IN THE COURT OF APPEALS OF IOWA

No. 9-582 / 08-1195
Filed November 12, 2009

CAR WASH CONSULTANTS, INC.
Plaintiff-Appellee/Cross-Appellant,

vs.

BELANGER, INC.,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

A manufacturer of automated car wash equipment appeals the judgment entered in favor of a distributor of that equipment on a jury verdict. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Robert M. Hogg and Patrick T. Roby of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellant.

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellee.

Heard by Vaitheswaran, P.J., Mansfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MANSFIELD, J.

This dispute between a manufacturer and a reseller of automated car wash equipment presents a number of interesting issues under Iowa's version of the Uniform Commercial Code. *See* Iowa Code ch. 554 (2005). Upon our review, we conclude that the district court erred in only one respect: It should not have submitted the reseller's claim for lost profits with respect to a location other than the one the parties actually contracted for. Accordingly, we affirm in part, reverse in part, and remand.

I. Facts and Proceedings.

From the evidence presented at trial, a rational juror could find the following facts: In 2003 James Angstman and Darryl High wanted to open a new automatic/self-serve car wash facility located at the intersection of C Street SW and Ely Road on the outskirts of Cedar Rapids. They formed Iowa Wash, L.L.C., and looked into various manufacturers of automated car wash systems, ultimately settling on equipment manufactured by Belanger, Inc. Belanger makes a complex piece of touchless car washing equipment featuring dual robotic spray arms. Belanger sells this equipment under the trademark "Vector." One advantage of the Vector over competitive systems is that the car moves more quickly through the automated wash process, thereby allowing more customers to be served in a given time period.

Belanger referred Iowa Wash to Car Wash Consultants, Inc. (CWC), their local dealer. CWC had installed several Belanger Vectors at locations in Missouri. Kirk Knickerbocker of CWC contacted Angstman. Thereafter,

Knickerbocker informed Belanger that Iowa Wash was a large company looking at building multiple sites throughout Iowa.

CWC provided Iowa Wash with a written site projection showing annual gross income and annual gross expenses, explaining, however, that "[i]n no way does CWC, Inc. profess these Income and Expense Projections to be any type of guarantee." Iowa Wash also advised CWC that they were interested in opening multiple car wash sites in Iowa that would be "cookie cutters." At one point, Angstman and High met Knickerbocker at a separate Johnson Avenue location. Knickerbocker was told that Iowa Wash was in negotiations to buy that site.

Subsequently, in April 2004, Iowa Wash entered into a written contract to purchase the equipment and supplies for the C Street car wash from CWC. In addition to a Belanger automatic unit (the Vector), the car wash was to include three self-service bays. For these bays, CWC sold Iowa Wash self-service equipment made by a different manufacturer. CWC also agreed to perform certain installation services for the car wash, although a licensed electrician and a licensed plumber were used when required.

Once the car wash went into operation in the fall of 2004, certain problems arose. Initially, there were "shuttle jams," although these were corrected. Later, the Vector unit would stop for no apparent reason. On one occasion a customer entered the automated car wash because the "enter" light said he could do so, but his vehicle bumped into the Vector's arms and was damaged. Iowa Wash

complained to both Belanger and CWC.[1] Finally, Iowa Wash demanded that Belanger take the automated system back.

Iowa Wash reached a settlement with Belanger, under which Belanger took its Vector back, paid for electrical and plumbing rework to reinstall a different manufacturer's unit, and also compensated Iowa Wash for downtime during the removal and reinstallation. Notwithstanding the settlement,[2] Belanger takes the position that its equipment was not defective, but that the problems were due to faulty wiring, plumbing, and heating onsite in Cedar Rapids—matters in which it was not involved. Belanger argued that CWC had improperly installed the low voltage lines close to the high voltage lines, resulting in interference that adversely affected the operation of the Vector.[3]

Belanger sold its equipment pursuant to a "Standard Equipment Warranty." Under that warranty, Belanger warranted to the original purchaser that its equipment "shall be free from defects in workmanship and material under normal use and service for a period of 1 year plus 30 days from the date of invoice." According to the document, defective parts are warranted for repair or replacement for thirteen months, but the labor to repair or replace parts is warranted for only 120 days. The warranty also provides,

---

[1] Despite this, as of February 2005, Iowa Wash was still looking into a possible Vector for the Johnson Avenue location. Ultimately, Iowa Wash did open a car wash on Johnson Avenue, but without the involvement of CWC and without using Belanger equipment.

[2] A Belanger witness testified at trial that this was the only time Belanger had taken a Vector back. Belanger resold the used unit to a different customer, and it was reported to be running smoothly.

