

STATE OF MICHIGAN  
COURT OF APPEALS

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DAVID KAMMERAAD and BELINDA  
KAMMERAAD,

UNPUBLISHED  
January 25, 2007

Plaintiffs-Appellees,

v

AUTO SPORTS UNLIMITED, INC., d/b/a AUTO  
SPORTS OF HOLLAND,

No. 262166  
Ottawa Circuit Court  
LC No. 04-048564-CP

Defendant-Appellant.

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Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right the judgment entered in favor of plaintiffs. We affirm.

This case arises from plaintiffs' purchase of a used, 1996 Land Rover Range Rover HSE sport utility vehicle from defendant. After discovering that the vehicle had numerous mechanical defects, which defendant declined to repair, plaintiffs filed their complaint, asserting claims for revocation of acceptance under § 2608 of the Michigan uniform commercial code ("UCC"), MCL 440.2608, fraudulent misrepresentation, innocent misrepresentation, breach of warranty, breach of the federal Magnuson-Moss Warranty – Federal Trade Commission Improvement Act ("MMWA"), 15 USC § 2301 *et seq.*, breach of contract, violation of the Michigan Consumer Protection Act ("MCPA"), MCL 445.901 *et seq.*, and violation of the Michigan Motor Vehicle Service and Repair Act ("MMVSRA"), MCL 257.1301 *et seq.* Plaintiffs' claim for revocation of acceptance under the UCC was tried to the court; the remainder of plaintiffs' claims were submitted to the jury. The jury returned a verdict in plaintiffs' favor on the MMWA and MMVSRA claims, finding for defendant on the remainder of plaintiffs' claims. Thereafter, the trial court ruled in plaintiffs' favor on their claim for revocation of acceptance.

Defendant argues on appeal, for the first time, that the circuit court lacked subject matter jurisdiction over the instant action. A challenge to the court's subject-matter jurisdiction may be raised at any time, including for the first time on appeal. *Polkton Charter Twp v Pellegroni*, 265 Mich App 88, 97-98; 693 NW2d 170 (2005). This Court reviews de novo the question whether a trial court has subject-matter jurisdiction. *Id.* at 98.

As this Court explained in *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004), quoting *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992):

Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending. The question of jurisdiction does not depend on the truth or falsity of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry. Jurisdiction always depends on the allegations and never upon the facts.

Whether a court has subject-matter jurisdiction is determined by reference to the allegations set forth in the complaint, including the amount demanded, at that time the litigation is commenced. *Zimmerman v Miller*, 206 Mich 599, 604-605; 173 NW 364 (1919); *Grubb Creek Action Committee v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668-669; 554 NW2d 612 (1996). “If it is apparent from the allegations that the matter alleged is within the class of cases with regard to which the court has the power to act, then subject-matter jurisdiction exists.” *Grubb Creek*, *supra* at 668.

The circuit courts were established by the Michigan Constitution, which provides:

The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court. [Const 1963, art 6, § 13.]

Thus, “[c]ircuit courts are courts of general jurisdiction, and have original jurisdiction over all civil claims and remedies ‘except where exclusive jurisdiction is given by the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.’” *Farmers Ins Exchange v South Lyon Community Schools*, 237 Mich App 235, 241; 602 NW2d 588 (1999), citing MCL 600.605. “MCL 600.8301 provides district courts with exclusive jurisdiction over civil claims when the amount in controversy does not exceed \$25,000.” *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 473; 628 NW2d 577 (2001). Therefore, the circuit court does not have subject-matter jurisdiction over civil claims having an amount in controversy less than \$25,000. *Id.* at 475. The allegations of the complaint must be considered in determining whether the amount in controversy appears to a legal certainty to be within the jurisdictional limit of the district court, or whether there is a sufficient amount in controversy to allow the circuit court to exercise jurisdiction over the action. *Id.* MCL 600.8315 provides that, “[t]he district court shall not have jurisdiction in actions for injunctions, divorce or actions which are historically equitable in nature, except as otherwise provided by law.” Thus, the circuit court has exclusive jurisdiction over cases involving equitable matters, regardless of the amount in controversy. MCL 600.605; MCL 600.8315.

