STATE OF MICHIGAN

COURT OF APPEALS

GREENFIELD DIE & MANUFACTURING CORPORATION,

Plaintiff-Appellant/Cross-Appellee,

v

JOHN H. POWERS, INC.,

Defendant,

and

CAPTIVE FASTENER CORPORATION,

Defendant-Appellee/Cross Appellant.

UNPUBLISHED

August 1, 2000

No. 213293
Wayne Circuit Court
LC No. 96-639805-CK

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant Captive Fastener Corporation pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). Defendant Captive cross appeals, challenging the trial court's denial of an earlier motion for summary disposition. We affirm in part, reverse in part and remand for further proceedings.

We review a trial court's decision on a motion for summary disposition de novo. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994).

Turning first to defendant Captive's cross appeal, we find no error in the trial court's denial of Captive's first motion for summary disposition. Contrary to what Captive argues, privity of contract is not required in order for a plaintiff to maintain an action for breach of warranty under the UCC. *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 342; 480 NW2d 623 (1991); see also *Piercefield v Remington Arms Co*, 375 Mich 85, 98; 133 NW2d 129 (1965); *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38-39; 536 NW2d 815 (1995); *Auto-Owners Ins Co v Chrysler Corp*, 129 Mich App 38, 43-44; 341 NW2d 223 (1983). This rule applies even where, as

here, the loss claimed is purely economic. *Sullivan*, *supra* at 342; see also *Cova v Harley Davidson Motor Co*, 26 Mich App 602, 608-609; 182 NW2d 800 (1970). Accordingly, the trial court properly denied Captive's first motion for summary disposition.

In its principal appeal, plaintiff argues that the trial court erred in granting Captive's motion for summary disposition on the basis that a course of dealing between Captive and John H. Powers, Inc., operated to exclude warranties and limit remedies that would otherwise be available to plaintiff. We agree.

There was no direct evidence that Captive sent the pertinent acknowledgment form to Powers after it placed plaintiff's order. Thus, there is no direct proof that an express contract existed in this case which potentially incorporated the exclusionary language contained in the acknowledgment form. Thus, we need not decide whether any such language was or should have been conspicuous, nor whether Powers agreed to any exclusions by failing to object. See MCL 440.2316(2); MSA 19.2316(2) (modification of warranties); MCL 440.2719; MSA 19.2719 (limitation of remedies); MCL 440.1201(10); MSA 19.1201(10) ("conspicuous" requirement); see also MCL 440.2207; MSA 19.2207 and comments 4 and 5 thereto; but see *Krupp v Honeywell*, 209 Mich App 104, 108-109; 530 NW2d 146 (1995).

Rather, the principal question is whether, by virtue of Powers' and Captive's course of dealing, the exclusionary language contained in the pertinent acknowledgment form modified or excluded warranties and remedies that would otherwise be available. See MCL 440.1205(3); MSA 19.1205(3) (course of dealing); see also MCL 440.2719; MSA 19.2719; MCL 440.2316(3)(c) and (4); MSA 19.2316(3)(c) and (4).

Defendant Captive submitted an affidavit stating that an acknowledgment form (containing language excluding warranties and limiting remedies) was sent out whenever an order was to be shipped at a later date, but not when an order was filled immediately upon receipt. According to the deposition testimony of Lana-Rae Britt, however, while Captive "frequently" gave confirming POs, or acknowledgment forms, to confirm purchase orders that they have received from their customers, Captive was "inconsistent" with that practice. Further, Kenton Powers stated that he "kn[e]w there was a long time frame that Captive went without sending any acknowledgments. And prior to that, it was a hit-and-miss-type thing," although he admittedly "was seeing more of it today." The acknowledgment forms were routinely thrown out after checking the shipping schedule. Also, Mr. Powers was uncertain whether the exclusionary language contained in the subject acknowledgment form was the same as what he had received in the past.

Clearly, there was "a sequence of previous conduct between" Captive and Powers. See MCL 440.1205(1); MSA 19.1205(1). However, drawing all reasonable inferences in favor of the nonmoving party, we cannot agree that this "sequence of previous conduct" can "fairly … be regarded as establishing a common basis of understanding for interpreting" the parties' "expressions and other conduct." See MCL 440.1205(1); MSA 19.1205(1); see also *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). In particular, Powers' employees did not corroborate Captive's claim that the forms were sent out only when goods were to be shipped at a later date, but

not when orders were filled immediately. Rather, they testified only that the forms were sent out inconsistently, and showed no awareness or understanding of why or when the forms were sent or not sent. In fact, Mr. Powers himself could not say for sure that the exclusionary language was the same as that used in previous forms. We therefore conclude that reasonable minds could differ as to whether Captive's alleged practice of sending out acknowledgment forms could "*fairly* . . . be regarded as establishing a common basis of understanding for interpreting" the parties' "expressions and other conduct." See MCL 440.1205(1); MSA 19.1205(1) (emphasis added); see also *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). Because we conclude that a question of material fact exists concerning the parties' course of dealing, we find that the trial court erred in granting Captive's motion for summary disposition.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. Plaintiff may tax costs.

/s/ Harold Hood
/s/ David H. Sawyer
/s/ Mark J. Cavanagh