STATE OF MICHIGAN

COURT OF APPEALS

THE CHRISTMAN COMPANY,

Plaintiff-Appellee,

v

LATICRETE INTERNATIONAL, INC.,

Defendant-Appellant,

and

JOHN B. ROSSI COMPANY, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA & STEIN, HINKLE, DAWE, WOOD, AND JOHNSON,

Defendants.

UNPUBLISHED
April 21, 1998

No. 189261
Ingham Circuit Court
LC No. 93-73926-CK

Before: Corrigan, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

I. Facts

Defendant Laticrete International, Inc. ("Laticrete") appeals by right a judgment for Plaintiff Christman Company ("Christman") entered following a jury trial. Christman was the general contractor for the construction of the Capitol Commons Center, a seven story office building in Lansing owned by Heart of the City Associates ("Heart of the City"). Laticrete provided external porcelain tiles and related materials to be used as adhesives to attach the tiles to the building. However, after the tiles were placed, a substantial number of them detached and fell from the building. Christman essentially premised its claims against Laticrete,[1] including claims assigned to Christman by Heart of the City, on alleged defects in the materials provided by Laticrete, including an assertion that the tiles, with the corresponding adhesive materials, were simply not appropriate for use in a northerly climate. In

accordance with the findings of the jury in its special verdict, the trial court entered judgment for Christman and against Laticrete for $1,379,000. We affirm.

II. Judgment Notwithstanding the Verdict

Laticrete argues that the trial court erred by denying its motion for judgment notwithstanding the verdict ("JNOV"). We disagree. In reviewing this issue, we view the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995). Only if the evidence viewed in this manner fails as a matter of law to establish a claim, should a motion for JNOV be granted. *Id.* at 558.

Laticrete relies on limitation of damages provisions in the "limited warranty" that it provided to Christman in connection with the purchase of the exterior tiles and related goods at issue. The limited warranty provides for the following remedy:

> In the event of a breach of this warranty, LATICRETE will pay for replacement on a square foot basis of so much of the facade portion of the system as is defective, this payment to include labor and installation; provided, however, that the cost to LATICRETE of replacement of the facade on a square foot basis shall not exceed your original purchase price of the facade calculated on a square foot basis. As used in this warranty, the term "facade" includes the System plus frame, fasteners and tile or other covering adhered to the System. LATICRETE will not be liable for damages due to construction delays or any other damages, losses or expenses or any manner of consequential or incidental losses or damages.

The last two paragraphs of the limited warranty provide the following limitation of damages provisions:

> This implied warranty is given in lieu of all other express warranties. Any implied warranties arising by operation of law, if any, are limited to the ten (10) year limited warranty period herein provided for.[2]
>
> THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE OR OTHERWISE WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF.

Laticrete asserts that the trial court should have granted JNOV because the limitation of damages clause in the limited warranty applied to preclude Christman from obtaining a greater remedy than that provided by the limited warranty. We disagree.

The limited warranty includes an explicit statement that it is in lieu of all other "express warranties," but includes no such statement regarding implied warranties. At minimum, this creates an ambiguity regarding whether the limited warranty is given in place of any implied warranties. We recognize that the limited warranty does include a statement that there are "no warranties, express or implied, of merchantability or of fitness for a particular purpose or otherwise which extend beyond the

description on the face hereof" (capitalization omitted). Standing alone, this second statement might constitute a valid disclaimer of implied warranties to the extent allowed by law. However, when viewed in context, the limited warranty as a whole is ambiguous regarding implied warranties, particularly in light of the explicit disavowal of express warranties other than those provisions of the limited warranty itself.

It is a general precept of contract law that a contract is construed against the party responsible for drafting a disputed provision. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 183-184; 565 NW2d 887 (1997). Thus, we conclude that the limited warranty, drafted by Laticrete, should be construed as only providing that it is in lieu of express warranties, not that it is in lieu of implied warranties. Accordingly, we reject Laticrete's position that the limited warranty precluded Christman from obtaining greater remedies than those provided for by the limited warranty on Christman's claim that Laticrete breached implied warranties. As discussed further below, absent a valid disclaimer, every contract for a sale of goods subject to Article 2 of the Michigan Uniform Commercial Code (the "UCC") includes implied warranties of merchantability and fitness for a particular purpose. *Lumber Mutual Ins Co v Clarklift of Detroit, Inc*, 224 Mich App 737, 739; 569 NW2d 681 (1997).[3]

The jury in its special verdict answered "yes" to the question whether Laticrete breached an implied or express warranty in any way alleged by Christman. Our above analysis shows that Laticrete's position for claiming that the trial court should have granted JNOV is incorrect because the limited warranty did not preclude Christman's claim for greater relief than that provided for in the limited warranty for Laticrete's alleged breach of one or more implied warranties. Laticrete does not challenge the failure of the trial court to have had the jury separately questioned regarding alleged breaches of express warranties and alleged breaches of implied warranties. Accordingly, we will not now grant relief to Laticrete based on the jury having been asked in a single question whether Laticrete violated any applicable express or implied warranties.

