaching stipulations that would result in a 'mini [bench] trial.'"[10] The Court agreed to allow the parties to resolve the case in this manner, and, after "many days"[11] of negotiations, the parties signed the December 3, 2007 Settlement Agreement by which Plaintiff was to receive $41,199.60, the original cost of the vehicle, in return for which he agreed to dismiss his Lemon Law claim. The parties

[10] Tr. of Status Conf., at 3 (April 14, 2008).

[11] Defs' Letter of April 21, 2008, D.I. 37.

then signed the Stipulation on December 21, 2007, which incorporated the terms and conditions of the Settlement Agreement.[12]

The Stipulation recited *inter alia* that Plaintiff's Lemon Law claim had been settled, leaving four issues for the Court to decide on an anticipated stipulated record: 1) whether Plaintiff had standing and was entitled to remedies under the Elder Victims Enhanced Penalties Act; 2) whether Plaintiff had standing and was entitled to remedies under the Deceptive Trade Practices Act; 3) whether Plaintiff was entitled to pre-judgment interest; and 4) whether Plaintiff was entitled to counsel fees and costs.[13] However, in subsequent months it became apparent that the parties had never reached a meeting of the minds about the terms of the Settlement Agreement and Stipulation; in the parties' subsequent voluminous submissions to the Court, Defendants asserted that no evidence could be put forth by Plaintiff in support of the alleged violations of the Elder Victims Enhanced Penalties Act and the Deceptive Trade Practices Act, while Plaintiff maintained just the opposite. The parties also were unable to agree

[12] Stipulation of Facts, D.I. 28.

[13] Stipulation, D.I. 27.

to the factual record upon which this Court's decision would have been based.[14]

This Court *sua sponte* held in August 2008 that there were "fundamental disagreements as to what was supposedly agreed to in the partial settlement of the case, particularly with respect to what issues remain[ed] for this Court to decide,"[15] and concluded that the Settlement Agreement and Stipulation were unenforceable because there was no "meeting of the minds" as to the meaning of the provisions contained in those documents.[16] However, prior to the issuance of this Court's opinion finding the Settlement Agreement to be unenforceable, Defendants had issued a check to Plaintiff on or about December 28, 2007 for $41,199.60 and Plaintiff returned the Cadillac to Defendants, which was then sold at auction for $6,981.04.

The parties and the Court convened for a second trial scheduling conference on November 5, 2008, at which time a trial date of May 4, 2009

[14] *Stenta v. General Motors Corp., et al.*, 2008 WL 4194002 (Del. Super.) (denying Plaintiff's Motion for "Elder Victim Enhanced Penalty Act Liability and Deceptive Trade Practices Act Liability and Prejudgment Interest and Costs" because it was premised on the unenforceable Settlement Agreement and Stipulation).

[15] *Id.* at *1.

[16] *Id.*

was established.[17] During that conference, the Court set a new discovery deadline of December 15, 2008 and a new dispositive motions deadline of January 20, 2009. The Court indicated by subsequent letter of December 2, 2008 that "[t]he original Trial Scheduling Order of April 18, 2007 should continue to govern this case unless 'manifest injustice' requires its amendment."[18]

In the ensuing months, the parties then filed eight motions: 1) Defendants' Motion for Leave to File an Amended Answer with Affirmative Defenses to Plaintiff's Amended Complaint;[19] 2) Defendants' Motion for Summary Judgment;[20] 3) Plaintiff's Motion for Protective Order Against Defendants' Motion for Summary Judgment;[21] 4) Defendants' Motion for Return of Vacated Net Settlement Proceeds;[22] 5) Plaintiff's Motion *In*

[17] Second Trial Scheduling Order, D.I. 50.

[18] Letter from the Ct. to Counsel, Dec. 2, 2008, D.I. 58 (vacating order allowing supplementation of defense expert report since the Court erroneously believed that the supplementation was unopposed and noting that "the original Trial Scheduling Order should continue to govern this case").

[19] D.I. 51.

[20] D.I. 69.

[21] D.I. 76.

[22] D.I. 62.

