

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

AMY NEARY, et al.,)	
)	
<i>Plaintiffs</i>)	
)	
v.)	Cause No. 3:20-CV-338-RLM-MGG
)	
THOR MOTOR COACH, INC., and)	
FORD MOTOR COMPANY,)	
)	
<i>Defendants.</i>)	

OPINION AND ORDER

Amy Neary and Susan Eckenrode sued Thor Motor Coach, Inc. and Ford Motor Company alleging that their RV was defective in violation of state and federal law. Thor and Ford moved for summary judgment on all claims, arguing that they didn't violate that parties' limited warranty and that they didn't have an opportunity to repair all of the RV's alleged defects. The court heard oral argument on July 25, and now denies Ford's and Thor's motions for summary judgment and denies Thor's motion to strike expert Dennis Bailey.

Motion to Exclude Dennis Bailey's Testimony

Thor moves to exclude Dennis Bailey's opinions in their entirety and preclude Mr. Bailey from testifying at trial. Under Federal Rule of Evidence 702, which governs the admissibility of expert testimony, a witness "who is qualified as an expert by knowledge, skill, experience, training, or education" can state an opinion if: (a) the expert's scientific, technical, or other specialized knowledge will

help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702.

The district court performs a gatekeeping function before admitting such testimony, to ensure that the admitted testimony or evidence is reliable, as well as relevant. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993). The proponent of the testimony bears the burden of establishing by a preponderance of the evidence that the testimony meets each of those elements. Varlen Corp. v. Liberty Mut. Ins. Co., 924 F.3d 456, 459 (7th Cir. 2019). In making this assessment the court focuses “solely on the principles and methodology, not the conclusions they generate.” Schultz v. Akzo Nobel Paints, LLC, 721 F.3d 426, 431 (7th Cir. 2013) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. at 595).

Thor doesn't challenge Mr. Bailey's educational and experiential qualifications to be considered an expert, and the court concludes based on his curriculum vitae that he qualifies as an expert. Thor says Mr. Bailey's methodology is unreliable because it can't be identified (and so doesn't even reach testability), isn't standard in the industry, and hasn't been peer-reviewed, and wasn't and couldn't be reliably applied.

The court disagrees with Thor's argument that Mr. Bailey's appraisal methodology can't be understood from his report. Mr. Bailey's report lays out his appraisal methodology, which includes the non-exhaustive list of 21 factors of

appraisal procedures and non-exhaustive list of 24 factors that can affect an RV's value. To assign a specific weight to a certain factor when conducting an RV appraisal isn't standard in the RV industry. In several cases, judges of this court have allowed an RV appraisal expert to simply present his final valuation after providing an overview of the specific factors he used. *See e.g., Hoopes v. Gulf Stream Coach*, 2016 WL 1165683, at *10 (N.D. Ind. Mar. 25, 2016); *Pegg v. Nexus RVs LLC*, 2019 WL 2772444, at *6 (N.D. Ind. July 2, 2019); *Pattee v. Nexus RVs LLC*, No. 3:19-CV-162 JD, 2022 WL 834330, at *8 (N.D. Ind. Mar. 21, 2022). The court finds no reason to exclude Mr. Bailey's testimony based on this argument.

Thor says that Mr. Bailey's appraisal methodology is unreliable, claiming it isn't standard in the RV industry and hasn't been peer reviewed. Mr. Bailey's declaration says his methodology is consistent with the standards and generally accepted methodology used in the RV appraisal industry. Thor provides an opposing expert declaration from Doug Lown to support its argument that Mr. Bailey's appraisal methodology isn't consistent with the standards in the RV industry, but Mr. Lown doesn't identify the industry appraisal standards to which he refers, and he doesn't identify how Mr. Bailey deviates from those standards. Further, Mr. Lown has testified that he's "not sure there is any industry standard appraisal practices", he's "not aware of any specific appraisal classes or information strictly on RVs", and he doesn't "know of any written guidelines that are produced in this industry for that topic". Even if the court accepts Mr. Lown's testimony – and the record provides nothing on which to

choose between experts on this topic – the industry’s inability to agree upon a standard doesn’t make Mr. Bailey’s methodology less reliable.