Under the implied warranty of merchantability, a seller of goods warrants that they are fit for the ordinary purposes for which they are used. *Latimer v William Mueller & Son, Inc*, 149 Mich App 620, 632; 386 NW2d 318 (1986).[4] Viewing the evidence in a light most favorable to Christman with regard to this issue, the jury could reasonably have determined that the goods at issue here, exterior building tiles and corresponding adhesive materials, were not fit for their ordinary purposes due to the tiles falling off the building very shortly after they were applied in a proper way. Alternatively, the provision of the UCC regarding the implied warranty of fitness for a particular purpose provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose. [MCL 440.2315; MSA 19.2315.]

The jury could reasonably have determined from testimony and other evidence regarding the course of dealing among Christman, Heart of the City and Laticrete that Laticrete had reason to know that Christman and Heart of the City were relying on Laticrete to furnish them with exterior building tiles and materials for adhesion of those tiles that would work at the Capitol Commons Center in Lansing. Cf.

National Cash Register Co v Adell Industries, Inc, 57 Mich App 413, 414-416; 225 NW2d 785 (1975) (upholding trial court's finding of breach of implied warranty of fitness where the seller knew that the primary purpose for the purchase of an accounting machine was to substantially reduce the number of work hours involved in preparing the buyer corporation's payroll and to enable the buyer to get its payroll out on time). From the detachment of a large number of the tiles provided by Laticrete and the expert testimony about the unsuitability of the exterior tiles and adhesive materials provided by Laticrete for use in a northerly climate, the jury could reasonably have determined that Laticrete breached an implied warranty of fitness for the particular purpose of using the goods at the Capitol Commons Center. Thus, the trial court properly denied Laticrete's motion for JNOV.

In light of our above analysis, we need not reach Christman's arguments that the remedy offered in the limited warranty failed of its essential purpose, was unreasonable in light of the harm experienced and was unconscionable.

III. Jury Instructions Under SJI2d 25.12

Laticrete argues that the trial court abused its discretion by giving only part of SJI2d 25.12 and, thereby, not instructing the jury that, with regard to the claims of breach of express warranty, Christman had to prove that the product at issue was defective at the time that it left Laticrete's control. We review decisions by the trial court about jury instructions for an abuse of discretion. *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 103; ___ NW2d ___ (1997); *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997). We review jury instructions in their entirety and should not extract them piecemeal. *Id.* Reversal is not required if the theories of the parties and applicable law are, on balance, fairly and adequately presented to the jury. *Id.*

The trial court instructed the jury:

> The following instructions are applicable to the claim against Laticrete. An express warranty is a representation or statement made in writing, orally or by other means by a seller that his or her product has certain characteristics or will me[e]t certain standards. In order to prevail on its claim for breach of express warranty, Christman must prove each of the following:
>
> A) That Laticrete expressly warranted the Laticrete panel system in one or more of the ways claimed by Christman.
>
> B) That Christman relied upon Laticrete's warranty.
>
> C) That the Laticrete panel system was defective in the ways claimed by Christman.
>
> D) That Christman has sustained damage. And,
>
> E) That Laticrete's breach of warranty was a proximate cause of the damages sustained by Christman.

Your verdict on this claim will be for Christman if you find that Christman has proven all of those propositions. Your verdict on this claim will be for Laticrete if you find that Christman has failed to prove any of these propositions.

In contrast, SJI2d 25.12 provides:

> The plaintiff has the burden of proving each of the following:
>
> a. that the defendant expressly warranted the product in one or more of the ways claimed by the plaintiff
>
> b. that the [plaintiff / plaintiff's decedent] [relied upon / or / was protected by] the warranty
>
> c. that the product (description of alleged failure to meet express warranty)
>
> d. *that the product (description of alleged failure to meet express warranty) at the time it left defendant's control*
>
> e. that the [plaintiff / plaintiff's decedent] [was injured / sustained damage]
>
> f. that the (description of alleged failure to meet express warranty) was a proximate cause of the [injuries / damages] to [plaintiff / plaintiff's decedent].
>
> Your verdict will be for the plaintiff if you decide that all of these have been proved.
>
> Your verdict will be for the defendant if you decide that any one of these has not been proved. [Emphasis supplied.]