Limine—Opposing Offer of Settlement;[23] 6) Plaintiff's Motion *In Limine*—Affidavit of Richard Masiello;[24] 7) Plaintiff's Motion *In Limine* or Summary Judgment on the Issue of Elder Victims Enhanced Penalty Act, Deceptive Trade Practices Act;[25] and 8) Defendants' Motion *In Limine* to Preclude the Expert Testimony and/or Opinion of Plaintiff's Expert, Howard Reamer as it Relates to Mechanical Diagnosis and Repair.[26]

During the pretrial conference on April 22, 2009 the Court heard oral argument on Defendants' Motion for Leave to File an Amended Answer with Affirmative Defenses to Plaintiff's Amended Complaint, Defendants' Motion for Summary Judgment, and Plaintiff's Motion for Protective Order Against Defendants' Motion for Summary Judgment. Defendants explained the circumstances surrounding Plaintiff's October 9, 2007 deposition (taken after the September 7, 2007 discovery deadline), which formed the basis for Defendants' November 16, 2007 motion to amend their answer with affirmative defenses, including the statute of limitations defense. Defense counsel represented that Plaintiff's deposition had been timely noticed in 2007, but it had been delayed by Plaintiff's move to Sunrise Senior Living,

[23] D.I. 65.

[24] D.I. 66.

[25] D.I. 67.

[26] D.I. 68.

an assisted living center. Defense counsel represented that the delayed deposition was the result, at least in part, of Defendants' attempt to accommodate Plaintiff's personal schedule and allow him time to adjust and that it was not until Plaintiff was finally deposed on October 9, 2007 that Defendants had the factual basis to formulate a statute of limitations defense. Plaintiff's counsel countered that Defendants were put on notice of a statute of limitations issue by Plaintiff's demand letter of May 30, 2005, and that Defendants need not have waited to depose Plaintiff to then assert their statute of limitations defense.

At the end of the conference, the Court announced that it would grant both Defendant's Motion to Amend the Answer with Affirmative Defenses and Defendant's Motion for Summary Judgment and advised that this opinion would follow. The trial date was cancelled.

III. THE PARTIES' CONTENTIONS

In connection with Defendants' Motion for Leave to File an Amended Answer with Affirmative Defenses, Defendants contend that Superior Court Civil Rule 15 provides that leave to amend should be granted liberally and that Plaintiff is not prejudiced by Defendants' proposed amendments because, among other reasons, Plaintiff had been aware of Defendants'

intention to assert a statute of limitations defense since at least November 15, 2007 when Defendants filed their first motion for summary judgment.

In response, Plaintiff contends that the motion for Leave to File Amended Answers is untimely as violative of the first Trial Scheduling Order and that Defendants should not be permitted to amend their Answer, thereby contravening the original April 18, 2007 Trial Scheduling Order, without a showing of "manifest injustice," which Plaintiff asserts does not exist.

In connection with Defendants' Motion for Summary Judgment, Defendants contend that 1) Plaintiff's claims in Counts I, II, III, and IV are barred by the three year statute of limitations of 10 *Del. C.* § 8106; 2) Plaintiff's claims in Counts I, II, III, and IV are otherwise barred by laches; 3) Plaintiff cannot recover treble damages under the Enhanced Penalties Act because the treble damage provision was enacted after Plaintiff's cause of action accrued; 4) Plaintiff does not have standing to bring a claim under the Deceptive Trade Practices Act in Count III; 5) Plaintiff's claims for breach of labor warranties in Counts V, VI, and VII for repairs prior to March 31, 2001, are barred by the statute of limitations pursuant to 6 *Del. C.* § 2-725 and by the doctrine of laches; 6) Plaintiff's claims for breach of implied labor warranties in Counts VI and VII and for consequential damages in

Counts V, VI and VII are disclaimed and excluded under the Limited Labor Warranty; and 7) in the event Defendants' motion to preclude Plaintiff's expert is granted, summary judgment should be entered in favor of Defendants because Plaintiff cannot prove a defect in the vehicle without an expert.

In response, Plaintiff maintains that Defendants' motion is untimely pursuant to the original April 18, 2007 Trial Scheduling Order and that 1) the applicable statute of limitations (which plaintiff agrees is 10 *Del C.* § 8106) did not begin to run until there had been a "reasonable number of repair attempts"; 2) laches is an equitable defense and inapplicable to this case; 3) Plaintiff is entitled to treble damages under the Elder Victims Enhanced Penalties Act; 4) Plaintiff has standing under the Deceptive Trade Practices Act; 5) Defendants' claims relating to warranties are untimely; 6) implied warranties cannot be disclaimed when there is an express warranty; and 7) Defendants' motion to exclude Plaintiff's expert is untimely and mooted, in part, by the testimony of Defendants' service manager to the effect that mold was found inside the trunk and under the glass of the windshield in the foam of the dashboard.

