STATE OF MICHIGAN

COURT OF APPEALS

JOHN DANOVICH and PATRICIA DANOVICH,

Plaintiffs-Appellees,

v

CHELSEA LUMBER COMPANY,

Defendant, Third-Party Plaintiff,

v

ROSEBURG FOREST PRODUCTS,

Third-Party Defendant-Appellant

UNPUBLISHED
March 7, 1997

No. 182899
Washtenaw Circuit Court
LC No. 94-2158-AV

JOHN DANOVICH and PATRICIA DANOVICH,

Plaintiffs-Appellees,

v

CHELSEA LUMBER COMPANY,

Defendant, Third-Party Plaintiff-Appellant,

v

ROSEBURG FOREST PRODUCTS,

Third-Party Defendant.

No. 183017
LC No. 94-2158-AV

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* Circuit judge, sitting on the Court of Appeals by assignment.

Before: Jansen, P.J., and Saad and M.D. Schwartz,* JJ.

PER CURIAM.

Defendant Chelsea Lumber and third-party defendant Roseburg Forest Products (hereafter "defendants") appeal from the circuit court opinion and order. Because the circuit court correctly vacated the district court's opinion, we affirm the circuit court.

I

FACTS

Chelsea sold lumber manufactured by third-party defendant Roseburg to plaintiffs, Mr. and Mrs. Danovich. Plaintiffs claim that the exterior plywood was defective; Chelsea claims that its disclaimer of warranty on the back of its invoice to plaintiffs relieved it of liability for the alleged defect. On the facts of this case, the disclaimer would indeed relieve Chelsea of liability if the disclaimer is "conspicuous."

The district judge submitted the question of whether the disclaimer was conspicuous to the jury; the jury found that the disclaimer was conspicuous and the district judge entered judgment accordingly for defendants. The circuit court vacated the district court's judgment, finding that whether a disclaimer is conspicuous is for the judge, not the jury. The circuit court remanded for a new trial.

Because the judge, not the jury, should determine whether a disclaimer is conspicuous, the district court erred in submitting this question to the jury. And, because the jury was compelled to conclude that no warranty was available to plaintiffs after finding Chelsea's disclaimer conspicuous (thus valid), the district court's error was not harmless. Indeed, it was dispositive of plaintiff's case. Accordingly, the circuit court's holdings that: (1) the disclaimer's "conspicuousness" was a matter for the judge, not the jury, (2) the district court's error on this issue was not harmless, and (3) the matter must be retried, are correct and affirmed.

II

ANALYSIS

Defendants asserts that the circuit court erred in vacating the district court's decision to send the issue of the "conspicuousness" of the disclaimer to the jury. The "implied warranty of merchantability"-- which guarantees that the goods are fit for the ordinary purposes for which such goods are used – is implied in every contract for the sale of goods. MCL 440.2314; MSA 19.2314. Yet, purchasers of goods may be denied the benefit of such a warranty if the seller effectively limits the warranty in writing, but only if the word "merchantability" is used and the disclaimer is "conspicuous." MCL 440.2316(2); MSA 19.2316(2). "Conspicuous" is defined in the general definitions section of the Uniform Commercial Code as follows:

> Subject to additional definitions contained in the subsequent articles of this act which are applicable to specific articles or parts of this act, *and unless the context otherwise requires*, in this act:
>
> * * *
>
> (10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: non-negotiable bills of lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram, any stated term is "conspicuous". ***Whether a term or clause is "conspicuous" or not is for decision by the court***. [MCL 440.1201(10); MSA 19.1201(10), emphasis added.]

Defendants argue that the phrase "and unless the context requires otherwise," gives the trial court discretion to determine whether the question is more appropriate for the court or for a jury. In support of their theory, defendants rely on Michigan Standard Jury Instructions which contain an instruction directing the jury to consider the issue of "conspicuousness." SJI2d 140.44. Defendants contend that the district judge properly sent the issue to the jury because the judge's poor eyesight prevented him from determining whether the disclaimer was "conspicuous" under the reasonable person standard; and because plaintiffs failed to raise the issue before the trial court in a timely manner.

The circuit court disagreed with defendants' arguments, concluding that the plain meaning of MCL 440.1201(10); MSA 19.1201(10) meant that the "conspicuousness" of warranty limitations was a matter for the court. We agree. The introductory language of MCL 440.1201; MSA 19.1201 means that the definitions are generally applicable within the UCC, unless (1) different definitions are given within a particular article of the UCC, or (2) the "context," (meaning the use or application of the word) otherwise requires. Defendants' interpretation is in direct conflict with the last sentence of MCL 440.1201(10); MSA 19.1201(10), which expressly requires the matter to be decided by the court.

This conclusion was made crystal clear in *Krupp PM Engineering, Inc v Honeywell, Inc*, 209 Mich App 104, 107; 530 NW2d 146 (1995), (decided two months after the circuit court's decision) which held that, despite SJI2d 140.44, "conspicuousness" was not a matter for the jury. Therefore, we conclude here that determining "conspicuousness" is always a matter for the court; the district court erred in sending the issue of "conspicuousness" to the jury.

II

Defendants also claim that any error by the district court in sending the question of conspicuousness to the jury was harmless for three reasons. We disagree with all three. Trial court error is not harmless, and reversal is required, where the result might well have been different without the error. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 218; 457 NW2d 42 (1990).