Thor’s objection based on a lack of testable metrics isn’t persuasive. Rule 702 doesn’t categorically require such metrics. Mr. Bailey’s appraisal opinions aren’t easily subjected to rigorous testing and replication. Rule 702 requires reliability of methodology, not necessarily the exacting standards required of a scientific or technical expert. That Mr. Bailey’s methodology wasn’t formally peer-reviewed weighs against a finding of reliability, but it’s not dispositive. The test for reliability of nonscientific experts is flexible and not mechanically scrutinized in the same manner as scientific experts. United States v. Romero, 189 F.3d 576, 584 (7th Cir. 1999); Lees v. Carthage Coll., 714 F.3d 516, 525 (7th Cir. 2013); Pattee v. Nexus RVs, LLC, No. 3:19-CV-162 JD, 2022 WL 834330, at *8 (N.D. Ind. Mar. 21, 2022); Hoopes v. Gulf Stream Coach, Inc., 2016 U.S. Dist. LEXIS 39096, at *35 (N.D. Ind. 2016) (holding that appraisals are not an exact science that can be mechanically scrutinized; rather as long as an explanation of the methodologies and principles supporting the experienced appraiser’s opinion were referenced and the conclusions were not based upon speculative belief alone, the report passes muster); *see also* Wendell v. GlaxoSmithKline LLC, 858 F.3d 1227, 1235 (9th Cir. 2017) (“expert testimony may still be reliable and admissible without peer review and publication.”). Both of Thor’s experts testified that they are unaware of any RV appraisal methodology that has been subject to peer review. The court doesn’t find reason to exclude Mr. Bailey’s testimony at trial based on this argument.

Lastly, Thor says Mr. Bailey's manufacturing defect and merchantability opinions aren't reliable. Thor argues that Mr. Bailey's report contains no explanation of how he formed the opinion that the alleged defects attributable to Thor reduced the value of the RV by \$130,923.17. Thor finds issue with Mr. Bailey's report because it doesn't explain how Mr. Bailey applied his factors of valuation to this specific case; how each factor affected his valuation; and the specific, individual defect values. Further, Thor argues that Mr. Bailey offers two separate and irreconcilable opinions on the RV's value.

A report required by Fed. R. Civ. P. 26(a)(2)(B) needn't include every thought a retained expert had in arriving at his opinions or every word he might say on the stand in his report. This court has rejected any hardline requirement that an expert in an RV case must itemize the cost of repairs or allot a percentage weight value to each factor to meet the Daubert standard. *See e.g. Pattee v. Nexus RVs LLC*, No. 3:19-CV-162 JD, 2022 WL 834330, at *8 (N.D. Ind. Mar. 21, 2022).

Mr. Bailey's report can't be characterized as mere *ipse dixit*. He didn't simply testify that the RV had a certain value because he said so. He explained that in the RV industry, as he has seen and experienced it, he is able to appraise an RV using a list of concerns, inspection of the RV to verify the concerns, and photographic evidence to document the findings.

These arguments essentially address the weight the the trier of fact should give Mr. Bailey's opinion rather than the reliability of the methodology that gave rise to the opinion. Mr. Bailey's report might not provide the level of detail that

Thor would like to see, but in exhaustively detailing the information he considered in formulating his conclusion [Doc. No. 43-9 at pp. 2–18], explaining his investigative method [Doc. No. 43-9 at pp. 16,18, 20-23], and outlining the methodological factors he used to parse that information in valuing the RV [Doc. No. 43-9 at pp. 2-17], he has provided plenty of detail to satisfy the requirements of Rule 702. Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 761 (7th Cir. 2010).

The focus of a court addressing admissibility under Rule 702 must be solely on the principles and methodology, not the conclusions they generate. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. at 595. Thor’s arguments about the accuracy and credibility of Mr. Bailey’s calculations might persuade a jury, but that is no basis for exclusion. The court finds no reason to exclude Mr. Bailey’s testimony at trial, and so denies the motion to exclude his testimony. The jury will be free to accept or reject the evidence presented and find the RV to have not been defective or that specific defects are worth some different amount.

The court denies Thor’s motion to strike Dennis Bailey’s testimony.

Summary Judgment Motions: Facts

“Summary judgment . . . is proper only if the pleadings, discovery materials, disclosures, and affidavits demonstrate no genuine issue of material fact such that [the movant] is entitled to judgment as a matter of law.” Protective Life Ins. Co. v. Hansen, 632 F.3d 388, 391-392 (7th Cir. 2011); Fed. R. Civ. P. 56(a). The court’s summary judgment function isn’t “to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The court must construe the evidence, and all inferences that can reasonably be drawn from the evidence, in the light most favorable to the non-moving party. Id. at 249, 255 The movant bears the burden of showing that there is no genuine issue of material fact, but the non-moving party “may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.” Id. at 256. A fact is material if affects the outcome of the case. Monroe v. Indiana Dep’t of Transportation, 871 F.3d 495, 503 (7th Cir. 2017). “A factual dispute is genuine only if ‘the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” Alston v. City of Madison, 853 F.3d 901, 910–911 (7th Cir. 2017) (quoting Carroll v. Lynch, 698 F.3d 561, 564 (7th Cir. 2012)).