[3] A Belanger technical support representative testified that he visited the location in February 2005, and that the wiring was the "worst" he had ever seen. He did some rewiring and was able to run at least ten cars through flawlessly. However, the record indicates there were some problems even after that date.

> In no event shall Seller be liable for any incidental, special, consequential or exemplary damages resulting from the furnishing, performance or use of any goods or services sold pursuant hereto, whether due to a breach of contract, breach of warranty, the negligence of Seller or to otherwise; not for loss of business . . . .

Finally, at the bottom, in conspicuous language, the warranty provides, "THIS LIMITED WARRANTY FOR EQUIPMENT AND REPLACEMENT PARTS IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WHETHER STATUTORY OR OTHERWISE, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABIILTY OR FITNESS FOR A PARTICULAR PURPOSE."

On December 11, 2006, CWC sued Belanger for breach of contract, breach of express warranties, breach of implied warranties, and negligence. CWC contends that Belanger's shipment of a defective and malfunctioning Vector unit caused CWC to incur out-of-pocket expenses, and also to lose the Iowa Wash account, resulting in a significant loss of business. Belanger answered and counterclaimed, seeking indemnification from CWC for the costs of its settlement with Iowa Wash.

Trial took place from February 4 to 8, 2008. The district court granted Belanger's motions for directed verdict on CWC's breach of express warranty and negligence claims, and CWC never requested that its breach of contract claim be submitted to the jury. However, the district court denied CWC's motion for directed verdict on the implied warranty of merchantability claim. The district court also granted Belanger's motion for directed verdict regarding lost profits in part, disallowing damages for locations other than C Street and Johnson Avenue.

After deliberations, the jury found that Belanger breached the implied warranty of merchantability and awarded CWC $3,465.25 in out-of-pocket losses, $54,000 in lost profits in connection with servicing the Vector at C Street, and $52,066.34 in connection with future business at Johnson Avenue. The jury denied any relief to Belanger on its counterclaim.

Belanger appeals. It argues: (1) there was insufficient evidence that its equipment was defective and therefore breached the implied warranty of merchantability; (2) the implied warranty of merchantability did not extend to CWC, but only to the ultimate customer, Iowa Wash; (3) even if potentially applicable, the implied warranty of merchantability was disclaimed by Belanger; (4) the lost profits awards were too remote and speculative and also should have been foreclosed by Belanger's exclusion of consequential damages; and (5) a new trial should be granted because the verdict as a whole was not supported by sufficient evidence. CWC cross-appeals, arguing that the district court erred in not submitting its express warranty claim to the jury. For the reasons set forth herein, we reject all claims of error except Belanger's assertion that the lost profits claim for the Johnson Avenue location should not have been submitted to the jury.

II. Analysis.

A. Standard of Review.

We review the district court's rulings on a motion for directed verdict for the correction of errors at law. Iowa R. App. P. 6.4 (2008); *Easton v. Howard*, 751 N.W.2d 1, 5 (2008); *Felderman v. City of Maquoketa*, 731 N.W.2d 676, 678 (Iowa 2007).

> In reviewing such rulings, we view the evidence in the light most favorable to the nonmoving party to determine whether the evidence generated a fact question. To overcome a motion for directed verdict, substantial evidence must exist to support each element of the claim or defense. Substantial evidence exists if reasonable minds could accept the evidence to reach the same findings.

Yeates v. Iowa W. Racing Ass'n, 721 N.W.2d 762, 768 (Iowa 2006).

The parties agree that this case is governed by Article 2 of the Uniform Commercial Code (UCC). *See* Iowa Code § 554.2101. This article provides that a merchant seller of goods, such as car wash equipment, makes an implied warranty of merchantability, unless the warranty is "excluded or modified." *Id*. § 554.2314. To be merchantable, the goods must at least "pass without objection in the trade under the contract description" and be "fit for the ordinary purposes for which such goods are used." *Id*.

B. Scope of Implied Warranty Obligation under the UCC.

According to comment 1 to section 2-314 of the UCC, "the warranty of merchantability applies to sales for use as well as sales for resale." *See Barney Mach. Co. v. Cont'l M.D.M., Inc.*, 434 F.Supp. 596, 600 (W.D. Pa. 1977) (relying on this comment to hold that a reseller may rely upon the warranty of merchantability). Hence, we disagree with Belanger's contention that the implied warranty of merchantability may extend only to Iowa Wash as the ultimate customer and not to the "value added reseller," CWC.

