STATE OF MINNESOTA
IN COURT OF APPEALS
A11-40

Robert Phythian,
Appellant,

vs.

BMW of North America, LLC, a foreign limited liability company
qualified to do business in the State of Minnesota,
Respondent.

Filed September 26, 2011
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CV-09-19762

Todd E. Gadtke, Daniel J. Brennan, Gadtke & Brennan, P.A., Maple Grove, Minnesota (for appellant)

Lenae M. Pederson, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota; and

Timothy V. Hoffman (pro hac vice), Sanchez Daniels Hoffman L.L.P., Chicago, Illinois (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

WRIGHT, Judge

After the district court granted respondent's summary judgment motion and dismissed appellant's claims against respondent for breach of its duty to repair, Minn.

Stat. § 325F.665, subds. 2, 3 (2010), and breach of express warranty, 15 U.S.C. § 2310(d)(1) (2006) and Minn. Stat. § 336.2-607 (2010), this case proceeded to trial on appellant's remaining claims. A jury returned a verdict in favor of respondent on these claims, and the district court denied appellant's motion for a new trial. Appellant argues that summary judgment was erroneously granted as to the breach of duty to repair and breach of express warranty claims because there are genuine issues of material fact and the district court erred in its application of the law. Appellant also argues that the district court abused its discretion by limiting appellant's testimony at trial on the remaining claims. We affirm.

FACTS

Appellant Robert Phythian leased a new vehicle from respondent BMW of North America, LLC (BMW) for a three-year period beginning on October 10, 2006. Phythian's lease included an express limited written warranty providing that BMW would "repair or replace . . . defective part(s)" relating to a defect in material or workmanship without cost for parts or labor. The warranty period was 48 months or 50,000 miles, whichever occurred first.

On February 12, 2008, after driving the vehicle approximately 12,830 miles, Phythian had difficulty starting the vehicle. Phythian drove the vehicle to the dealership where BMW inspected it and determined that the battery would not hold a charge. BMW replaced the defective battery, test-drove the vehicle, determined that the vehicle functioned properly, and returned the vehicle to Phythian the next day at no cost.

On June 9, 2008, after driving the vehicle approximately 2,000 additional miles, the vehicle was towed to the dealership because it would not start. BMW inspected the vehicle and determined that the fuel pump and fuel filter with regulator were defective. BMW replaced the defective fuel pump, fuel filter with regulator, and spark plugs, and returned the vehicle to Phythian on June 13 at no cost.

After driving the vehicle approximately 3,000 additional miles, Phythian drove the vehicle to BMW on December 26, 2008 because it was "sputtering" and "running rough." From its inspection of the vehicle, BMW determined that the crank case vent system was frozen and plugged with emulsified oil and water. BMW removed the emulsified oil and water, test-drove the vehicle, determined that the vehicle functioned properly, and returned the vehicle at no cost to Phythian on December 31.

After driving the vehicle approximately 1,000 additional miles, Phythian drove the vehicle to BMW again on February 24, 2009 because it had broken down while being driven and the "check engine" light had illuminated. After inspecting the vehicle, BMW determined that the fuel pump relay and fuel pump were defective. BMW replaced the fuel pump relay and the fuel pump, determined that the vehicle functioned properly, and returned the vehicle to Phythian the next day at no cost.

Phythian sued BMW, alleging that BMW failed to fulfill its duties to repair, refund, or replace the vehicle, in violation of Minn. Stat. § 325F.665, subds. 2, 3; and that BMW breached its implied and express warranties, in violation of the Magnuson-Moss Warranty Act (MMWA), 15 U.S.C. §§ 2301-2312 (2006), and Minn. Stat. §§ 336.2-607, 336.2-314 (2010). Finding that "it is an undisputed fact that every defective part was

repaired or replaced when the [vehicle] was brought in," the district court granted BMW's motion for summary judgment on two of Phythian's claims: (1) the alleged breach of BMW's express warranty and (2) the alleged breach of BMW's duty to repair. The district court denied BMW's motion for summary judgment on Phythian's remaining claims.

At the jury trial that followed, Phythian sought to introduce testimony that on October 10, 2009, when he was returning the vehicle to the dealership at the expiration of his lease, the vehicle stalled. He attempted but was unable to restart the vehicle, and the vehicle required towing. The district court limited Phythian's testimony to reflect only that the vehicle broke down and required towing.