To defeat a summary judgment motion, “the nonmovant must present definite, competent evidence in rebuttal,” Parent v. Home Depot U.S.A., Inc., 694 F.3d 919, 922 (7th Cir. 2012), and “must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires

trial[,]” Hemsworth v. Quotesmith.com, Inc., 476 F.3d 487, 490 (7th Cir. 2007); *see also* Fed. R. Civ. P. 56(e)(2).

Ms. Neary and Ms. Eckenrode have been on an odyssey to seek repair for their RV. After the purchase, Ms. Neary identified various defects in the RV and repeatedly brought the RV to Thor-approved repair locations to have it repaired under warranty. Some, but not all, the defects were repaired. The RV was at Thor-approved repair shops undergoing warranty repairs for 211 days in all. They sue about 45 defects, which are set forth in detail in Appendix A. Sixteen of those problems are fixed. Only three of the remaining 29 alleged defects are alleged to have three or more repair attempts when the record is viewed as favorably to the plaintiffs as is reasonably possible.

Because this order denies the summary judgment motions, the factual recitation will be brief. Because the motions and ruling turn on the RV’s whereabouts at any given time, the court lays out the facts (these are not agreed facts, but rather facts as a reasonable jury could find them) in relation to where the RV was:

June 14-27, 2019: Ms. Neary and Ms. Eckenrode purchased the RV from Camping World Raleigh and felt severe vibration on the way home.

June 27-July 27, 2019: the RV was at Camping World Hanover for repairs under the Thor warranty. The plaintiffs’ plan, which was later changed, was to return the RV to Camping World Hanover after season and once the necessary parts arrived.

July 27-July 29, 2019: the RV left Camping World Hanover for ATEL Bus at Ford's authorization to address the plaintiffs' complaint of severe vibration.

July 29-August 10, 2019: the RV went from ATEL Bus to Apple Ford in York, PA. ATEL Bus had determined that the transmission had to be replaced, and Ford wanted that work done at a Ford authorized dealership.

August 28-29, 2019: the RV went from Apple Ford to the Elkhart/Wakarusa Service Center for repair work under the Thor warranty. Ford was notified that the severe vibration continued on the trip. The RV left the Elkhart/Wakarusa Service Center at day's end on August 29.

August 29-October 8, 2019: the plaintiffs had possession of the RV.

October 8-November 22, 2019: the RV was at Camping World Raleigh for work under the Thor limited warranty.

November 22-30, 2019: the RV was with Ms. Neary and Ms. Eckenrode, who took it for the Thanksgiving holiday.

November 30, 2019-February 29, 2020: the RV was Camping World Raleigh, where repairs under the Thor warranty were said to have been completed. Ms. Neary and Ms. Eckenrode were informed on

December 5 that repairs were done, but they didn't pick the RV up until February.

March 1-April 14, 2020: the RV was back at Camping World Raleigh for more work under the Thor warranty, after the plaintiffs concluded the repairs weren't complete.

April 14-November 16, 2020: the RV was at Apple Ford for repairs under the Ford limited warranty.

Of the 521 days from June 14, 2019 to November 16, 2020, the plaintiffs had the RV for 63 days, and the defendants or their agents had it for 458 days.

Ms. Neary and Ms. Eckenrode assert breach of warranty on 45 alleged defects. Sixteen of those problems are fixed. Twenty-nine are alleged to remain.

Thor's Summary Judgment Motion

Thor and the plaintiffs agree that Indiana law provides the rule of decision in their dispute. Thor argues that Indiana law provides that an RV seller must have had three or more opportunities to repair before it can be said to have had a reasonable opportunity to repair a claimed defect. Indiana law is very favorable to an RV seller, but it's not quite that favorable. The warrantor must have at least three opportunities or a reasonable time in which to repair the claimed defect. See Cimino v. Fleetwood Enters., 542 F. Supp. 2d 869, 882; Pegg v. Nexus RVs LLC, 2019, U.S. Dist. LEXIS 110067, at *20 (N.D. Ind. 2019); Bordoni v. Forest River, 2020 U.S. Dist. LEXIS 63919, at *8 (N.D. Ind. 2020). Thor had the

RV for 219 days – more than seven months. A reasonable jury viewing these facts in the light most favorable to Ms. Neary and Ms. Eckenrode could decide that Thor had notice and a reasonable opportunity to cure the defects on the Ms. Neary and Ms. Eckenrode’s RV and failed to do so within a reasonable time.