C. Evidence of Breach of Implied Warranty of Merchantability.

Moreover, CWC presented sufficient evidence that Belanger breached the implied warranty of merchantability. *See Renze Hybrids, Inc. v. Shell Oil Co.*, 418 N.W.2d 634, 638 (Iowa 1988) (indicating that the defective nature of the

goods may be proved by circumstantial evidence); *Van Wyk v. Norden Labs., Inc*., 345 N.W.2d 81, 87 (Iowa 1984) (same). As noted, even after the Belanger technical representative arrived in February 2005 and did some rewiring, problems with the Vector unit remained. Also, it was undisputed at trial that Belanger ultimately took the Vector back and paid certain compensation to Iowa Wash. In the absence of a limiting instruction, the jury was entitled to infer that Belanger took these actions because there was something wrong with its equipment.

D. Applicability of Warranty Disclaimer.

This brings us to Belanger's argument that CWC's implied warranty claim should not have been submitted to the jury anyway because that warranty was properly disclaimed. Under Iowa Code section 554.2316(2), "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous." Here Belanger's standard equipment warranty provided, in all capital letters, that "THIS LIMITED WARRANTY FOR EQUIPMENT AND REPLACEMENT PARTS IS EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WHETHER STATUTORY OR OTHERWISE, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE." We believe this language meets the requirements of Iowa Code section 554.2316(2) and normally would be effective to disclaim the implied warranty of merchantability. *See* Iowa Code § 554.1201(2)(j) (defining "conspicuous"); *All-Iowa Contracting Co. v. Linear Dynamics, Inc.*, 296 F. Supp.

2d 969, 980 (N.D. Iowa 2003) (enforcing disclaimer of implied warranty of merchantability).

CWC contends, however, that this disclaimer of warranties was only effective as to Iowa Wash. In CWC's view, Belanger cannot argue simultaneously (1) the affirmative warranty contained in the "Standard Equipment Warranty" extended only to Iowa Wash and (2) the disclaimer therein applied to *both* Iowa Wash *and* CWC.

Although neither party cites any legal authority on this issue, we are aware of three prior decisions that appear to support CWC's position. In *Hydra-Mac, Inc. v. Onan Corp*., 450 N.W.2d 913, 917 (Minn. 1990), the Minnesota Supreme Court decided that a disclaimer of warranties was not enforceable as to an entity that did not receive the benefits of the limited warranty. In that case Onan sold allegedly defective engines to Hydra-Mac that were incorporated into skid loaders. *Hydra-Mac, Inc.*, 450 N.W.2d at 915-16. The engines came with an express, limited warranty directed to "the original purchaser of goods for use," and a disclaimer of all implied warranties. *Id*. at 916. Hydra-Mac argued that it was not subject to the disclaimer because it was not the purchaser of the goods "for use." *Id*. The court agreed:

> [Onan] further contends that although the limited warranty does not apply to Hydra-Mac, the rest of the provision, the disclaimer, does. We reject this contention. The disclaimer language is actually a portion of the limited warranty provision and appears to be intended to apply only [to] the ultimate consumer. To claim that the rest of the disclaimer applies to Hydra-Mac, a party that is not an ultimate user and not covered by the disclaimer, appears to us to be illogical.

Id. at 917.

Similarly, in *Harbourview Yacht Sales, L.L.C. v. Ocean Yachts, Inc*., 500 F. Supp. 2d 462, 466-67 (D.N.J. 2007), which involved a dispute between a yacht manufacturer and a yacht dealer, the court declined to enforce the manufacturer's warranty disclaimers against the dealer, after concluding that the manufacturer's limited warranty did not extend to the dealer. And, in *JM McCormick Co., Inc. v. International Truck & Engine Corp.*, No. 1:05-cv-146-RLY-TAB, 2007 WL 2904825, (S.D. Ind. Sept. 28, 2007), the court held that a manufacturer of plywood for buses could not assert a warranty disclaimer against its immediate customer, i.e., the bus manufacturer, because the warranty itself extended only to bus purchasers. As the court explained:

> Considering the warranty as a whole and giving effect to each provision, the court finds that McCormick's limited warranty does not apply to International Truck. As such, McCormick's disclaimer of the implied warranties of merchantability and fitness for a particular purpose is not effective against International Truck and does not bar its breach of warranty claims against McCormick.

JM McCormick Co. at *12.

