STATE OF MICHIGAN

COURT OF APPEALS

THOMAS M. PROSE,

Plaintiff-Appellant,

v

SUN AND SKI MARINA,

Defendant-Appellee.

UNPUBLISHED
December 9, 2004

No. 245823
Oakland Circuit Court
LC No. 94-488794-CK

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

In this action arising from the purchase of a boat, plaintiff appeals as of right, challenging the circuit court's grant of summary disposition to defendant and award of mediation sanctions. We affirm in part, and remand for further proceedings.

I. Facts

On November 1, 1990, plaintiff ordered a boat from defendant for the price of $23,772, and plaintiff gave defendant a $100 deposit. Plaintiff asserts that defendant told him that this particular boat would be perfect for him and fit for its use in recreational water-skiing and boating with his family. At that time, plaintiff signed a purchase order, acknowledging that he had read and understood the back of the agreement, which contained an exclusion of warranties provision and an integration clause. On April 24, 1991, plaintiff accepted delivery of the boat and paid the balance of the purchase price with his credit card. Plaintiff alleges that, shortly after delivery, he discovered that the gauges fogged, the boat pulled in one direction, the gas line leaked, and the upholstery was torn. There is no dispute that defendant is a designated warranty repair facility of the boat's manufacturer.

Plaintiff mailed a letter to defendant on April 29, 1991, requesting repairs in conjunction with the twenty-five hour maintenance appointment. Defendant performed service on plaintiff's boat on May 28, 1991, and plaintiff mailed defendant another letter on June 3, 1991, alleging that some items were not repaired to his satisfaction. On September 27, 1991, defendant's service manager mailed a letter to plaintiff, acknowledging his awareness of plaintiff's dissatisfaction

and offering to schedule an appointment to further service the boat. The lower court record contains no further correspondence between plaintiff and defendant until March 30, 1993,[1] when plaintiff wrote defendant a letter, claiming that defendant had not responded to plaintiff's telephone calls and letters. On April 20, 1993, plaintiff sent a letter to defendant, enclosing copies of previous correspondence and requesting service for his boat. On December 19, 1994, plaintiff filed a complaint, alleging misrepresentation/fraud, negligence, violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, revocation of acceptance, and various breach of warranty claims.

After examining the boat on its trailer in April 1996, plaintiff's expert concluded that the desired repairs totaled less than $900. This expert was unable to verify whether there was a fuel leak or a rudder problem because he did not operate the engine. Defendant's expert reached the same conclusion, estimating the cost of repairs at less than $1000. Both experts agreed that there was no substantial impairment.

Defendant filed a motion for summary disposition, which was granted in part in July 1996. Both parties filed motions for reconsideration. In June 1997, defendant filed a second motion for summary disposition on the remaining claims. On September 26, 2001, more than six years after plaintiff filed his original complaint, the trial court granted defendant summary disposition on plaintiff's remaining claims and denied reconsideration with respect to the claims that had already been dismissed. In September 2002, the trial court awarded defendant mediation sanctions in the amount of $11,446.26.[2]

II. Warranty claims

A.

Plaintiff first argues that the trial court erroneously relied on disclaimers in the purchase contract as a basis for dismissing his warranty claims because there were questions of fact concerning when he signed the contract, and the timing affects the validity of the disclaimers.

We review de novo a trial court's ruling on a motion for summary disposition. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). "In reviewing such a decision, we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine

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[1] The lower court record contains numerous items of correspondence between plaintiff and his credit card company during this period of time, as plaintiff disputed the charge. Plaintiff asserted to the credit card company that he was wiling to return the boat, but there is no evidence that he expressed this desire to defendant.

[2] MCR 2.403 was amended in 2000 to substitute the phrase "case evaluation" for the term "mediation." We will use the term "mediation" because the mediation in this case took place in 1996. In general, this Court applies the version of MCR 2.403 in effect at the time of mediation. *Haliw v Sterling Heights,* 257 Mich App 689, 695; 669 NW2d 563 (2003).

issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted).