A

Defendants first assert that the district court's decision to send this issue to a jury was harmless error because the limitation was conspicuous as a matter of law. We disagree. Here, the disclaimer appears on Chelsea's customer invoice. The paper is yellow with black print on the front. At the bottom of the front of the invoice appears:

"IMPORTANT"

Read Terms and Conditions governing this sale on reverse side.

The word "IMPORTANT" is in small, red print, while the sentence below is in small black print. On the back of the invoice are nine sections separated by titles. The entire text is in small, light gray print. The titles are centered in capitals followed by the body of the text which is in standard lower case print. The third of nine sections, entitled "WARRANTY," introduces the following:

> Seller agrees that any merchandise delivered hereunder found to be defective in material or workmanship will be repaired or replaced by the seller without additional charge for the merchandise. This warranty is made in lieu of any other warranties or conditions including merchantability or fitness for a particular purpose. The remedies under this warranty are exclusive, and by accepting this merchandise, the Buyer agrees to these conditions and waives any other warranties, conditions, express or implied.

Although the district judge denied plaintiffs' motion to determine whether the warranty disclaimer was "conspicuous" as a matter of law, he stated that the disclaimer was "very difficult to read," and he observed that the disclaimer was not "highlighted" and was written in "invisible," "light gray ink."

In *Latimer v William Mueller & Son, Inc*, 149 Mich App 620, 635; 386 NW2d 618 (1986), a disclaimer of implied warranties was printed on one of three tags attached to bags of seed. Although the word "warranty" appeared in capitals at the top of the tag, the rest of the language was in standard type, not in contrasting color, and not emphasized by any other method. We concluded there that the disclaimer was not conspicuous because the heading "warranty" suggested that warranties were *included* rather than excluded, in light of the fact that the disclaiming language was the least conspicuous language attached to the bag. *Id.* 149 Mich App at 636.

In *Krupp*, 209 Mich App 104, we considered whether a warranty disclaimer contained on a customer service invoice was conspicuous. On the bottom of the front of the invoice, the words "The Standard Terms and Conditions on the reverse side are a part hereof" appeared in small italicized print. *Id*. 209 Mich App at 109. The following appeared in the body of the text on the back of the invoice:

> WITH EXCEPTION OF THE TWELVE MONTH WARRANTY, SET FORTH ABOVE, THE COMPANY MAKES NO EXPRESS WARRANTIES, NO WARRANTY OF MERCHANTABILITY AND NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF. In no event

will the company be liable for indirect, special or consequential damages of any nature whatsoever. [*Id*. 209 Mich App at 108.]

We held there that a reasonable person could not have been expected to notice the warranty disclaimer. *Id*. 209 Mich App at 109. Although some of the language was in capitals, the pivotal final statement was not. Moreover, before a reader would be directed to the back of the invoice, he or she would have to notice the phrase "The Standard Terms and Conditions on the reverse side are a part hereof," written in small italicized print at the bottom of the front of the invoice. *Id*.

In light of the case law, we are unable to agree with defendants' argument (i.e. that the district judge's decision to send this issue to a jury was harmless error because the disclaimer was conspicuous as a matter of law). In fact, similar to *Latimer*, 149 Mich App at 635-636, the word "warranty" appears in capitals, which suggests that warranties were *included* rather than excluded. Also, here *none* of the disclaiming language appeared in capitals, nor did Chelsea employ any other device to draw attention to the disclaiming language. The entire disclaimer, including the heading and the text, did not stand out in any way from the other standard terms and conditions listed on the back of the invoice.

We find no merit to Roseburg's argument that it was sufficient to capitalize the word "warranty" on the back of the invoice, in light of MCL 440.1201(10); MSA 19.1201(10) which states, "A printed heading in capitals (as: non-negotiable bill of lading) is conspicuous." Roseburg ignores the following sentence: "Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color."

B

Defendants also argue that the issue of conspicuousness had no bearing on the outcome of the trial because the jury concluded that there was no breach of implied warranty. In question 1B on the form of verdict, the jury was asked whether the language regarding the limitation of the implied warranty was "conspicuous," to which it responded "yes." Below question 1B, the form instructed "If the answer to Question 1B is "Yes", do not answer Question 1C." Question 1C asked whether defendant Chelsea breached an implied warranty. Although the jury was instructed not to answer the question, it responded "no."

Defendants' argument fails because the jury was instructed in such a way that once it found that the warranty disclaimer was "conspicuous," it had to conclude that there was no breach of implied warranty. The structure of the form of verdict also leads to such a conclusion. The jury was instructed to skip question 1C (the breach of implied warranty question) if it determined in question 1B that the warranty disclaimer was "conspicuous." Therefore, the instruction implied that a finding of conspicuousness automatically resulted in a finding that there was no breach of implied warranty.

C

Finally, Chelsea argues that sending the issue of conspicuousness to the jury was not error because plaintiffs did not object at trial to the submission of the issue to the jury. This argument is based

upon inaccurate facts. Plaintiffs moved to have the issue of conspicuousness determined as a matter of law prior to trial. The district court refused to do so, and ordered plaintiffs' counsel to either abandon the issue or permit it to go to the jury. This argument has no merit.

In summary, we agree with the circuit court that the district court erred in sending the issue of conspicuousness to the jury. It is possible that the jury found for Chelsea for another reason, (e.g., the siding was merchantable, plaintiffs did not provide reasonable notice, or plaintiffs did not sustain damages); but that is a matter of conjecture. Therefore, the result in this case might well have been different if the error had not occurred. *King*, 184 Mich App at 218.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Michael D. Schwartz