The jury returned verdicts in favor of BMW on all of Phythian's claims. Specifically, the jury found that (1) "Phythian present[ed] the vehicle for repair of the same defect or condition" within three years following the date it was delivered to him by BMW; (2) BMW did not "fail to repair the same defect or condition within a reasonable number of attempts"; and (3) "the vehicle [was] fit for its ordinary purpose when it was delivered to Robert Phythian." Phythian moved for a new trial on the ground that the district court erred by limiting his testimony regarding the October 10, 2009 stalling incident. The district court denied Phythian's motion, concluding that the limitation on Phythian's testimony "did not have a substantial effect on the outcome of the trial," and ordered entry of judgment on the verdicts. This appeal followed.

D E C I S I O N

I.

Phythian argues that the district court erred by granting summary judgment in favor of BMW on the claims for breach of express warranty and breach of the duty to repair. Whether summary judgment was properly granted presents a question of law, which we review de novo. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002). In doing so, we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A party is entitled to summary judgment when "there is no genuine issue as to any material fact and that . . . party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact does not exist when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). A party challenging summary judgment must do more "than rest on mere averments." *Id.* at 71. Rather, a genuine issue for trial must be established by substantial evidence. *Id.* at 69-70. Summary judgment is properly granted when a party fails to establish the existence of an element essential to the party's case. *Bersch v. Rgnonti & Assocs.*, 584 N.W.2d 783, 786 (Minn. App. 1998), *review denied* (Minn. Dec. 15, 1998).

A.

A consumer who is damaged by a warrantor's breach of warranty may bring an action in state or federal court. 15 U.S.C. § 2310(d)(1). We apply state law with regard

to whether a warranty was breached. *Carey v. Chaparral Boats, Inc.*, 514 F. Supp. 2d 1152, 1154 (D. Minn. 2007). The elements of a breach-of-warranty claim under Minnesota law are (1) the existence of a warranty, (2) breach of the warranty, and (3) causation of damages. *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 52-53 (Minn. 1982).

Phythian contends that the district court erred by concluding that BMW's express warranty required BMW only to repair or replace a defective part in the vehicle regardless of whether such repair or replacement prevented "the stalling and non-starting" problems to recur. BMW's express warranty at issue here provides:

> To obtain service under this limited warranty, the [vehicle] must be brought, upon discovery of a defect in material or workmanship, to the workshop of any authorized BMW [dealership], during normal business hours. The authorized BMW [dealership] will, without charge for parts or labor, either repair or replace the defective part(s) using new or authorized remanufactured parts.

A seller may, as here, limit the buyer's warranty remedies to the repair and replacement of nonconforming goods; but when a limited remedy "fail[s] of its essential purpose," the buyer may seek a remedy provided under the general remedy provisions of the Uniform Commercial Code (UCC), including a refund of the purchase price. Minn. Stat. §§ 336.2-711, 336.2-719(1)(a), (2) (2010). A limited remedy fails its essential purpose when "circumstances arise to deprive the limiting clause of its meaning or one party of the substantial value of its bargain." *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 356 (Minn. 1977). If a "seller repairs the goods each time a defect arises, a repair-and-replacement clause does not fail of its essential purpose. But if repairs are not

successfully undertaken within a reasonable time, the buyer may be deprived of the benefits of the . . . remedy." *Id.* A seller does not have an unlimited amount of time to deliver conforming goods. *Id.* at 355.

Phythian argues that this case is similar to *Durfee* because in both cases the vehicle at issue was repaired on several occasions and the repeated nature of the dealership's repair attempts in *Durfee* sufficiently evinced the dealership's breach of warranty. In *Durfee*, the Minnesota Supreme Court concluded that the district court did not clearly err by concluding that the limited remedy in a vehicle manufacturer's express warranty failed of its essential purpose because the vehicle "could not or would not be placed in reasonably good operating condition." *Id.* at 356-57. But the facts of *Durfee* are distinguishable. In *Durfee*, the vehicle defects included a defective muffler that was repaired at the buyer's expense because the dealership did not have the correct parts. *Id.* at 351-52. And the dealership failed to identify the root cause of some of the defects, leaving several specific vehicle defects unrepaired after repeated repair attempts. *Id.* Moreover, the buyer in *Durfee* took the vehicle in for repair at least six times in the first nine months after purchasing the vehicle—with one repair session lasting approximately one month. *Id.* By contrast, each time Phythian took his vehicle to the dealership for repair, BMW identified and repaired or replaced a distinct defect, had the correct parts available, completed the work in one to five days, and returned the fully functioning vehicle to Phythian at no cost.