We believe these decisions may be somewhat overstated. It is not necessarily "illogical" for a manufacturer's warranty disclaimer to apply to an intermediary, even though the intermediary may not be receiving the benefits of the manufacturer's limited warranty. An entity that is only temporarily taking title to the goods, and then reselling them, could be regarded as having a better opportunity to manage its exposure, thus needing fewer legal protections. Additionally, if CWC's reading of this disclaimer were correct, any disappointed purchaser could simply take an assignment of the reseller's rights, thereby circumventing any disclaimer. As one treatise has said, "When the manufacturer

sells the goods to a dealer who resells the goods to the ultimate purchaser, the dealer cannot sue the manufacturer if the manufacturer includes in the contract a disclaimer of warranties that satisfies UCC § 2-316." *3A Lary Lawrence, Lawrence's Anderson on the Uniform Commercial Code*, § 2-316:155 (3d. Ed.).

Furthermore, the disclaimer language is broad and purports to eliminate "*ANY* IMPLIED WARRANTY OF MERCHANTABILITY." (Emphasis added.) While the affirmative warranty language is limited by its terms to "the original purchaser," the disclaimer is not.

However, we ultimately conclude that in this case, Belanger's limited warranty was open to two reasonable but differing interpretations. The document begins with the heading, "LIMITED WARRANTY." One might conclude that all subsequent language in the document, including the disclaimer, was qualified by that initial heading and thus applied only to parties that were beneficiaries of the limited warranty. Or, one might conclude that the disclaimer, because of its expansive wording, applied to everyone, including the initial recipient of the document, CWC. When a contract is ambiguous and is subject to two reasonable and differing interpretations, interpretation is generally a question of fact, and it is not the role of the court of appeals to substitute its own judgment. *See Walsh v. Nelson*, 622 N.W.2d 499, 504 (Iowa 2001). Because we cannot say as a matter of law that Belanger disclaimed the implied warranty of merchantability as to CWC, we decline to disturb the district court's decision to submit that claim to the jury.[4]

[4] Because we have upheld the district court's submission of the implied warranty claim to the jury, we need not reach the merits of CWC's cross-appeal, wherein it contends that

E. Lost Profits Award.

Next, Belanger contends the district court erred in denying its lost profits motion for directed verdict in part, thereby allowing the jury to award CWC lost profits for both the C Street and the Johnson Avenue sites. At the outset, Belanger points out that its "Standard Equipment Warranty" also contains a separate exclusion of consequential damages: "In no event shall Seller be liable for any incidental, special, consequential or exemplary damages resulting from the furnishing, performance or use of any goods or services sold pursuant hereto . . . ." Such exclusions are enforceable unless they are unconscionable. *See* Iowa Code § 554.2719(3) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable."). Lost profits are a form of consequential damages. *Boone Valley. Coop. Processing Ass'n v. French Oil Mach. Co.*, 383 F. Supp. 606, 610 (N.D. Iowa 1974) (holding that lost profits are a form of consequential damages and cannot be recovered when there is a valid exclusion of consequential damages).

However, this exclusion of consequential damages is subject to the same dual interpretation as the disclaimer of warranties was. Standing alone, the exclusion certainly appears broad enough to eliminate any liability for consequential damages. However, it is also part of a document that begins with the heading "LIMITED WARRANTY." That limited warranty, in turn, benefits only "the original purchaser," i.e., Iowa Wash. Accordingly, given the ambiguity as to whether the consequential damages exclusion applies to all parties in the chain

---

its express warranty claim also should have gone to the jury. CWC concedes that its recovery under breach of express warranty would be identical to that under breach of implied warranty.

of title or just Iowa Wash, we find the district court did not err in refusing to grant Belanger a directed verdict on this ground.

Yet Belanger also maintained below, and maintains here, that the lost profits were simply too speculative and remote. The jury awarded CWC $54,000 in lost profits in connection with servicing the Vector at C Street and $52,066.34 in lost business at the Johnson Avenue location. Kirk Knickerbocker testified that at each location he could make about $15,098.56 a year on supplies and labor. He also testified that CWC would have received a $34,866.32 profit on the sale of a Vector at Johnson Avenue. CWC's theory was that the defect in the Vector shipped to C Street ruined the Belanger/CWC/Iowa Wash relationship, and brought about this loss of business.

"In a proper case," consequential damages may be awarded for a seller's delivery of nonconforming goods that the buyer has accepted. *See* Iowa Code § 554.2714(3). Consequential damages include "any loss resulting from . . . needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise . . . ." *Id*. § 554.2715(2).[5] Limitations on consequential damages under the U.C.C. embrace two concepts: The damages must be reasonably foreseeable at the time of contracting, and they must be proved with reasonable certainty. *See Shinrone, Inc. v. Tasco, Inc*., 283 N.W.2d 280, 285-86 (Iowa 1979) (noting and discussing both limitations).