In connection with Defendants' Motion for Return of Vacated Net Settlement Proceeds, Defendants contend that because the Settlement

Agreement was declared unenforceable, Defendants are entitled to return of the settlement proceeds, less the amount realized by sale of the Cadillac at auction. Defendants maintain that the settlement proceeds must be returned because 1) Defendants are entitled to return of monies paid pursuant to a settlement agreement later vacated by court order; 2) Plaintiff would be unjustly enriched if he were permitted to retain settlement proceeds; and 3) Defendants are entitled to "equitable restitution."

In response, Plaintiff contends that because Defendants sold the Cadillac at auction this Court does not have jurisdiction to order rescission because Defendants cannot return the Cadillac to Plaintiff.

IV. DISCUSSION

A. Defendants' Motion for Leave to File an Amended Answer with Affirmative Defenses to Plaintiff's Amended Complaint is Granted to Avoid Manifest Injustice.

Defendants filed a Motion for Leave to File an Amended Answer with Affirmative Defenses on November 17, 2008 that included, *inter alia*, its statute of limitations defense.[27] Defendants contend that their motion was timely filed in compliance with the second Trial Scheduling Order, which had established November 17, 2008 as the deadline for filing a motion to

[27] Mot. for Leave to File an Am. Answer with Affirmative Defenses, D.I. 51.

add a party or amend a pleading.[28] Defendants note that in the second Trial Scheduling Order the Court added the words "subject to approval from Court" next to the deadline for submission of Defendants' expert report, while no such annotation accompanied the deadline for motions to add a party or amend a pleading.[29] Defendants maintain that "leave to amend under Superior Court Civil Rule 15 is granted liberally and in the absence of prejudice to another party the trial court is required to exercise its discretion in favor of granting leave to amend."[30] Defendants argue that the merits of the motion to amend their Answer, when considered, will result in summary judgment being awarded to them.

In response, Plaintiff contends that Defendants' motion is untimely because it was not filed by the deadline for such motions established by the first Trial Scheduling Order.[31] Plaintiff maintains that, pursuant to the standard recently articulated by the Delaware Supreme Court in *Wright v. Moore*, an untimely motion to amend a Trial Scheduling Order should not be

[28] Second Trial Scheduling Order.

[29] Defs' Mot. for Summ. J. at ¶ 20.

[30] Defs' Mot. for Leave to File and Am. Answer with Affirmative Defenses to Pl.' Am. Compl. at ¶ 27 (citing *Ahmed v. NVR, Inc.*, 945 A.2d 1167 (Del. 2008); *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258 (Del. 1993)).

[31] First Trial Scheduling Order, D.I. 15.

granted unless there is a showing of "manifest injustice."[32] Plaintiff maintains that the April 18, 2007 Trial Scheduling Order controls the deadline for filing these motions, and that no "manifest injustice" has been shown.

In *Wright*, a jury rendered a defense verdict in an automobile negligence case, which the plaintiff appealed.[33] The Supreme Court reversed and remanded the case to the trial court. The plaintiff filed a motion to modify the scheduling order to reopen discovery to present new evidence of medical expenses incurred since the first trial, which the trial court denied, reasoning that the time for discovery established by the original Trial Scheduling Order had elapsed and would not be reopened.[34] On interlocutory appeal, the Supreme Court reversed, holding that the trial court's failure to reopen discovery constituted manifest injustice.[35] While this case differs procedurally from *Wright*, the manifest injustice standard is appropriate in this case.[36] Defendants have met the requisite

[32] *Wright v. Moore*, 953 A.2d 223 (Del. 2007).

[33] *Id.* at 224.

[34] *Id.*

[35] *Id.* at 226.

[36] This case differs from *Wright* in that this case did not go to trial, and thus no verdict was rendered by a jury. Nonetheless, the manifest injustice standard is applicable;

Rule 16 "manifest injustice" standard, pursuant to the first Trial Scheduling Order: "The order following a final pretrial conference shall be modified only to prevent manifest injustice."[37] In any event, Defendants' motion was filed in compliance with the second Trial Scheduling Order. To prevent Defendants from amending their Answer would constitute manifest injustice; Plaintiff is not prejudiced because Plaintiff was on notice of Defendants' intent to amend its answer to include additional affirmative defenses since November 15, 2007, if not earlier.[38]

During oral argument on April 22, 2009 Defendants explained the circumstances surrounding Plaintiff's October 9, 2007 deposition (taken after the September 7, 2007 discovery deadline), which formed the basis for Defendants' November 16, 2007 motion to amend their answer with

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however, certainly under the more liberal "good cause" standard applied to timely requests for modification, the Court would also grant Defendants' Motion for Leave to Amend the Answer on that basis.

