IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GORAN FATOVIC, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	C.A. No. 00C-08-299 MMJ
CHRYSLER CORPORATION,	)	
BAKER CHRYSLER-PLYMOUTH-	)	
JEEP-EAGLE, INC. and CHRYSLER	)	
FINANCIAL COMPANY, L.L.C.,	)	
	)	
Defendants.	)	

Submitted: March 28, 2003
Decided: November 19, 2003

ORDER

Upon Plaintiffs' Motion for Reargument or in the Alternative Motion to Alter or Amend Judgment

Darryl K. Fountain, Esquire, 1225 King Street, Suite 400, Wilmington, Delaware 19801, Attorney for Plaintiffs

Michael J. Carlson, Esquire., Anderson, Coe & King, 201 N. Charles Street, Suite 2000, Baltimore, Maryland 21201, Attorney for Defendants

JOHNSTON, J.

By Order dated February 28, 2003, the Court granted the Defendants' Motions for Summary Judgment. On March 11, 2003, Plaintiffs filed their Motion for Reargument or in the Alternative Motion to Alter or Amend Judgment. Defendants filed their Opposition to Plaintiffs' Motion on March 27, 2003.

I. *Plaintiffs' Motion for Reargument*

1. Superior Court Civil Rule 59(e) provides: "A motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision." Plaintiffs' Motion for Reargument was filed 7 business days after the Court's Order granting summary judgment. Therefore, Plaintiffs' Motion for Reargument must be denied as untimely filed.

II. *Plaintiffs' Motion to Alter or Amend Judgment*

2. Plaintiffs bear a heavy burden when requesting relief under Rule 59.

> Such motions are not a mechanism for litigants to relitigate claims already considered by the court. *Co-Executors of the Will of Mansfield*, Del. Ch., C.A. No. 11340, let. op. at 2, Chandler, V.C. (Nov. 5, 1990). Rather, Rule 59 relief is available to prevent injustice and will be granted only when the moving party demonstrates that the court's decision "rested on a misunderstanding of a material fact or a misapplication of law." *Arnold v. Society for Savings Bancorp., et al.*, Del. Ch., C.A. No. 12883, let. op. at 1, Chandler, V.C. (Jan. 30, 1995).[1]

A motion to alter or amend judgment must be based on one of the following grounds: (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct clear error of law or to prevent manifest injustice.[2]

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[1] *In re ML/EQ Real Estate Partnership Litigation*, Del. Ch., C.A. No. 15741, slip. op. at 1, Strine, V.C. (Mar. 22, 2000).

[2] *North River Insurance Co. v. Cigna Reinsurance Co.,* 52 F.3d 1194, 1218 (1995).

3. Plaintiffs have argued that the Court's February 29, 2003 Order is based upon two erroneous assumptions and upon an error of law. First, the Court found that Plaintiffs did not identify any expert. Plaintiffs assert that they were not required to identify an expert until July 24, 2003 pursuant to the Court's Scheduling Order. Second, the Court erred in relying on a "deposition involving a subsequent purchaser whose experience or use of the vehicle may be quite dissimilar to that of the Plaintiffs." Third, Plaintiffs assert that the Court erred in its ruling concerning election of remedies arising from Plaintiffs' recission of the contract.

4. Because Plaintiffs have based their Motion to Alter or Amend on allegations of Court error, this analysis is limited to whether Plaintiffs have demonstrated a need to correct clear error of law or to prevent manifest injustice.

Plaintiffs' Failure to Timely Identify Expert Witness

5. Following arbitration, the Court issued its original scheduling order on November 13, 2001. That order had a discovery cut-off date of May 13, 2002 and a motions deadline of June 3, 2002. The scheduling order was modified, by stipulation of the parties, on two occasions. The final scheduling order extended discovery to September 30, 2002, with a motions deadline of October 21, 2002. It was not until after the discovery cut-off date that Defendants filed their motions for summary judgment. After a hearing on the motions held November 12, 2002, the Court took the matter under advisement. Subsequently, without request from either party, a new scheduling order was issued by mistake. Because the new discovery deadline was issued by mistake, plaintiffs were not actually awarded additional time in which to

obtain an expert. Plaintiffs have had adequate time to secure an expert in this case. This lawsuit was initiated by Plaintiffs on September 6, 2000. Throughout the case Plaintiffs have never sought additional time to obtain an expert. Therefore, the Court correctly granted summary judgment based in part upon Plaintiffs' failure to timely identify an expert witness.