The Thor warranty has what the parties describe as a “back-up remedy provision” that provides that if all else fails, the purchasers’ “sole and exclusive remedy shall be to have [Thor] pay an independent service shop of your choice to perform repairs to the defect OR if the defect is uncurable, have [Thor] pay diminished value damages.” The plaintiffs point to a letter Ms. Neary says she sent to an independent shop, Frank’s RV Repair, requesting repairs for the outstanding defects. Ms. Neary and Ms. Eckenrode claim that the independent shop said they couldn’t repair it.

Thor says the court shouldn’t consider that letter because the plaintiffs didn’t submit the letter until a month after the discovery deadline (which already had been extended over Ms. Neary’s objection). Thor says that the expired discovery deadline keeps it from seeking additional discovery or even confirm Frank’s RV Repair’s receipt of the letter. Courts can exclude evidence because of discovery violations, including missed deadlines. Finall v. City of Chi., 239 F.R.D. 504, 506-507 (N.D. Ill. 2006). But Ms. Neary and Ms. Eckenrode failed to disclose the letter due to inadvertence, and Thor provides no evidence of prejudice as to the delay in receipt. Exclusion would be unjustifiably heavy-handed.

A reasonable jury could find that the backup remedy provision failed its essential purpose because the remedy was ineffectual and deprived the plaintiffs

of the benefit of their bargain. Martin v. Thor Motor Coach Inc., No. 3:20-CV-13 DRL-MGG, 2022 WL 1443015, at *4 (N.D. Ind. May 6, 2022); *see also* Sunny Indus., Inc. v. Rockwell Int'l Corp., 175 F.3d 1021 (7th Cir. 1999). Although Frank's RV Repair didn't explicitly state that the defects were "uncurable," Thor can't pay the plaintiffs' chosen independent service shop to perform repairs because the independent service shop recommended that Thor or Ford conduct the repairs. The back-up remedy provision provides no basis for an award of summary judgment to Thor.

Because a reasonable jury viewing the evidence in light most favorable to the plaintiffs and drawing all reasonable inferences in their favor could find that the defects asserted by Ms. Neary and Ms. Eckenrode weren't repaired despite Thor's reasonable opportunity to repair and could further find that Ms. Neary and Ms. Eckenrode didn't fail in their obligations under the back-up remedy provision, the court must deny Thor's summary judgment motion.

Ford's Summary Judgment Motion

Ford seeks summary judgment, as well. Ford and the plaintiffs agree that Pennsylvania law provides the rule of decision in their dispute. To prevail on a claim for breach of warranty under the Pennsylvania Uniform Commercial Code, a plaintiff must establish that a breach of warranty occurred and that the breach was the proximate cause of the specific damages sustained. Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102 (3rd Cir.1992); Kruger v. Subaru of America, Inc., 996 F.Supp. 451 (E.D.Pa.1998). Pennsylvania law doesn't define

a reasonable opportunity to repair or cure. Ford asks the court to read Pennsylvania law as including Indiana's requirements of three or more repair opportunities and/or a reasonable time to repair. But Pennsylvania hasn't adopted those limitations, and nothing in Pennsylvania law suggests that the highest court in Pennsylvania would adopt provisions as favorable to manufacturers as Indiana law has become.

The plaintiffs identify three alleged defects covered by the Ford warranty: grind in the transmission between first and second gear, a malfunctioning fuel gauge, and a severe vibration. Viewing the evidence as favorably to the plaintiffs as reasonably possible, a reasonable juror could find that Ms. Neary and Ms. Eckenrode presented the RV to Ford for repair of the severe vibration defect under the Ford warranty three times over a period of at least 172 days and the severe vibration was never fixed. The grind in the transmission between first and second gear defect was subject to repair once over a period of at least 140 days and still isn't fixed; as a result, Ms. Neary and Ms. Eckenrode find the RV hard to drive and no longer feel safe driving the RV. Ultimately, whether Ford's warranty failed its essential purpose is a factual question for the jury. Woolums v. Nat'l RV, 530 F. Supp. 2d 691, 701 (M.D. Pa. 2008); *see also* Strickler v. Peterbilt Motors Co., No. Civ. A. 04-3628, 2005 WL 1266674, at *4 (E.D. Pa. May 27, 2005). Aggregating the total repairs, including multiple repair attempts on each Ford repair visit and the total amount of repair time, a reasonable juror could determine that the delay in supplying the remedy and the amount of

attempts to remedy the defects results in Ford's warranty failing its essential purpose.