A standard civil jury instruction must be given on a party's request if it is applicable and accurately states the applicable law. *Walker v City of Flint*, 213 Mich App 18, 20; 539 NW2d 535 (1995); accord, MCR 2.516(D)(2).

However, in the circumstances of this case, it is unnecessary to determine whether the trial court technically erred by departing from SJI2d 25.12. First, the central point of Christman's claims against Laticrete was that the goods at issue were improperly promoted for use on the exterior of the Capitol Commons Center when they were unsuitable for use in the winter climate of this northerly location. This alleged "defect" in the panel system, with respect to areas like Lansing and Michigan generally that repeatedly have very cold winters, would be present regardless of when the panels installed on the Capitol Commons are considered to have left Laticrete's control. Also, Laticrete has not pointed to any evidence of a significant change in the nature of the exterior tiles and adhesive materials that it provided between any point that could reasonably be considered as the point that those materials left Laticrete's control and the time that the tiles were attached to the Capitol Commons Center. While Laticrete argues that a hotly contested issue in this case was whether the exterior tiles detached because

of a defect in the goods provided by Laticrete or because of misapplication of the exterior tiles by a third party, the trial court's instructions only allowed a finding of liability against Laticrete based on a defect in the goods provided by Laticrete. No reasonable juror would have understood the trial court's instructions as allowing an imposition of liability on Laticrete for *misapplication* of those goods by a third party because that would not involve any defect in the goods themselves. Thus, we conclude that, even if the trial court's instructions to the jury were somewhat imperfect by failing to inform the jury that an actionable defect in any of the materials provided by Laticrete had to be present at the point of sale, the instructions did not constitute error requiring reversal because they fairly and adequately presented the pertinent issues to be tried. *Joerger, supra at* 173.

IV. Jury Instructions under SJI2d 140.44

Laticrete argues that the trial court abused its discretion by refusing to give SJI2d 140.44 regarding the elimination or modification of an implied warranty under the UCC or, alternatively, that the trial court erred by failing to rule as a matter of law that the limited warranty eliminated all other warranties. However, as explained in Part I, because of ambiguous language in the limited warranty, its limitation of remedy provisions as a matter of law did not constitute a valid elimination or modification of any implied warranty. Thus, the trial court did not err by refusing to give SJI2d 140.44 or by failing to rule that, as a matter of law, the limited warranty eliminated all other warranties.

V. Hearsay Testimony

Laticrete argues that the trial court abused its discretion by admitting hearsay testimony from Christman's expert witness Charles Parisi. Laticrete bases this argument on the trial court having overruled an objection to Christman's counsel questioning Parisi about what he learned from talking to certain consultants.

MRE 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

First, although apparently not recognized by Laticrete, an expert witness may base an opinion on hearsay. *Triple E Produce Corp v Mastronadi Produce, Ltd*, 209 Mich App 165, 175; 530 NW2d 772 (1995). However, more to the point, the testimony at issue was non-hearsay evidence because it was not admitted for the truth of the matter asserted. As defined in MRE 801(c), a statement is hearsay only if, in pertinent part, it is offered to prove the truth of the matter asserted. Here, as explained on the record, the trial court admitted the testimony at issue on redirect examination to rebut an implication from cross-examination of Parisi that his investigation of the alleged problems with the Laticrete panel system was inadequate. The trial court expressly instructed the jury not to consider the testimony at issue for the truth of the matter asserted. Jurors are presumed to understand and follow instructions. *Bordeaux v The Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Thus, Laticrete's

position regarding this issue rests on a flawed premise, as the testimony at issue did not constitute hearsay.

VI. Expert Testimony

Next, Laticrete argues that the trial court abused its discretion by allowing Parisi to testify as an expert about exterior ceramic tile systems. We disagree. We review a trial court's decision that an expert witness is qualified for an abuse of discretion. *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 141; 528 NW2d 170 (1995); *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989). Laticrete argues, in essence, that Parisi had no expertise in the field of exterior panelized tile systems. Laticrete cites testimony showing that Parisi was not a member of certain "tile-related associations" and that he had never done specifications for exterior vertical tile installations. However, according to Parisi's testimony, he was an architect who had been involved in major architectural projects and was a member of professional organizations related to that field. The main thrust of Parisi's testimony was that the tile system used on the exterior of the Capitol Commons Center was inappropriate due to the climate of the area. The trial court surely could consider this to be within the scope of Parisi's expertise as an architect. Arguable deficiencies in Parisi's expertise as applied to exterior tile paneling might have been relevant to the weight of his testimony, but such considerations did not preclude its admission. Cf. *Woodruff v USS Great Lakes Fleet, Inc*, 210 Mich App 255, 259-260; 533 NW2d 356 (1995) (gaps in the expertise of an expert witness were relevant to the weight of the testimony, not to its admissibility).