We reject plaintiff's arguments insofar that they are based on his assertion that he did not sign the purchase contract on November 1, 1990. Plaintiff admitted in his deposition that he signed the contract "on or about" November 1, 1990. Although plaintiff later averred in an affidavit that he did not sign the purchase contract at that time, a party may not create an issue of fact by providing an affidavit that contradicts his earlier deposition testimony. *Dykes v William Beaumont Hosp,* 246 Mich App 471, 479; 633 NW2d 440 (2001).

B.

Plaintiff additionally contends that there is a question of fact concerning whether the disclaimers were "explicitly negotiated." According to plaintiff, where a party negotiates for special equipment, a presumption arises that the buyer did not consent to boilerplate disclaimers. In support of this argument, plaintiff relies on *Berg v Stromme,* 79 Wash 2d 184, 196; 484 P2d 380 (1971), wherein the Washington Supreme Court stated:

> Waivers of such warranties, being disfavored in law, are ineffectual unless explicitly negotiated between buyer and seller and set forth with particularity showing the particular qualities and characteristics of fitness which are being waived.

Plaintiff also asserts that he was "tricked" into signing the purchase contract, and maintains that Michigan "has a long history of refusing to enforce contracts where, as here, the contract is induced by fraud or artifice." In response, defendant asserts that plaintiff had a duty to read the contract and cannot invalidate it on the ground that he failed to do so.

Plaintiff's arguments do not afford a basis for appellate relief. First, they were not made before the trial court. An issue not raised before and considered by the trial court is generally not preserved for appellate review. *Adam v Sylvan Glynn Golf Course,* 197 Mich App 95, 98; 494 NW2d 791 (1992). Second, plaintiff's reliance on *Berg, supra,* is not persuasive, inasmuch as the jurisdiction from which that decision emanates has since recognized limitations to its applicability. See *Puget Sound Financial, LLC v Unisearch, Inc,* 146 Wash 2d 428, 438-439; 47 P3d 940 (2002). Third, plaintiff's assertion that he was tricked into signing the purchase contract because he thought it was merely confirming price and delivery is another attempt to contradict his deposition testimony that he signed the contract on or about November 1, 1990, and that defendant did not prevent him for reading it. For these reasons, we reject these claims of error.

C.

Plaintiff also argues that the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq,* precluded defendant from disclaiming the implied warranty of merchantability. Plaintiff relies on 15 USC 2308(a), which prohibits a "supplier" that has either made a written warranty to the consumer or entered into a service contract with the consumer from disclaiming any implied warranty. Plaintiff argues that defendant "made a written warranty" because it adopted the manufacturer's written warranty by "contractually binding itself to perform thereunder, by

incorporating the warranty into the sale, including oral representations about the Defendant's commitments under the warranty."

We decline to address plaintiff's argument that a delayed revocation is not untimely where the delay is attributable to the seller's efforts to repair. Because plaintiff did not raise this argument before the trial court, it is not preserved. *Adam*, *supra* at 98. Although this Court may review an unpreserved issue if it involves a question of law and the facts necessary for its resolution have been presented, plaintiff's adoption-of-warranty argument is based in part on oral representations and no evidence was presented on that point. *Id.* at 98-99.

D.

We decline to address plaintiff's additional arguments discussing the dismissal of the warranty claims because they are not included in the statement of the issue presented. MCR 7.212(C)(5); *Liggett Restaurant Group, Inc v Pontiac,* 260 Mich App 127, 139; 676 NW2d 633 (2003).

III. Revocation of Acceptance

Plaintiff next argues that the trial court improperly made a finding of fact in concluding that his revocation of acceptance under the Michigan Uniform Commercial Code (UCC), MCL 440.1101 *et seq.*,[3] was untimely. See MCL 440.2608(2).