[37] Super. Ct. Civ. R. 16(e).

[38] At that time, this Court denied Defendants' Motion for Leave to Amend the Answer with Affirmative Defenses and Defendants' Motion for Summary Judgment because both motions were untimely filed—just two weeks before trial was set to commence and a week after the pretrial conference. *See* Defs' Mot. for Leave to File and Am. Answer with Affirmative Defenses to Pl.'s Compl., D.I. 22; Defs' Mot. for Summ. J., D.I. 21; Letter from the Ct. Denying Mot. for Leave to File and Am. Answer with Affirmative Defenses to Pl.'s Compl. and Defs' Mot. for Summ. J., D.I. 24. *Cf. Abdi v. NVR, Inc.*, 945 A.2d 1167 (Del. 2008) (affirming trial court's order granting summary judgment because 1) the defendant timely asserted a statute of limitations defense; 2) the plaintiff impliedly consented to the defense by failing to object to the defendant's motion for leave to amend its answer; and 3) notwithstanding the defendant's failure to formally file an amended answer, the plaintiff had been put on notice of the defendant's intent to pursue a statute of limitations defense).

affirmative defenses, including the statute of limitations defense and Defendants' November 15, 2007 Motion for Summary Judgment. Defense counsel represented that Plaintiff's deposition was timely noticed, but that it was delayed by Plaintiff's move to an assisted living center. Defense counsel represented that the delayed deposition was the result, at least in part, of Defendants' attempt to accommodate Plaintiff's schedule and allow him time to adjust and that it was not until Plaintiff was deposed that Defendants had the factual basis to formulate a statute of limitations defense. Plaintiff's counsel countered that Defendants were put on notice of a statute of limitations issue by Plaintiff's demand letter, which preceded the Complaint, and thus Defendants need not have waited to depose Plaintiff to formulate their statute of limitations defense.

The Court recognizes that its letter of December 2, 2008, which stated "[t]he original Trial Scheduling Order of April 18, 2007 should continue to govern this case unless 'manifest injustice' requires its amendment" may have created some confusion.[39] However, that letter was specifically concerned with supplementation of a defense expert report, which was annotated in the second Trial Scheduling Order as "subject to approval from Court." The deadline for motions to add a party or amend a pleading was

[39] Letter from the Ct. to Counsel, Dec. 2, 2008.

not similarly annotated. The Court never reached the merits of Defendants' November 15, 2007 motion for summary judgment (it having been originally denied as untimely) and the Court only recently focused on the merits of the motion. This Court finds "manifest injustice" to exist even if the first Trial Scheduling Order were deemed to apply to the complete exclusion of the second Trial Scheduling Order.

Defendants' Motion for Leave to File an Amended Answer with Affirmative Defenses is granted.

B. Defendants' Motion for Summary Judgment is Granted Because the Applicable Statute of Limitations for Each of Plaintiff's Claims Has Run.

1. Counts I, II, III, and IV Are Barred by the Three Year Statute of Limitations Pursuant to 10 *Del. C.* § 8106.

Count I (Lemon Law), Count II (Consumer Fraud), Count III (Deceptive Trade Practices), and Count IV (Elderly Victims Act) of Plaintiff's Complaint are statutory claims. In Delaware, actions based on statutory violations are governed by a three-year statute of limitations, pursuant to 10 *Del. C.* § 8106, which states in pertinent part: "[N]o action based on a statute . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . ."[40] Both parties agree that 10

[40] 10 *Del. C.* § 8106.

Del. C. § 8106 is the applicable statute of limitations; the dispute is over the date on which that statute of limitations begins to run.

This Court addressed this very issue in *Pender v. Daimler Chrysler Corporation* (when a Lemon Law cause of action accrues, thereby triggering a statute of limitations).[41] In *Pender*, the plaintiff purchased a new Jeep Grand Cherokee on March 10, 1999, which came with a standard warranty for three years or 36,000 miles, whichever came first. In addition, the plaintiff purchased a service contract for six years or 75,000 miles, whichever came first, covering the cost of parts and labor to correct defects in materials or workmanship, less a fifty dollar deductible per visit.[42] The Jeep had an ongoing idling problem, which the plaintiff first reported to the dealer on July 20, 1999. Additional attempts to repair the idling problem were made on October 1, 1999, October 29, 1999, November 12, 1999, and November 17, 1999.[43] The plaintiff complained about the idling problem again on November 15, 2001 and July 8, 2003, and filed suit on December 2,

[41] *Pender v. Daimler Chrysler Corp.*, 2004 WL 2191030 (Del. Super.).