VII. Scientific Evidence

Finally, Laticrete argues that the trial court abused its discretion by admitting scientific evidence from Richard Muenow about the results of resonant frequency testing of the quality of the adhesion of the exterior tiles provided by Laticrete at the Capitol Commons Center.

The trial court stated with regard to Muenow's testimony about the resonant frequency testing results:

> With respect to the various objections raised by both the counsel, I would point out that there has been peer review of this matter, because the peer review is the system by which scientific journals accept articles for publication. That is, that people who are recognized experts in the field, review proposed articles and make a determination as to whether or not they contribute to the field.
>
> This witness has testified that he has had two articles, which deal solely with resonant frequency, as well as three other articles that are referred to, published in ACIA Journals, the Nuclear Regulatory Commission publication, and another publication that he said so quickly, that I couldn't get it written down.
>
> I believe this witness has established his qualifications as an expert in the field of resonant frequency testing. It is not necessary to prove that that testing is—has been

> retested for porcelain tile or retested for any particular kind of material. The issue is whether or not this is an accepted materials test by the scientific construction community, and his testimony establishes that it is so accepted.
>
> With respect to relevance, that argument goes to weight and not to admissibility. Again, with respect to whether or not the preliminary nature of the report means that it is a final report, goes to relevance—or goes to weight and not to admissibility.
>
> For all of these reasons, 1, [sic] the Court overrules the objection to the testimony of Mr. Muenow as an expert in the field of materials testing and particularly ultrasonic devises and testing, and overrules the objection to the admission of Plaintiff's Proposed Exhibit 299. It is admitted. You may proceed.

Under the *Davis-Frye* rule,[5] novel scientific evidence must have gained general acceptance to be admissible at trial. *People v Lee,* 212 Mich App 228, 262; 537 NW2d 233 (1995). The party offering the evidence has the burden of showing its acceptance in the scientific community. *Id.* However, the *Davis-Frye* rule is only applied to novel scientific techniques or principles. *People v Haywood,* 209 Mich App 217, 221; 530 NW2d 497 (1995). A party is not required to show the general acceptance of an already established test. *Id.*

Laticrete asserts that Muenow, who made his living from doing resonant frequency testing, did not provide any evidence that the testing had achieved scientific acceptance for testing exterior porcelain panelized tile and that Christman presented no other evidence to establish the admissibility of the test. However, Muenow testified that he was a civil structural engineer who specialized in the evaluation of damaged structures. In light of Muenow's testimony, the trial court reasonably determined that the resonant frequency testing that Muenow provided evidence about established tests within the scientific community. Thus, the trial court did not need to apply the *Davis-Frye* rule in determining the admissibility of the testimony in question and did not abuse its discretion, *Lopez v General Motors Corp,* 224 Mich App 618, 634 (1997), in admitting the testimony.

Affirmed. Christman, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Maura D. Corrigan
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[1] As indicated in the caption of this case, three other companies were defendants below. In accordance with the jury verdict, the judgment in this case provided that Christman would recover $453,000 plus statutory interest from Defendant Stein, Hinkle, Dawe, Wood, and Johnson and $450,000 plus statutory interest from Defendant John B. Rossi Company. However, those companies have not appealed. The judgment also provided, in accordance with the jury verdict, that Christman was not entitled to recover from American Casualty Company of Reading, Pennsylvania.

[2] Because this suit was filed within ten years of the purchase of the goods at issue, it is immaterial whether this actually requires any suit for breach of implied warranties to have been filed within a ten year period.

[3] MCL 440.2314; MSA 19.2314 provides for the implied warranty of merchantability. MCL 440.2315; MSA 19.2315 provides for the implied warranty of fitness for a particular purpose.

[4] The implied warranty of merchantability has also been described as a warranty "that goods are of average quality in the industry." *Guaranteed Construction Co v Gold Bond Products*, 153 Mich App 385, 392-393; 395 NW2d 332 (1986). We see no real difference between these two ways of stating the content of the implied warranty of merchantability.

[5] The reference is to the decisions in *People v Davis*, 343 Mich 348, 370-372; 72 NW2d 269 (1955) and *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923).