The trial court's ruling reflects its conclusion that plaintiff failed to demonstrate a genuine issue of material fact concerning the timeliness of his attempted notification of revocation of acceptance. In its first motion for summary disposition, defendant asserted that plaintiff's revocation of acceptance was untimely because plaintiff failed to timely notify defendant of revocation, waiting almost four years after he was aware of the alleged problems before serving the complaint, which was defendant's first written notice that plaintiff sought revocation. In response, plaintiff asserted that the allegations were untrue and that during the course of dealings from the time of delivery, defendant was notified of the defective vessel, defendant's failure to repair and/or adjust the vessel constituted a continuing breach. Plaintiff did not, however, contend that he notified defendant of revocation earlier than claimed by defendant.

On appeal, plaintiff argues that the trial court engaged in fact-finding and erroneously concluded that he waited until 1994 to assert a claim for revocation, when the evidence indicated that he notified defendant of defects within a few days of delivery, then "continued in his efforts to obtain repairs by way of numerous letters and telephone calls, during which [he] also

[3] Although plaintiff's statement of the issue also refers to revocation of acceptance under the MMWA, plaintiff does not address the applicability of the MMWA in this context. Therefore, we deem this aspect of the issue abandoned. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

expressed his desire to revoke or rescind the transaction." Having failed, however, to raise that point in response to defendant's motion and having failed to present evidence to support it, summary disposition was properly granted. See *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997); *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 110; 593 NW2d 595 (1999).

We decline to address plaintiff's argument that a delayed revocation is not untimely where the delay is attributable to the seller's efforts to repair. The argument was not raised before the trial court. Although there is authority to support the view that a reasonable time for revocation depends on the circumstances of the case, including assurances by the seller that a defect would be repaired, plaintiff failed to present evidence of the circumstances to justify the delay in this case. See *Uganski v Little Giant Crane & Shovel, Inc*, 35 Mich App 88, 107; 192 NW2d 580 (1971).

Because summary disposition of this claim was properly granted on the basis that revocation of acceptance was untimely, we need not consider whether summary disposition was additionally warranted on the basis that there was no substantial impairment of value to support revocation under MCL 440.2608(1).

IV. The Michigan Consumer Protection Act

Plaintiff argues that the trial court also erroneously dismissed his MCPA claims on the basis that a breach of warranty is not an essential element of a consumer protection claim. The court's ruling appears to be based on both MCR 2.116(C)(8) and (C)(10). We review de novo a trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Rose, supra* at 461.

Defendant filed its first motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that plaintiff's MCPA claims were barred by the economic loss doctrine and that plaintiff's claims lacked specificity. Defendant supported its position by attaching depositions and other documentary evidence. The burden then shifted to plaintiff to establish that a genuine issue of material fact existed, but plaintiff's response failed to address either of defendant's arguments. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Defendant's second motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) asserts that plaintiff's claims were barred by the economic loss doctrine and waiver or release. Defendant supported its position by attaching depositions and other documentary evidence. The burden then shifted to plaintiff to establish that a genuine issue of material fact existed, but plaintiff's response again failed to address either of defendant's arguments, merely asserting that actual reliance need not be shown or pleaded.[4] *Smith, supra* at 455. Plaintiff failed to present any evidence of unlawful, unfair, unconscionable, or deceptive methods, acts, or practices, and

[4] We note that plaintiff's arguments are not responsive to the arguments advanced by defendant and that plaintiff's argument contains a discussion of documents supplied to an entity that is not a party to this lawsuit. It is apparent that plaintiff erroneously "pasted" portions of this argument from a brief in another unrelated case.

defendant's alleged statement that "this specific boat was the perfect boat for [him] and fit for [his] expressed purpose for its use in recreational water skiing [sic] and recreational boating with [his] wife and family" is purely opinion or puffing. *Van Tassel v McDonald Corp*, 159 Mich App 745, 752-753; 407 NW2d 6 (1987).