Ford isn't entitled to summary judgment on this record.

Conclusion

For these reasons, the court DENIES Thor's summary judgment motion [Doc. No. 41], DENIES Ford's summary judgment motion [Doc. No. 44], and DENIES Thor's motion to exclude the testimony of Dennis Bailey [Doc. No. 47].

SO ORDERED.

ENTERED: September 6, 2022

/s/ Robert L. Miller, Jr.
Judge
United States District Court

APPENDIX A

Defect Description	Number of Repair Attempts Alleged by the Plaintiff	Fixed or Not Fixed	Covered by Warranty?
1. Driver's Side Window Hard to Open	2x	Not fixed	Yes
2. Radio requires an object to turn on for use	0	N/A	No
3. Rear Differential is leaking fluid	0	N/A	No
4. Inverter not secured to wall	0	N/A	No
5. Scratch on passenger side of motor home	1x	Not fixed	No
6. Scratch on driver's Side out	2x	N/A	No
7. Scratch on driver's side rear at top	2x	N/A	No
8. Sunshade does not come down completely at front window	0	N/A	Yes
9. Back awning over deck does not open correctly	1x	Not fixed	Yes
10. Shower Leaks into basement/bathroom floor	3x	Not fixed	Yes
11. Pantry not repaired correctly	1x	Not Fixed	Yes
12. Water temperature doesn't stay hot at kitchen sink	1x	Not Fixed	Yes
13. Inverter doesn't show display	0x	N/A	No
14. Solar panel doesn't work as designed	0x	N/A	No

15. Passenger side front wheel missing center decorative hub cover	0x	N/A	Yes
16. Paint flaw on passenger side ramp door	0x	N/A	No
17. Passenger side ramp door has gap at bottom	0x	N/A	Yes
18. Cover for fuse/breaker panel missing	0x	Not Fixed	Yes
19. Tray on passenger side cracked	0x	N/A	Yes
20. Sealant on roof cracked	1x	Not Fixed	Yes
21. Wall border tape in bathroom is wrinkled	2x	Fixed	Yes
22. Paint chips on rear ramp door	0x	N/A	No
23. Front hood latch will not allow the door to open	0x	N/A	Yes
24. Front dash air conditioner does not work	1x	N/A	Yes
25. Daylight visible at accelerator pedal	0x	N/A	Yes
26. Driver's side slide out	3x	Not Fixed	Yes
27. Shower Molding coming out	1x	Not Fixed	Yes
28. Couch has cut/slit	1x	Not Fixed	Yes
29. Crooked cup holder in garage couch	1x	Not Fixed	Yes
30. Garage doorknob stopper missing	1x	Not fixed	Yes
31. Diamond shield coming off	1x	Not Fixed	Yes
32. Pleather shelf ripping	1x	Fixed	Yes

33. Software recall	1x	Fixed	Yes
34. Cabinet hinge broken	1x	Fixed	
35. Outlets inoperative	1x	Fixed	Yes
36. Vents not blowing air	1x	Fixed	Yes
37. Entry door won't stay closed	2x	Not fixed	Yes
38. Microwave blowing breaker	1x	Not fixed	Yes
39. Drawers open during transit	3x	Not fixed	Yes
40. Vinyl floor lifting	2x	Not fixed	Yes
41. Excessive sawdust falling out of areas	1x	Not fixed	Yes
42. Floor registers not properly sealed	1x	Fixed	Yes
43. Bathroom faucet loose	2x	Fixed	Yes
44. Bed off track	2x	Fixed	Yes
45. Panels Loose	1x	Fixed	Yes
46. Passenger side cup holder cracked	1x	Fixed	Yes
47. Bathroom fan inoperative	1x	Not fixed	Yes
48. Bunk netting pulled away	1x	Not fixed	Yes
49. Lug nut missing	1x	Not fixed	Yes
50. Ceiling trim falling down	1x	Fixed	Yes
51. Molding over tv falling down	1x	Not fixed	Yes
52. Flat panel above fridge falling off	1x	Fixed	Yes

53. Can see light through kitchen ceiling fan	1x	Not fixed	Yes
54. Molding behind toilet pulling away	1x	Not fixed	Yes
55. Bathroom wallpaper wrinkled and peeling	2x	Not fixed	Yes
56. Molding around garage A/C coming off	2x	Not fixed	Yes
57. Passenger side compartment lock inoperative	1x	Fixed	Yes
58. Compartment door missing spring	1x	Fixed	Yes
59. Bubble under window sink	1x	Fixed	Yes