[5] This section is the Uniform Commercial Code's take on the venerable rule of *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Court of Exchequer 1854), which generally holds that consequential damages must have been reasonably foreseeable at the time of contracting either because they would flow naturally from the breach or because they had been brought to the other party's attention at that time.

Belanger argues that the lost profits claimed by CWC in this case were neither reasonably foreseeable at the time of contracting nor proved with reasonable certainty. Belanger points to Angstman's trial testimony that Iowa Wash was so fed up with CWC there was "no" possibility it would have done future business with it. Belanger also notes the large volume of evidence that CWC was responsible for at least some of the problems at the C Street location. CWC, on the other hand, points to a January 2003 e-mail where it advised Belanger that Iowa Wash was "very interested in building multiple locations," maintaining that this put Belanger on notice of potential lost profits at other locations. CWC also points out that Knickerbocker actually visited the Johnson Avenue location with Iowa Wash representatives before shipping the Vector for C Street (although there is no evidence *Belanger* knew of this meeting). Additionally, CWC comments that a jury was entitled to take Angstman's testimony about dissatisfaction with CWC with a grain of salt. By the time of trial, Belanger had made peace with Angstman's company, and a December 2004 survey indicated that Iowa Wash was reasonably pleased with CWC's service. Finally, CWC points out that on February 17, 2005, the day after Belanger's technical representative arrived and performed work, Angstman e-mailed Belanger to ask about the longevity of the equipment because it was looking at fifteen-year financing for the next location.

Although every case stands on its own facts, courts often reject "loss of a customer" theories of consequential damages on the ground that they are too speculative. *See* Lary Lawrence, *3A Lawrence's Anderson on the Uniform Commercial Code*, § 2-715:97 (3d. Ed.); *Harbor Hill Lithographing Corp. v. Dittler*

Bros., Inc., 348 N.Y.S.2d 920, 924 (N.Y. Sup. Ct. 1973) (holding that buyer was "not entitled to recover lost profits resulting from the loss of the entire Barnell account, claimed as a result of this brochure embroglio"). CWC's theory with respect to Johnson Avenue requires a number of inferential leaps. One would have to assume that but for the defect in Belanger's Vector, whatever it was, Iowa Wash would have opted for another Vector at the next location and would have been able to arrange satisfactory financing for it (a consideration apparently important to it). One would also have to assume that Iowa Wash would have forgiven the other problems it had with CWC at the C Street location unrelated to the Vector, such as its overstated financial projections and the unsatisfactory heating system, and continued to work with it. *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F.Supp. 91, 99 (E.D. Tenn. 1977) ("The Court finds that Island Lake had nothing more than a hope that General Motors would continue to purchase coal from it. Whatever hope existed was diminished in part by Jackson's own conduct. Under these circumstances, the Court finds that Island Lake did not lose its so-called 'contracts' as a proximate result of any alleged breach by Kopper Glo.").

Moreover, there is no evidence that Belanger was aware of the contemplated Johnson Avenue location at the time of contracting. CWC can point only to prior, general communication it had with Belanger, advising it that Iowa Wash was "very interested in building multiple locations." This effort by a sales representative to talk up the importance of a nascent, potential customer is not sufficient, in our view, to trigger potential consequential damage liability for other, separate transactions under Iowa Code section 554.2715(2). Thus, while

we uphold the full award of damages with respect to the C Street location, we find the Johnson Avenue damages were too speculative and remote and, therefore, the issue should not have been submitted to the jury.

The district court viewed whether the Johnson Avenue profits should have been submitted to the jury as a close question. Following the presentation of the plaintiff's case, the district court commented, "At this point I'm not going to strike the claim for future profits at Johnson Avenue, though I may reconsider that." In its post-trial written ruling, the district court stated, "The issue of future profits from the facility on Johnson Avenue is not as clear [as C Street]." Ultimately, while there is much to be said for the court's thorough and thoughtful ruling, we believe the court may have given undue weight to CWC's knowledge of Iowa Wash's future plans, rather than focusing on Belanger's knowledge at the time of contracting, which was the critical consideration under Iowa Code section 554.2715(2).[6]

III. Conclusion.

For the reasons stated, we affirm the judgment below, except we reverse the award of $52,066.34 in damages for future business at Johnson Avenue, and remand for further proceedings consistent herewith.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

[6] We hold that the district court did not err in denying Belanger's motion for new trial. Aside from the lost profits award for Johnson Avenue, which we are reversing, we believe the verdict in favor of CWC was supported by substantial evidence and effectuated substantial justice. *Johnson v. Knoxville Cmty. Sch. Dist*., 570 N.W.2d 633, 635 (Iowa 1997).