After the burden shifted to plaintiff, he failed to present documentary evidence establishing the existence of a material factual dispute. *Smith, supra* at 455. Although the trial court granted the motion under both 2.116(C)(8) and (C)(10),[5] it should be affirmed under MCR 2.116(C)(10) because there are no genuine issues regarding any material fact. "A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Michigan Dept of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).[6]

V. Mediation Sanctions

Next, plaintiff argues that the trial court erred in awarding the amount of attorney fees and costs requested by defendant as mediation sanctions. Interpretation of a court rule and the decision to award mediation sanctions are questions of law that we review de novo. *Ayre v Outlaw Decoys, Inc*, 256 Mich App 517, 520; 664 NW2d 263 (2003). We review the amount of mediation sanctions awarded for an abuse of discretion. *Id.*

Mediation occurred on August 30, 1996, and the notice of rejection is dated September 30, 1996. At that time, MCR 2.403(O) stated, in pertinent part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. . . .
>
> (2) For the purposes of this rule "verdict" includes,
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> * * *

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[5] The trial court dismissed the MCPA claims in part because plaintiff failed to establish that defendant breached any warranties. Contrary to the trial court's holding, however, a claim under the MCPA does not necessarily require proof that the defendant breached a warranty. The other ground for dismissing the MCPA claims was that they were barred by the economic loss doctrine. We conclude that this was error as well because the economic loss doctrine only applies to tort claims (e.g., product liability claims) arising from a sale. *Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 380; 656 NW2d 858 (2002). Therefore, we conclude that the trial court erred in granting defendant summary disposition on these grounds.

[6] Defendant offers two additional grounds for affirmance. We decline to consider defendant's argument that the purchase contract's integration clause barred proof of presale statements because this argument was not raised before the trial court. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997). Defendant also argues that plaintiff waived his rights under the MCPA. We find defendant's argument unpersuasive and its reliance on *Haddad v Vic Tanny Int'l, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 1989 (Docket No. 103737) to be misplaced.

(c) a judgment entered as a result of a ruling on a motion filed after mediation.

* * *

(6) For the purposes of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.

Plaintiff claims that the court failed to conduct the necessary inquiry to determine the reasonableness of the fees and to make findings of fact. In *Miller v Meijer, Inc,* 219 Mich App 476, 479-480; 556 NW2d 890 (1996), this Court explained:

> Where, as in this case, the party opposing the taxation of costs challenges the reasonableness of the fee requested, the trial court should inquire into the services actually rendered before approving the bill of costs. Although a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is. The trial court need not detail its findings as to each specific factor considered in its determination of reasonableness. However, the court is required to make findings of fact with regard to the attorney fee issue. [Citations and internal quotation marks omitted.]

Although the trial court should "normally hold an evidentiary hearing when the opposing party challenges the reasonableness of a fee request," a trial court does not err in awarding fees without having conducted an evidentiary hearing where "the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision." *Head, supra* at 113, citing *Gianetti Bros Constr Co v Pontiac,* 175 Mich App 442, 450; 438 NW2d 313 (1989). In *Jager v Nationwide Truck Brokers, Inc,* 252 Mich App 464, 488; 652 NW2d 503 (2002), this Court, citing *Head, supra,* and *Gianetti Bros, supra,* stated that an evidentiary hearing is not required "if the parties created a sufficient record to review the issue"; it did not mention that the court needed to explain the reasons for the decision, as had been stated in *Head, supra.*

At the trial court level, plaintiff challenged the reasonableness of the time spent. Plaintiff's attorney submitted an affidavit and a copy of defendant's itemized statements, with notations by plaintiff's counsel's questioning numerous charges (e.g., "duplicative," "excessive," "unnecessary"). The trial court did not conduct an evidentiary hearing to resolve the disputed issue and did not make any findings of fact. Nor did the court explain the reason for its decision. Defendant asserts that plaintiff's challenges to the time expended should be rejected merely because the time was actually spent. That argument, however, is contrary to case law governing the determination of a reasonable attorney fee.