[42] *Id.* at *1.

[43] *Id.*

2003 alleging violations of the Lemon Law, the Consumer Fraud Act, the Deceptive Trade Practices Act, and the Magnuson-Moss Act.[44]

In holding that the plaintiff's case was barred by the statute of limitations, the *Pender* Court concluded that the plaintiff's cause of action accrued on the date he first reported the idling problem to the dealer.[45] The Court explained, "[b]efore [July 20, 1999], Plaintiff had not experienced major problems with the car and he could not have thought bringing suit would be necessary. When Plaintiff first reported the idling problem, however, he triggered the *Lemon Law* and the three-year limitations period under § 8106 began to run."[46]

In the instant case, Defendants contend that this case is squarely governed by *Pender*. Pursuant to *Pender*, Plaintiff's cause of action in this case accrued on July 28, 2000, the date Plaintiff first complained of the moldy/musty smell. Consequently, Defendants maintain that Plaintiff's claim, filed on March 31, 2005, is barred by the statute of limitations.

In response, Plaintiff contends that the determination of when Plaintiff's claims accrued is a jury question, not a judicial question that can

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[44] *Id.* at *2.

[45] *Id.* at *3.

[46] *Id.*

be resolved pretrial.[47] Plaintiff bases his argument on 6 *Del. C.* § 5004 (part of the Lemon Law) that provides a rebuttable presumption that four attempts to by a dealer or manufacturer to repair a nonconformity constitutes a reasonable opportunity to repair.

Plaintiff relies on *Carter and Sheldon on Consumer Warranty Law*: "When a specified number of repair attempts is only a rebuttable presumption as to what is reasonable, then the trier of fact is left the ultimate decision when the Statute of Limitations begins running."[48] In *Lowe v. Volkswagen of America, Inc.*, the United States District Court for the Eastern District of Pennsylvania denied the defendant's motion for summary judgment on a Lemon Law claim on the basis that a genuine issue of material fact existed as to the precise date when, as a matter of law, there had been a reasonable number of repair attempts.[49] In reaching this

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[47] Pl.'s Mot. for Protective Order Against Defs' Mot. for Summ. J., Ex. B, ¶ 24. "We make no claim under the Uniform Commercial Code, since the four year statute of limitations commencing on the date of purchase, has run. However, an action under the Lemon Law is governed by 10 *Del. C.* § 8103, allowing a cause of action 'action (*sic*) based on a statute' (*sic*) to be filed within three years of the 'accrual' of the cause of action. A Lemon Law cause of action does not 'accrue' until the manufacturer has failed to correct a Lemon Law non-conformity after 'a reasonable period of time,' in the language of 6 *Del. C.* § 5002."

[48] CAROLYN L. CARTER & JONATHAN SHELDON, CONSUMER WARRANTY LAW § 14.2.7 (3d ed. 2006) (citing *Lowe v. Volkswagen of Am., Inc.*, 879 F. Supp. 28 (E.D. Pa. 1994)). The treatise suggests that the holding in *Lowe* is the general rule; however, no legal authority other than *Lowe* is cited in the treatise for this proposition.

[49] *Lowe*, 879 F. Supp. at 30.

conclusion, the Court noted that "there has been no reported Pennsylvania case directly addressing the issue" and that "the record is unclear about when plaintiff brought his car in for the third attempted repair of the engine and starting problems."[50] Plaintiff argues that, pursuant to *Lowe*, the "reasonable number of repair attempts" would be a question for the jury.

In this case, unlike *Lowe*, there is a state case that addresses when the statute of limitations begins to run—*Pender*.[51] This Court recognizes the importance of *stare decisis*, which holds that "when a point has been once settled by decision it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside . . . ."[52] This Court sees no reason not to follow *Pender*.

In addition, unlike the factual record in *Lowe* which was "unclear" as to the dates on which the plaintiff brought in his car for repairs, the factual record in this case is clear. At his deposition, Plaintiff testified that he complained about a musty/moldy smell on July 28, 2000, the day he picked

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[50] *Id.*

[51] Although the *Pender* Court stated that the plaintiff's Lemon Law claim "most likely" accrued on the date he first reported an idling problem, it is nonetheless clear from the entire context of that case that *Pender* held that the statute of limitations of 10 *Del. C.* § 8106 begins to run on the date a Lemon Law nonconformity is "first reported."