The Court's Consideration of Deposition of Subsequent Purchaser

6. The Court considered as undisputed facts: that Plaintiffs had a problem fastening down the vehicle roof, as evidenced by the initial return of the vehicle to the dealership; that the vehicle was never repaired after surrender by Plaintiffs; and that the subsequent purchaser did not have any leakage problems. Defendants' expert's opinion was that the leakage was the result of the removable top being improperly placed or secured on the vehicle, rather than as a result of any manufacturing defect. Plaintiffs asserted that the leak was caused by an unspecified defect.

7. In *Reybold Group, Inc. v. Chemprobe Technologies, Inc.,*[3] the Delaware Supreme Court held that the plaintiff could not maintain an action for breach of implied warranty of merchantability in the absence of expert testimony or circumstantial evidence that the product was defective.[4] In order to support a *prima facie* case, the plaintiff must provide evidence that would "tend to negate other reasonable causes of the injury sustained or there must be expert opinion that the product was defective."[5]

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[3] 721 A.2d 1267 (Del. 1998).

[4] *Id.* At 1269.

[5] *Id.* At 1270.

8. In granting summary judgment, this Court ruled that Plaintiffs failed to present evidence negating Defendants' evidence that the reasonable cause for the leakage was misplacement of the removable top. Although Plaintiffs disputed Defendants' expert's conclusions, where there are some disputed facts, summary judgment is still warranted if the undisputed facts and the non-movant's version of the disputed facts entitle the movant to judgment as a matter of law.[6] Therefore, the Court correctly considered the subsequent purchaser's deposition testimony, along with the other evidence, giving that testimony such weight as it deserved. The Court did not err by granting summary judgment after consideration of the deposition because that testimony was merely cumulative of Defendants' expert testimony.

Plaintiffs' Election of Remedies

9. It is undisputed that Plaintiffs rescinded their contract and returned the vehicle. The Court found that Plaintiffs' action constituted an election of remedies, preventing Plaintiffs from pursuing other remedies inconsistent with their choice. In *Stoltz Realty Co. v. Raphael*,[7] the Delaware Supreme Court stated that the doctrine of election of remedies is based on "any decisive act of a party, with knowledge of his rights and of the facts, indicating an intent to pursue one remedy rather than the other."[8]

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[6] *State Farm Mutual Auto Insurance Co. v. Mundorf,* 659 A.2d 215, 217 (Del. 1995).

[7] 458 A.2d 21 (1983).

[8] *Id.* At 23.

10. Plaintiffs argued that an election of remedies is not required under the UCC and the Lemon Law in Delaware as the remedies are cumulative. Further, Plaintiffs asserted claims for breach of express warranty, under the Magnuson-Moss Act, for consumer fraud, and for deceptive trade practices. This Court considered each of these claims and ruled that: Plaintiffs failed to establish the existence of a defect in order to proceed under the UCC, Delaware Lemon Law, or Magnuson-Moss Act; Plaintiffs failed to present evidence of consumer fraud or deceptive trade practices; and the sales contract provision stating that the vehicle was being sold "as is" sufficiently disclaimed any express warranty. Therefore, the Court's election of remedies analysis was not erroneous.

III *Conclusion*

Plaintiffs' Motion for Reargument was not timely filed. Plaintiffs' Alternative Motion to Alter or Amend Judgment attempts to reargue issues fully and properly addressed in the Court's February 28, 2003 Order granting Defendants' Motions for Summary Judgment.

For the foregoing reasons, Plaintiffs' Motion for Reargument or in the Alternative Motion to Alter or Amend Judgment is hereby DENIED.

IT IS SO ORDERED.

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Judge Mary M. Johnston

oc: Prothonotary