Plaintiffs premised their invocation of the circuit court’s jurisdiction on their request for rescission of the purchase agreement as a remedy for defendant’s alleged innocent misrepresentations, or fraudulent misrepresentations, as well as for the revocation of acceptance claim. Rescission is an equitable remedy. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982). “Rescission is justified in cases of innocent misrepresentation if a

party relies upon the misstatement.” *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995). It is also available for a substantial or material breach affecting an essential part of the contract or where a misrepresentation was made with intent to deceive or mislead. *Omnicom of Michigan v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997); *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677; 473 NW2d 720 (1991).

Defendant does not contest that plaintiffs properly pleaded claims for breach of contract, fraudulent misrepresentation and innocent misrepresentation, or that rescission can be an appropriate remedy for these claims. Defendant argues, however, that here, as in *Henderson v Chrysler Corp*, 191 Mich App 337, 339; 477 NW2d 505 (1991), “[a]lthough plaintiff[s]’ claim was referred to as rescission in the complaint, it is apparent that plaintiff[s] were] asserting revocation of acceptance of a motor vehicle sales contract,” pursuant to the UCC. In *Henderson* the plaintiff purchased a truck from the defendant, receiving a written warranty at the time of sale:

Sometime after plaintiff accepted the truck, it began to have engine-related difficulties. Plaintiff attempted on numerous occasions, but without success, to have the truck repaired. Eventually, plaintiff filed in the Macomb Circuit Court an action for rescission, naming both [the manufacturer and the dealer] as defendants, seeking to revoke acceptance of the vehicle and claiming breach of contract and breach of warranty.

The case was removed to the district court after mediation upon a finding that the damages were below the jurisdictional limit for circuit court. [*Id.* at 339.]

The case was tried in the district court, resulting in a verdict for the plaintiff. The defendant argued on appeal that the district court lacked jurisdiction because an action for revocation of acceptance is equitable in nature. This Court disagreed, concluding that while rescission is equitable in nature, revocation of acceptance is an action at law. *Id.* at 340-341.

In the instant case, plaintiffs alleged claims for revocation of acceptance under the UCC *as well as* separate claims for innocent and fraudulent misrepresentation for which rescission was the remedy sought. Reviewing the allegations of plaintiffs’ complaint, we conclude that, because plaintiffs’ alleged colorable claims for rescission, the circuit court had jurisdiction to hear this case. MCL 600.605; MCL 600.8315.

Defendant next argues that plaintiffs’ claim for revocation of acceptance is an action at law and not an equitable action and, therefore, that it should have been submitted to the jury. Defendant is correct that revocation of acceptance is an action at law, not equity. *Henderson, supra* at 341. Plaintiffs filed a jury demand, and defendant filed a reliance on that demand. Thus, the parties were entitled to a jury trial on all factual issues relating to plaintiffs’ legal claims. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 53-54; 698 NW2d 900 (2005). However:

A “subsequent waiver of a properly demanded jury trial can be inferred from the conduct of the parties under a ‘totality of the circumstances’ test.” Where both parties have actively participated in a lengthy bench trial regarding damages

without objection or protest, they have waived their right to a jury trial and may not claim error on appeal.

[*Id.* at 54. Citations omitted.]

Defendant participated in all respects, without objection or protest, in the trial of the revocation of acceptance claim to the court. Therefore, defendant waived any jury demand as to that claim.

Defendant also argues that the trial court's determination that plaintiffs were entitled to revoke their acceptance was not supported by the evidence presented at trial, and was not in conformance with MCL 440.2608, which provides, in relevant part:

- (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
  - (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
  - (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

In granting revocation, the trial court explained that defendant represented the Range Rover as a "well cared for" used vehicle, and that defendant did not disclose to plaintiffs that the vehicle had been stolen and stripped or that parts were replaced. The trial court inferred that "well cared for" implies that, in addition to being clean, the mechanical aspects of the vehicle have been well maintained and that mechanical problems were appropriately taken care of. The trial court found that plaintiffs expected to purchase a "well cared for" Range Rover; that the Range Rover was not "well cared for," and therefore, that it did not conform to that which plaintiffs agreed to buy; and that this nonconformity did substantially impair its value.