Phythian also relies on *Jacobs v. Rosemount Dodge-Winnebago S.*, in which a jury found that the seller's failure to seasonably cure the defects in a motorhome substantially

impaired the motorhome's value to the buyers. 310 N.W.2d 71, 76 (Minn. 1981). The Minnesota Supreme Court, citing *Durfee*, affirmed the district court's entry of judgment on the jury's verdict. *Id.* But in *Jacobs*, the seller did not deny that the defects were not seasonably cured. *Id.* Moreover, *Jacobs* involved more than 20 defects, some of which were not repaired and other defects "appeared to be in worse condition after being in the shop for repairs." *Id.* at 74. And on at least one occasion, the attempted repairs took more than one month to complete. *Id.* at 74-75. Thus, *Jacobs* also is distinguishable.

Phythian contends that the record contains circumstantial evidence that BMW breached its express warranty. But *Nelson v. Wilkins Dodge, Inc.*, on which Phythian relies for this proposition, also is inapposite. 256 N.W.2d 472 (Minn. 1977). The vehicle in *Nelson* exhibited several cosmetic and functional defects within the first four months and 9,000 miles after the buyer purchased the vehicle. *Id.* at 474. The *Nelson* court concluded that, because the vehicle exhibited problems so soon after the vehicle was purchased, the jury could reasonably infer that the problems arose from defects in workmanship rather than normal deterioration from use, and a directed verdict would be improper. *Id.* at 476-78. Here, the parties do not dispute that the problems with Phythian's vehicle arose from defects in Phythian's vehicle. But the defects at issue here did not first arise until Phythian had driven the vehicle for approximately 16 months, and approximately 12,830 miles. Moreover, the jury found, albeit on the implied-warranty-of-merchantability claim, that the vehicle was "fit for its ordinary purpose when it was delivered" to Phythian. Thus, *Nelson* fails to assist Phythian in establishing that

summary judgment was improperly granted on the breach-of-express-warranty claim here.

Phythian asserts that each problem with his vehicle arose from the same defect—"the stalling and non-starting condition"—and therefore the vehicle remained continuously defective from February 12, 2008, until Phythian returned the vehicle on October 10, 2009. But the undisputed record establishes that BMW inspected the vehicle and identified a unique defective part on each separate occasion—the battery, the fuel pump, the crank case vent system, the fuel filter with regulator, and the fuel pump relay. And on each occasion, BMW repaired or replaced the defective part, determined that the vehicle was functioning normally, and returned the functioning vehicle to Phythian. Moreover, Phythian drove the car for two to six months, and approximately 1,000 to 3,000 miles, between each incident without any reported vehicle problems. Although each defective part caused the same symptom—characterized by Phythian as "stalling or non-starting"—the record reflects that the vehicle's stalling or failures to start were merely indicators of different underlying defects.

Phythian also argues that the repairs were not performed within a reasonable period of time. BMW's express warranty states that "a reasonable time must be allowed for warranty repairs to be completed after the [vehicle] is received by the authorized BMW [dealership]." Whether an action required by the UCC has occurred at or within a reasonable time depends on the nature, purpose, and circumstances of the action. Minn. Stat. § 336.1-205 (2010). Generally, what constitutes a reasonable time for the performance of contract obligations is a question of fact or a mixed question of law and

fact to be determined by a jury. *Bly v. Bublitz*, 464 N.W.2d 531, 535 (Minn. App. 1990). "'Yet the court may and should in a proper case determine [what constitutes a reasonable time] as a matter of law.'" *Id.* (quoting *Henry v. Hutchins*, 146 Minn. 381, 387, 178 N.W. 807, 809 (1920)). The undisputed record establishes that, when problems arose with Phythian's vehicle, BMW repaired or replaced a defective part and returned the vehicle to Phythian either the next day or within five days. Between two and six months elapsed after each incident. Our careful review of the facts viewed in the light most favorable to Phythian establish that there is no genuine issue of material fact as to whether BMW complied with the warranty within a reasonable time after each defect arose.

