STATE OF MICHIGAN

COURT OF APPEALS

MERYLAND HARRIS,

Plaintiff-Appellant,

v

FORD MOTOR COMPANY and DIAMOND LINCOLN-MERCURY, INC.,

Defendants-Appellees.

UNPUBLISHED
February 11, 2000

No. 210096
Wayne Circuit Court
LC No. 96-646282-CK

Before: Bandstra, C.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendants' motion for directed verdict. See MCR 2.515. We affirm.

On June 27, 1996, plaintiff purchased a 1996 Mercury Sable from Diamond Lincoln-Mercury, Inc. (Diamond). Immediately after plaintiff took the car off the lot, plaintiff noticed a "grunting" noise when she turned the car to the right. Plaintiff notified Diamond and brought the car back the following Monday to have the car repaired. However, Diamond was unable to repair the noise at that time. Plaintiff returned to Diamond concerning the noise on July 22, 1996, and at that time Diamond ordered parts for the car. On July 30, 1996, Diamond informed plaintiff that Ford Motor Company, the manufacturer of the Sable, had issued a Technical Service Bulletin concerning the "grunting" problem and indicated that the noise was an engineering problem that Ford was working to correct. Plaintiff then began to communicate with Ford concerning the problem. Plaintiff ultimately demanded that Ford replace or buy back her car because the car was a "lemon." Plaintiff made several more trips to Diamond concerning the noise before Diamond replaced the power steering hose on October 11, 1996. However, Diamond's corrective repair did not stop the noise.

On November 12, 1996, plaintiff filed an eleven-count complaint against defendants alleging, *inter alia*, violations of implied and expressed warranties, revocation of acceptance, violation of the Michigan consumer protection act (MCPA), MCL 445.901; MSA 19.418(1), and violation of the New Motor Vehicle Warranties Act (lemon law), MCL 257.1401 *et seq*.; MSA 9.2705(1) *et seq*.

In May 1997, plaintiff took the car to Star Lincoln Mercury regarding the noise. Star replaced a leaking power steering hose, but the repair did not abate the noise. On August 11, 1997, plaintiff returned to Star concerning the noise. Plaintiff was requested to leave the car or return the next week, plaintiff did neither.

A jury trial commenced on January 26, 1998, at which time plaintiff testified that she worried about her safety while in the car and that she had lost confidence in the car. Plaintiff also testified that the noise had substantially impaired the value and use of the car to her. However, she continued to use the car without incident. Plaintiff's only other witness, an expert in the field of automobile mechanics, testified that the car made a "grunting" noise and that the steering column vibrated when it made a right turn greater than ninety degrees, but that the noise did not always occur. The witness, however, was unable to determine whether the noise and vibration constituted a safety concern.

Following plaintiff's case in chief, the trial court granted defendants' oral motion for directed verdict. With regard to the lemon law and revocation counts, the court found plaintiff failed to established a substantial impairment of value or use of the vehicle. With regard to the warranty claims, the court found that the condition was repairable and that neither Ford nor Diamond violated any warranty. The trial court also dismissed the claim under the Michigan consumer protection act because plaintiff failed to prevail on the other counts.

This Court reviews the grant or denial of a directed verdict de novo. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). This Court reviews all the evidence presented up to the time of the motion to determine whether a question of fact existed. In doing so, this Court views the evidence in the light most favorable to the nonmoving party and grants him every reasonable inference and resolves any conflict in the evidence in his favor. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 325; 535 NW2d 272 (1995).

Plaintiff first argues that the trial court erred by directing a verdict on the lemon law claim. Under the lemon law,[1] a manufacturer must repair or replace a new motor vehicle if it "has any defect or condition that impairs the use or value of the new motor vehicle to the consumer or which prevents the new motor vehicle from conforming to the manufacturer's express warranty." MCL 257.1402; MSA 9.2705(2). Section 3 of the act provides:

> If a *defect or condition* which was reported to the manufacturer or new motor vehicle dealer pursuant to section 2 continues to exist and the new motor vehicle has been *subject to a reasonable number of repairs* as determined under subsection (3), the manufacturer shall within 30 days have the option to either replace the new motor vehicle with a comparable replacement motor vehicle currently in production and acceptable to the consumer or accept return of the vehicle and refund to the consumer the full purchase price . . . less a reasonable allowance for the consumer's use of the vehicle. [MCL 257.1403(1); MSA 9.2707(3)(1) (emphasis added).]