Defendant first argues that the trial court erred in determining that there was a nonconformity in the vehicle that substantially impaired its value to plaintiffs. This Court reviews findings of fact by a trial court sitting without a jury for clear error. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake was made. *Id.*

A nonconformity, within the meaning of MCL 440.2608, is "a failure of the goods sold to conform to legitimate expectations arising from the contract." *Davis v LaFontaine Motors, Inc*, 271 Mich App 68, 82; 719 NW2d 890 (2006). Both testimony and documentary evidence presented at trial established that defendant advertised the Range Rover as a "well cared for" vehicle, and that defendant's salesman advised plaintiffs that the vehicle had a single prior owner, and was a well cared for, leased vehicle. Such statements imply that the vehicle has been well maintained mechanically, and that it had not suffered the type of damage that this vehicle incurred. Thus, we conclude that the trial court's factual determination that defendant represented the Range Rover to be a well cared for, mechanically sound vehicle was supported by the evidence presented by trial.

Defendant next argues that the trial court's factual findings were insufficient to warrant revocation of acceptance, because the court failed to determine whether plaintiffs accepted the Range Rover on the reasonable assumption that the nonconformity would be cured, or that plaintiffs' acceptance of the vehicle was reasonably induced by the seller's assurance, as required by MCL 440.2608. We conclude, however, that the trial court's opinion, fairly read, indicates that the court implicitly concluded that plaintiffs' acceptance of the vehicle was reasonably induced by defendant's assurances as to its condition as a "well cared for" Range Rover.

Defendant argues that because plaintiffs elected to proceed to judgment on their revocation claim, they are not entitled to an award of attorney fees. We review a trial court's award of attorney fees for an abuse of discretion. See e.g., *In re Condemnation of Private Property for Highway Purposes*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997). Whether attorney fees constitute incidental and/or consequential damages under the UCC presents a question of statutory construction. Issues of statutory construction are reviewed de novo. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

Plaintiffs are entitled to recover for revocation of acceptance those damages available to a buyer for nondelivery, including incidental and consequential damages. MCL 440.2711; MCL 440.2713. In *Kelynack v Yamaha Motor Corp, USA*, 152 Mich App 105, 114; 394 NW2d 17 (1986), this Court held that a trial court did not abuse its discretion when it awarded attorney fees as consequential damages incident to the buyer's revocation of acceptance of a nonconforming motorcycle, even where the warranty excluded recovery of incidental and consequential damages. This Court noted that to determine otherwise would be "particularly untenable where, as here, the bulk of the buyer's damages are the consequential damages which the seller now seeks to avoid. In this case, failure to award plaintiff attorney's fees would in effect result in no remedy at all." *Id.* at 115-116. We therefore conclude that the trial court did not abuse its discretion in awarding plaintiffs their attorney fees as consequential damages as part of their remedy for revocation of acceptance.

Further, the trial court had the discretion to award plaintiffs their attorney fees under the MMWA. That act specifically provides:

If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and provision of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate. [15 USC § 2310(d)(2).]

Defendant does not argue that an award of attorney fees under the MMWA was an abuse of discretion. Rather, without citation to authority, defendant asserts that, having chosen to accept the remedy for revocation of acceptance, plaintiffs are limited to an award of attorney fees under the UCC. In *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 308-309; 616 NW2d 175 (2000), this Court upheld the trial court's award of attorney fees under the MMWA, where the plaintiff was barred from recovering consequential and incidental damages under the UCC by the express terms of the applicable warranty. This Court noted that the MMWA "exists in order to assist consumers in vindicating their rights where legal expenses would otherwise be

prohibitive.” *Id.* at 310.<sup>1</sup> The Court explained, however, that the plaintiffs were not permitted to obtain double recovery of attorney fees pursuant to the MMWA and another theory of recovery. *Leavitt* thus stands for the proposition that a plaintiff prevailing on a UCC claim and an MMWA claim may recover attorney fees, even where such fees are not available as part of the UCC claim, so long as such award does not result in double recovery of such fees. Therefore, the trial court did not abuse its discretion in awarding plaintiffs their attorney fees under the MMWA, regardless of the fact that plaintiffs proceeded to judgment on their revocation of acceptance claim, and regardless of whether attorney fees are available as incidental and/or consequential damages under the UCC.

Affirmed.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Helene N. White

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<sup>1</sup> This Court further determined that the language of the MMWA, which provides for an award of attorney fees to a plaintiff who “finally prevails,” authorizes an award of a successful plaintiff’s actual and reasonable appellate attorney fees. *Leavitt, supra* at 311-312.