In sum, Phythian's vehicle experienced problems arising from at least four distinct defective parts on four separate occasions. On each occasion, BMW repaired or replaced each defective part in a reasonable amount of time, thus complying with the express warranty as a matter of law. Accordingly, the district court did not err by granting summary judgment in favor of BMW and dismissing Phythian's breach-of-express-warranty claim as a matter of law.

B.

Phythian also argues that the district court erred by granting summary judgment to BMW on Phythian's breach-of-duty-to-repair claim under Minnesota's lemon law, Minn. Stat. § 325F.665 (2010). He contends that the question of whether BMW failed to conform the vehicle to the warranty after a reasonable number of repair attempts is a fact question for the jury.

Minnesota's lemon law provides in pertinent part:

> Manufacturer's duty to repair. If a new motor vehicle does not conform to all applicable express warranties, and the consumer reports the nonconformity to the manufacturer, its agent, or its authorized dealer during the term of the applicable express warranties or during the period of two years following the date of original delivery of the new motor vehicle to a consumer, whichever is the earlier date, the manufacturer, its agent, or its authorized dealer shall make the repairs necessary to conform the vehicle to the applicable express warranties, notwithstanding the fact that the repairs are made after the expiration of the warranty term or the two-year period.

Minn. Stat. § 325F.665, subd. 2. The district court granted summary judgment in favor of BMW and dismissed Phythian's claim brought under section 325F.665, subdivision 2, finding that no genuine issue of material fact exists because "every time [Phythian] reported to [BMW] that there was a nonconformity, [BMW] conformed the [vehicle] to the warranty (*i.e.*, repaired or replaced the defective parts)."

A remedy under this provision is limited to nonconformities reported to the authorized dealer "during the term of the applicable express warranties *or* during the period of two years following the date of original delivery of the new motor vehicle to a consumer, whichever is the earlier date[.]" *Id.* (emphasis added). Only the first two incidents with Phythian's vehicle are at issue here because they are the only ones that were reported within the first two years following the date of original delivery. The record establishes that BMW identified and replaced each defective part, after which the vehicle functioned normally and conformed to BMW's express warranty. Moreover, this determination is bolstered by the jury's consideration of a related claim, Minn. Stat.

§ 325F.665, subd. 3, for which it found that BMW did not fail to repair the same defects or condition at issue here within a reasonable number of attempts.

Accordingly, the district court did not err by granting summary judgment and dismissing Phythian's claim brought under section 325F.665, subdivision 2.

II.

Phythian challenges the district court's decision to limit Phythian's testimony regarding the October 10, 2009 stalling incident that occurred when he was returning the vehicle to BMW at the expiration of his lease. The decision to exclude evidence is committed to the broad discretion of the district court, and its evidentiary rulings will not be disturbed unless they are based on an erroneous view of the law or constitute an abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990) *superseded by statute on other grounds*, Minn. Stat. § 549.21 (1990). A jury verdict on an appeal from a district court's denial of a motion for a new trial will not be disturbed unless it is "manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Washington Cnty. Schs.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted).

Phythian testified that on October 10, 2009, the vehicle "broke down and was towed." Phythian argues that a new trial is warranted because the district court erred by preventing him from testifying that the vehicle would not restart after it broke down. The manner in which the vehicle failed, Phythian contends, was critical to proving that BMW

never properly repaired the vehicle. The district court observed that any error in limiting Phythian's testimony was "of no moment" and had "no effect on the outcome of the case." We agree. The jury could reasonably infer that, because the vehicle "broke down and was towed," Phythian was unable to start the vehicle. Moreover, the record contains ample evidence of four previous incidents during which the vehicle failed to start, stalled, or functioned poorly; and the limitations on this testimony did not prevent the jury from inferring, as Phythian alleged, that the October 10 incident was related to or arose from the same defect or condition.

Accordingly, the district court did not err by denying Phythian's motion for a new trial on this ground.

Affirmed.