Under subsection (3) of the act, there are two methods of determining what is a reasonable number of repairs. Under the first method, the method at issue in this case, it is presumed that a reasonable number of attempts have been made if:

> The same defect or condition that *substantially impairs the use or value of the new motor vehicle to the consumer* has been subject to repair a total of 4 or more times by the manufacturer or new motor vehicle dealer and the defect or condition continues to exist. [MCL 257.1403(3)(a); MSA 9.2705(3)(a)(emphasis added).]

Although the term "substantial impairment" has not been interpreted in the context of § 3(a), in *Colonial Dodge, Inc, v Miller*, 420 Mich 452; 362 NW2d 704 (1985), the Court interpreted the term "substantial impairment" in MCL 440.2608(1)(b); MSA 19.2608(1)(b) of the Uniform Commercial Code, which governs revocation of acceptance of nonconforming goods. The Court held that "in order to give effect to the statute, a buyer must show the nonconformity has a special devaluing effect on him and that the buyer's assessment of it is factually correct." *Id*. at 458. This test has both a subjective and objective element. The subjective element is that the nonconformity has a "devaluing effect on him," and the objective element is that the buyer's belief in the devaluing effect is factually correct.

Here, plaintiff had a subjective belief that the value of the car was diminished as a result of the noise. However, plaintiff did not present any evidence that her belief was factually correct. *Id.* at 458. Plaintiff did not make any attempt to sell or value the car, nor did she present any evidence that the car's value was diminished as a result of the occasional noise. Viewing the evidence in the light most favorable to plaintiff, plaintiff presented no evidence that would permit a reasonable jury to conclude that plaintiff's belief that the noise had a devaluing effect is factually correct.

Further, plaintiff offered no evidence to support her subjective belief that the use of the car was substantially impaired. Indeed, on cross-examination, plaintiff admitted that the car was reliable. See *Colonial*

Dodge, *supra* at 458. Unlike *Colonial Dodge*, where the missing spare tire created a "reasonable" fear of being stranded on a Detroit highway in the middle of the night, *id*. at 459, here there was no testimony that established that the occasional noise was potentially dangerous or unsafe. Plaintiff's own expert testified that he could not say for sure that there was a safety concern. Furthermore, the witness did not find enough of a safety concern to warn plaintiff not to drive the car. Viewing the evidence most favorably to plaintiff, plaintiff failed to present evidence from which a reasonable jury could conclude that the defective condition of the car substantially impaired plaintiff's use of the car. Therefore, the trial court did not err in granting defendants' motion for directed verdict on the lemon law claim.

Plaintiff also argues that the court erred by directing a verdict on the revocation of acceptance claim. Under the Michigan Uniform Commercial Code, a buyer may revoke his acceptance of a nonconforming good if its nonconformity substantially impairs its value to him if he has accepted it:

> (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances. [MCL 440.2608(1); MSA 19.2608(1).]

As noted above, plaintiff has failed to present evidence to support her contention that the noise substantially impaired the value of the car to her.

Plaintiff next asserts that the court erred by directing a verdict on the warranty claims. With plaintiff's purchase of the car, she received a three-year/36,000 mile bumper-to-bumper warranty. Plaintiff alleges that both implied and express warranties were given to her, and that the warranties failed of their essential purpose because defendants were unable to abate the noise. See MCL 440.2719(2); MSA 19.2719(2); *Krupp PM Engineering, Inc v Honeywell, Inc*, 209 Mich App 104, 109; 530 NW2d 146 (1995). We disagree. Defendants continued to attempt to fix the noise made by the car, and testimony indicates that there is a remedy to the problem that has fixed other 1996 Sable "grunting" noises. Plaintiff has refused to allow defendants to attempt to remedy the problem since her August 11, 1997, visit to Star. Although plaintiff has suffered with the noise in the car, she has not had a loss of use of the vehicle nor has there been evidence that the noise creates a safety problem.

Lastly, plaintiff's argues that the trial court erred by directing a verdict of the Michigan consumer protection act claim. We disagree. Both parties stipulated that, for plaintiff to succeed on the MCPA act, she would have to prevail on either the lemon law, revocation of acceptance, and/or warranty claims. Because the trial court properly granted a directed verdict on each of those claims, the trial court properly dismissed the claim under the MCPA.

Affirmed.

/s/ Richard A. Bandstra
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] This case was tried before the amendment of § 3. See 1998 PA 486, effective January 4, 1999. All statutory references to § 3 in this opinion are to the former version of the statute.