[52] *Oscar George, Inc. v. Potts*, 115 A.2d 479, 481 (Del. 1955).

up the Cadillac.[53] A technician attempted to remedy the smell by spraying a freshener in the car that same day.[54] Plaintiff further testified that every time he took the Cadillac in for service, including for oil changes, he complained to the service department about the musty/moldy smell, including on November 20, 2000, February 26, 2001, April 23, 2001, and August 16, 2001.[55]

Plaintiff contends that his cause of action did not accrue until the dealer had failed to correct the musty/moldy condition after a reasonable period of time and that this is a factual question for the jury. 6 *Del. C.* § 5004 (part of the Lemon Law) creates a presumption that four unsuccessful attempts to repair a vehicle constitute a reasonable opportunity for the dealer or manufacturer to repair the nonconformity:

> (a) It shall be presumed that a reasonable number of attempts have been undertaken to conform a new automobile to the manufacturer's express warranty if, within the warranty term or during the period of 1 year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date:
>
> (1) Substantially the same nonconformity has been subject to repair or correction 4 or more times by the manufacturer, its agents or its dealers and the nonconformity continues to exist;
>
> (2) The automobile is out of service by reason of repair or correction of a nonconformity by the manufacturer, its agents or its

[53] Stipulation of Facts, at ¶ 15.

[54] *Id.*

[55] *Id.* at ¶ 16.

> dealers for a cumulative total of more than 30 calendar days since the original delivery of the motor vehicle to the consumer.[56]

The presumption for a reasonable opportunity to repair is not unique to Delaware. In fact, it appears that every state's Lemon Law statute provides a presumption that a dealer or manufacturer has had a reasonable period of time to repair the nonconformity, usually after three or four repairs or if the car is out of service for 30 days.[57] The *Pender* Court did not construe 6 *Del. C.* § 5004 to require that four attempts to repair the nonconformity be made before a Lemon Law cause of action could accrue;[58] rather, *Pender* held that a Lemon Law cause of action accrued the first time the plaintiff gave notice of the nonconformity to the dealer.[59]

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[56] 6 *Del. C.* § 5004.

[57] DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW app. 15B at 1413-1430 (2008-09 ed.).

[58] The *Pender* Court noted, "even a gratuitous, lenient application of the Lemon Law does not save Plaintiff" because the plaintiff complained to the dealer five times within the first year about the idling problem, and "[a]fter the fifth failed repair attempt, if not before, Plaintiff undeniably knew that the car's idling problem was a continually existing nonconformity." *Pender*, 2004 WL 2191030 at * 3. Similarly, even if this Court found that Plaintiff's cause of action did not accrue until the fourth report of the musty/moldy smell to the dealer, Plaintiff's action still would be barred by the statute of limitations. Plaintiff complained about the moldy/musty smell on July 28, 2000, November 20, 2000, February 26, 2001, and April 23, 2001. Stipulation of Facts at ¶ 15-16. Thus, *assuming arguendo* that Plaintiff's claim did not accrue until the fourth report of a nonconformity, the statute of limitations would have run on April 24, 2004, over a year before Plaintiff filed suit on March 31, 2005.

[59] *Pender*, 2004 WL 2191030 at * 3. In fact, in *Consumer Warranty Law*, *Pender* is cited for the holding that the "statute of limitations begins to run when [a] consumer first reports the defect" as *contra* to *Lowe's* holding that the statute of limitations should not

A three year statute of limitations commencing at the time the car owner first reports a nonconformity to the dealer (so long as a report is made "during the term of the warranty or during the period of 1 year following the date of original delivery, whichever is earlier")[60] provides a readily determinable limitations period. This Court notes that a three year limitations period running from the time a nonconformity is reported is more favorable to the consumer than the limitations period of many other states: "[i]n many states, suit must be filed within six months after the expiration date of the warranty, or within one year from the date of delivery, whichever is earlier."[61] Therefore, Counts I through IV are barred by the statute of limitations of 10 *Del. C.* § 8106.[62]

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commence running until the manufacturer has attempted a reasonable number of repair attempts. CARTER & SHELDON, CONSUMER WARRANTY LAW § 14.2.7 at n. 282.

[60] 6 *Del. C.* § 5002.