"Actual costs" as used in MCR 2.403(O) does not mean the amount actually expended. *McAuley v General Motors Corp,* 457 Mich 513, 524; 578 NW2d 282 (1998), overruled in part on other grounds, *Rafferty v Markovitz,* 461 Mich 265, 273 n 6; 602 NW2d 367 (1999). Because

the definition of "actual costs" refers to a reasonable attorney fee, parties are limited "to recovery of a reasonable fee as determined by the trial court, regardless of the fee amount a party may contractually agree to with his attorney or the total amount he may spend on litigation." *McAuley, supra*. Thus, the amount paid is not sufficient proof of reasonableness; if it were, "'there would be little or no reason for vesting the trial court with discretion to set the amount of an attorney fee award.'" *Id*. (citation omitted).

Thus, in *McAuley, supra* at 525, the Court held that the trial court "appropriately deducted portions of plaintiff's legal expenditures . . . for duplicative work made necessary by substitution of plaintiff's counsel." Similarly, in *Petterman v Haverhill Farms, Inc,* 125 Mich App 30, 32; 335 NW2d 710 (1983), this Court referred to the "appropriateness of the time allocated to various tasks listed on the bill of costs" as "rais[ing] questions as to the reasonableness of the attorney fees award." The Court concluded that the "itemized bill in itself was not sufficient to establish the reasonableness of the fee, nor was the trial judge required to accept it on its face." *Id*., 33. See also *Antiphon, Inc v LEP Transport, Inc,* 183 Mich App 377, 386; 454 NW2d 222 (1990) (finding no abuse of discretion where the trial court's award was based on attorney time of one-half day of trial and eight hours of trial preparation rather than the claimed time of one day of trial and 51.8 hours of trial preparation).

The court's ruling is insufficient to enable this Court to determine how the trial court resolved plaintiff's challenges. The court may have recognized that, although it was not required to accept defendant's billing, the billing was a reasonable fee. On the other hand, it may have been persuaded by defendant's erroneous argument that the amount requested was appropriate merely because that was the amount actually charged. Under these circumstances, this Court is unable to determine whether the award was an abuse of discretion. Because no evidentiary hearing was conducted, the court did not explain its ruling, and the record is not sufficient to review the issue, we remand for an evidentiary hearing and findings of fact.

VI. Failure to Comply with MCR 2.113(G)

As an alternative ground for affirmance, defendant argues that plaintiff's amended complaints failed to state a cause of action against it because the purported incorporation by reference of the allegations in plaintiff's original complaint was invalid.

Pursuant to MCR 2.118(A)(4) and MCR 2.113(G), an amended complaint may not incorporate by reference the allegations in the original complaint. See *Derderian v Genesys Health Care Systems,* ___ Mich App ___; ___ NW2d ___ (Docket Nos. 245339 & 248908, issued August 24, 2004) (observing that where an amended complaint supersedes the prior complaint, the plaintiff may not rely on incorporation by reference to revive a claim that was not included in the amended pleading).

We distinguish *Derderian* because the amended complaint here did not supersede the prior complaint. MCR 2.118(A)(4) provides, in pertinent part: "*Unless otherwise indicated,* an amended pleading supersedes the former pleading." (Emphasis added.) In *Derderian,* the

second amended complaint essentially repeated the claims of the first amended complaint (with the exception of a claim under the Whistle-blowers' Protection Act[7] [WPA]), and then added new claims, new plaintiffs, and new defendants. There was no finding in *Derderian* that the amended complaint "otherwise indicated" that it was not superseding the original. In contrast, the amended complaint in this case contained only a single, additional count, designated as "Count IX," against a new defendant. In this circumstance, it is apparent that the amended complaint was not intended to supersede the original, i.e., "[t]o annul, make void, or repeal by taking the place of"[8] the original complaint. Because the amended complaint "otherwise indicated" that it did not supersede the original, MCR 2.118(A)(4), we conclude that the trial court did not err in declining to dismiss plaintiff's claims on the basis that the amended complaint superseded the original, leaving no remaining claims against defendant.

Affirmed in part, and remanded for an evidentiary hearing and findings of fact. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra

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[7] MCL 15.361 *et seq.*

[8] Black's Law Dictionary (8th ed).