

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM WENZEL,

Plaintiff-Appellant,

and

IRVING GALARZA and W.W. ENTERPRISES,

Plaintiffs,

v

CHRYSLER CORPORATION and SOUTHFIELD
JEEP EAGLE, INC.,

Defendants-Appellees.

UNPUBLISHED

March 9, 2001

No. 216931

Wayne Circuit Court

LC No. 96-631812 CK

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

After a jury trial, plaintiff-appellant (hereinafter plaintiff) appeals as of right from the trial court's entry of a judgment of no cause of action in favor of defendants. We affirm.

In December 1994, plaintiff and Irving Galarza entered into a thirty-six-month lease with defendant Southfield Jeep Eagle (SJE) for a 1995 Eagle Talon manufactured by defendant Chrysler Corporation. The lease contained a bumper to bumper thirty-six-month/36,000-mile warranty, with a more limited, twelve-month/12,000-mile warranty for select items, including clutch discs.

Within the first year Galarza, for whose use the vehicle was leased, returned the vehicle to SJE for service approximately twelve times. Four of the visits involved transmission problems. After the last of these service visits, which occurred in December 1995, the vehicle ran better for a short time, but again began experiencing transmission trouble in February 1996. By March 1996, plaintiff and Galarza believed the vehicle was not driveable, and plaintiff decided to park the vehicle in storage and pursue legal action. While legal action commenced, plaintiff paid the remaining lease payments, maintained the vehicle's insurance, and eventually extended the lease by six months in an effort to preserve the vehicle as possible evidence.

At the end of the three-day jury trial, the court instructed the jury regarding plaintiffs' claims that they revoked their acceptance of the vehicle, and that defendants breached express and implied warranties. According to a request by defendants, the court also gave the following instruction regarding mitigation of damages:

THE COURT: The measure of damage for breach of warranty whether express or implied is the difference at the time and place of acceptance between the value of the use of the vehicle accepted and the value it would have had if it had been as warranted for the warranty term including any incidental and consequential damages.

A person has a duty to use every reasonable effort to minimize his damages.

It is Defendants' burden of proof to prove that Plaintiffs – to prove – It is Defendants' burden to prove its claim that Plaintiffs have failed to mitigate their damages.

It is for you to decide whether Plaintiff failed to use such efforts and, if so, whether any damage resulted from such failure.

You must not compensate the Plaintiff for any portion of their damages which resulted from their failure to use such efforts.

The jury returned a special verdict rejecting each of plaintiffs' claims.

Plaintiff contends that the mitigation instruction was improper because it imposed on plaintiffs a duty to perpetually return the vehicle for repairs, and precluded the jury from being able to find a nonconformity that would support a finding of plaintiffs' proper revocation or defendants' breach of warranty.

We review jury instructions in their entirety. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997). A trial court's decision regarding jury instructions is reviewed for an abuse of discretion. Generally, a court must read an instruction requested by a party when it is applicable and accurately states the law. *Clark v Kmart Corp*, 242 Mich App 137, 143; 617 NW2d 729 (2000), citing MCR 2.516(D)(2). Instructional error does not warrant reversal unless failing to reverse would be inconsistent with substantial justice. *Johnson v Corbet*, 423 Mich 304, 326; 377 NW2d 713 (1985).

In this case, all three requirements for MCR 2.516(D)(2) were met. The mitigation instruction given was requested by a party, was applicable to plaintiffs' contractual claim, and accurately stated the relevant law. See *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 213-214; 457 NW2d 42 (1990) ("The injured party in a contract action must make every reasonable effort to minimize his or her damages. However the burden is on the defendant to establish that the plaintiff has not used such efforts."). Accordingly, the trial court did not abuse its discretion in reading the requested mitigation instruction. *Clark, supra*.

More importantly, however, any alleged instructional error regarding plaintiffs' duty to mitigate damages was harmless. MCR 2.613(A);¹ *Johnson, supra*. The jury's special verdict expressly found that plaintiffs did not properly revoke their acceptance of the vehicle, and rejected that defendant breached either an express or implied warranty. Because the jury rested its verdict on decisions concerning liability, and thus never even reached the issue of damages, the alleged instructional error could not have affected the outcome of this case.

Affirmed.

/s/ David H. Sawyer

/s/ Kathleen Jansen

/s/ Hilda R. Gage

¹ MCR 2.613(A) provides as follows:

An error in the admission or the exclusion of evidence, an error in ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.