[61] PRIDGEN & ALDERMAN, CONSUMER PROTECTION AND THE LAW § 15.10 (noting that "in many states, suit must be filed within six months after the expiration; *see, e.g.,* Ala. Code §§ 8-20A-1 to 6 (within 3 years of delivery); Ariz. Rev. Stat. Ann. §§ 44-1261 to -1267 (within 6 months following earlier of warranty expiration or 2 years or 24,000 miles from delivery); Ark. Code §§ 4-90-401 to -417 (within 2 years of reporting nonconformity or 2 years from beginning of dispute resolution); Colo. Rev. Stat. §§ 42-10-101 to -107 (within 6 months of warranty expiration or 12 months of delivery); D.C. Code Ann. §§ 50-501 to 510 (within 2 years of delivery); Haw. Rev. Stat §481I 1-4 (within 3 years from delivery or 1 year from 24,000 miles, whichever occurs first); Idaho Code §§ 48-901 to -913 (within 3 years of delivery or within 3 months of final mechanism decision); Ill. Rev. Stat. ch. 815, 380/1-8 (within 18 months of delivery, but may be extended for time spent in dispute resolution); Ind. Code § 24-5-13-1 to -24 (2 years from date of notice); Iowa Code Ann. §§ 322G.8 (within 3 years from delivery, or 1 year from 24,000 miles, whichever occurs first); Ky. Rev. Stat. §§ 367.840-46, 860-70 (within 2 years from delivery); Md. Com. Law Code Ann. § 14-1501 (within 3 years from delivery); Mo. Ann.

2. Counts V, VI, and VII Are Barred by the Four Year Statute of Limitations Pursuant to 6 *Del. C.* § 2-725.

Counts V through VII allege violation of the dealer's express written labor warranty, breach of the implied warranty of good workmanship, and breach of the implied labor warranty of fitness for intended purpose, respectively. Plaintiff contends that the labor warranties are "mixed contracts" of goods and services. Plaintiff avers that these "mixed contracts" are "covered by the UCC and are therefore covered by the Magnuson-Moss Warranty Act."[63] Claims brought under the Magnuson-Moss Act are governed by the statute of limitations set forth in the Uniform Commercial Code, which establishes a four year statue of limitations:

> (1) An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitations to not less than one year but may not extend it.

Stat. §§ 407.560-579 (within 6 months of warranty expiration or 18 months of delivery, whichever is earlier); Nev. Rev. Stat. §§ 597.600-.670 (within 18 months of delivery); N.M. Stat. Ann. § 57-16A-1 to -9 (within 3 months of hearing decision or 18 months of delivery); N.D. Cent. Code § 51-07-16 (within 6 months of warranty or 18 months of delivery); Or. Rev. Stat. §§ 646.315-375 (within 12 months of delivery or 12,000 miles); S.C. Code §§ 56-28-10 to -110 (within 3 years from delivery); S.D. Codified Laws §§ 32-6D-1 to -11 (within 3 years from delivery); Tenn. Code Ann. §§ 55-24-201 to -212 (within 6 months of warranty expiration or 12 months of delivery); Tex. Occ. Code Ann. §§ 2301.601 to .613 (within 6 months of warranty expiration, or 24 months or 24,000 miles from delivery); Vt. Stat. Ann. Tit. 9, §§ 4170-81 (within 12 months of warranty expiration); W. Va. Code §§ 46A-6A-1 to -9 (within 12 months of warranty expiration).

[62] This Court need not therefore reach the applicability of laches to these counts.

[63] Pl.'s Mot. for Protective Order Against Defs' Mot. for Summ. J. at ¶ 2(f).

> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.[64]

Where breach of warranty is alleged, the key date for statute of limitations purposes is the date of delivery.[65] Plaintiff took delivery of the Cadillac on July 28, 2000. The four year limitations period thereby expired on July 29, 2004, approximately eight months before Plaintiff filed suit. Plaintiff has acknowledged that no Uniform Commercial Code claims have been brought.[66] Plaintiff's breach of warranty claims are barred by 6 *Del. C.* § 2-725.

C. Defendants' Motion for Return of Vacated Net Settlement Proceeds is Denied.

In December 2007 the parties purportedly reached an agreement to resolve certain of Plaintiff's claims, including his Lemon Law claim, and stipulated that the remaining unresolved claims would be submitted to the Court for determination.

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[64] 6 *Del. C.* § 2-725.

[65] *S & R Assoc., L.P. v. Shell Oil Co.*, 725 A.2d 431, 435 (Del. Super. 1998); *Pender*, 2004 WL 2191030 at * 3.

[66] Pl.'s Demand Letter, May 30, 2005 ("We make no claim under the Uniform Commercial Code, since the four year statute of limitations commencing on the date of purchase, has run.").

However, after review of the Settlement Agreement and Stipulation and after considering much correspondence, many pleadings and at least two oral arguments over the meaning of the Settlement Agreement and Stipulation, this Court found that there were "fundamental disagreements as to what was supposedly agreed to in the partial settlement of the case, particularly with respect to what issues remain[ed] for this Court to decide."[67] Therefore, this Court concluded that the Settlement Agreement and Stipulation were unenforceable because there was no "meeting of the minds" as to the meaning of the provisions contained in those documents.[68]

However, prior to the issuance of this Court's opinion finding the Settlement Agreement to be unenforceable, Defendants had issued a check to Plaintiff for $41,199.60 and Plaintiff had returned the Cadillac to Defendants, which Defendants sold at auction for $6,981.04. Defendants now ask this Court to order return of the settlement proceeds, less the amount realized upon its sale at auction. Defendants maintain that the settlement proceeds must be returned because 1) Defendants are entitled to return of monies paid pursuant to a settlement agreement later vacated by court order; 2) Plaintiff would be unjustly enriched if he were permitted to

[67] *Stenta*, 2008 WL 4194002, *1 (Del. Super.).

[68] *Id.*

retain settlement proceeds; and 3) Defendants are entitled to "equitable restitution."

Plaintiff responds that he will only return the settlement proceeds in exchange for the Cadillac.[69] In essence, the parties seek rescission. This Court recognizes the doctrine of legal rescission and it may rescind a contract by declaring it invalid and entering an order restoring a party to his original condition by awarding money or other property of which he had been deprived.[70] However, this Court lacks jurisdiction to order equitable rescission, which is in effect:

> a form of remedy in which, in addition to a judicial declaration that a contract is invalid and a judicial award of money or property to restore the plaintiff to his original condition is made, further relief is required. Thus, the remedy of equitable rescission typically requires that the court cause an instrument, document, obligation or other matter affecting plaintiff's rights and/or liabilities to be set aside and annulled, thus restoring plaintiff to his original position and reestablishing title or recovering possession of property.[71]

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69 Plaintiff includes a "Request for Rule 60(b) Relief." Pl.'s Answer in Opp'n to Defs' Mot. for Return of Vacated Net Settlement Proceeds, D.I. 63 at p. 1-2. However, Plaintiff cites no case in support of his request for Rule 60(b) relief. Failure to cite authority for a legal argument constitutes waiver. *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008); *Gonzalez v. Caraballo***,** 2008 WL 4902686, *3 (Del. Super.).

70 *Monsanto Co. v. Aetna Cas. and Surety Co.*, 1989 WL 997183, * 1 (Del. Super.) (holding that "while claims for rescission, reformation and avoidance will usually fall within the jurisdiction of the Chancery Court, the claims for such remedies brought in a case before a Court of law will not automatically strip that Court's jurisdictional power").

71 *Medek v. Medek*, 2008 WL 4261017, *7 (Del. Ch.) (holding that the Court of Chancery had ancillary jurisdiction over a breach of contract claim under the cleanup doctrine because it was closely intertwined with the fraudulent transfer claim requesting equitable relief).

The remedy the parties seek in this case similarly requires more than an award of money damages; it also requires this Court to restore possession and title of the Cadillac to Plaintiff. Thus the Court lacks jurisdiction to order rescission of the settlement proceeds because the Cadillac was sold at auction by Defendants and, consequently, the parties' positions prior to the exchange cannot be restored. While Plaintiff agrees that the value of the Cadillac was scrap, there is no evidence to suggest that he would have surrendered the car in the absence of the Settlement Agreement. This series of events presents a situation where it is impossible for the Court to "unscramble the eggs."[72]

Moreover, this predicament could have been prevented if Defendants had issued the settlement proceeds into escrow pending a final resolution of all of the issues in this case, had retained the Cadillac, or better yet, had entered into a legally effective Settlement Agreement and Stipulation. Defendants bear an equal responsibility in having signed a Settlement Agreement and Stipulation whose terms were so incongruous as to render them unenforceable.

[72] *Catamaran Acquisition Corp. v. Spherion Corp*., 2001 WL 755387, * 4 (Del. Super.) (noting that "the Court of Chancery would find it impossible to 'unscramble the eggs' by rescinding the Agreement" and concluding that the plaintiffs' equitable rescission claim was futile).

V. CONCLUSION

For the foregoing reasons, Defendants' Motion for Leave to File an Amended Answer with Affirmative Defenses to Plaintiff's Amended Complaint is **GRANTED**, Defendants' Motion for Summary Judgment is **GRANTED**, Plaintiff's Motion for Protective Order Against Defendants' Motion for Summary Judgment is **DENIED**, and Defendants' Motion for Return of Vacated Net Settlement Proceeds is **DENIED**. The parties' remaining motions are **DENIED AS MOOT**.

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Richard R. Cooch

oc: Prothonotary