

**Court of Appeals, State of Michigan**

**ORDER**

Auto-Owners Insurance Co v Yamaha Motor Corp USA

Docket No. 243064

LC No. 2001-034425-CZ

Karen M. Fort Hood  
Presiding Judge

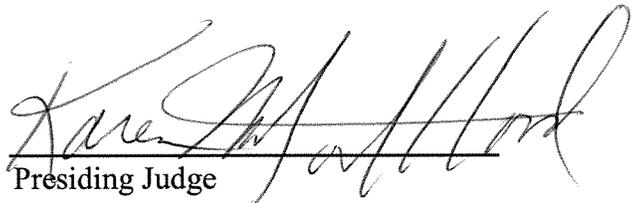
Richard A. Bandstra

Patrick M. Meter  
Judges

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On the Court's own motion, to correct a clerical error, the caption of the unpublished per curiam opinion issued February 12, 2004, is hereby AMENDED to include "USA" in the defendant-appellee's title.

The Court's docket has been modified to reflect the following: Auto-Owners Insurance Company v Yamaha Motor Corporation USA. In all other respects, the opinion remains unchanged.

  
\_\_\_\_\_  
Presiding Judge



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 2 2004

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Date

  
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Chief Clerk

STATE OF MICHIGAN  
COURT OF APPEALS

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AUTO OWNERS INSURANCE COMPANY,

Plaintiff-Appellant,

v

YAMAHA MOTOR CORPORATION,

Defendant-Appellee.

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UNPUBLISHED

February 12, 2004

No. 243064

Oakland Circuit Court

LC No. 2001-034425-CZ

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

In this products liability and breach of warranty action, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

This case concerns a fire allegedly caused by a golf cart distributed by defendant. Plaintiff paid over \$48,000 in insurance proceeds to its subrogors before contacting defendant to recover its losses.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When reviewing a decision on a motion for summary disposition based on MCR 2.116(C)(10), an appellate court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the light most favorable to the party opposing the motion. MCR 2.116(C)(10), (G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition was appropriately granted if there was no genuine issue as to any material fact, and the moving party was entitled to judgment as a matter of law. *Id.*

Plaintiff asserts that defendant should be equitably estopped from arguing it is not the manufacturer of the golf cart. We disagree. The doctrine of equitable estoppel is used to preclude an opposing party from either asserting or denying a particular fact. *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 527; 644 NW2d 765 (2002) (quoting *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999)). "Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Id.* However, "silence or inaction may form the basis for an equitable estoppel only where the silent party had a duty or obligation to speak or take action." *Conagra, supra*,

141 (citing *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 309-310; 583 NW2d 548 (1998)).

The existence of a duty presents a question of law for the court. *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996). The duty element questions whether an actor has a legal obligation to so govern his actions as not to unreasonably endanger the person or property of others. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). A single factor does not resolve the question of duty. Rather, the courts examine a wide variety of factors, including the foreseeability of harm, the nature of the risk, and the relationship of the parties. *Id.* at 450. Although plaintiff submitted documents regarding communications between plaintiff and defendant, plaintiff did not present evidence regarding the nature of the relationship between defendant, the distributor, and the manufacturer, such that a duty to take action could be imposed upon defendant. Defendant participated in the action in its role as a distributor and addressed the claim of breach of warranty raised against it. Under the circumstances, plaintiff did not present evidence in support of application of the doctrine of equitable estoppel, and the trial court properly granted defendant's motion for summary disposition. *Dressel, supra.*<sup>1</sup>

Plaintiff next asserts that the trial court erred in granting defendant summary disposition because issues of material fact remain. We disagree. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). MCL 600.2947(6) describes a distributor's liability as follows:

(6) In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:

(a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.

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<sup>1</sup> We note that plaintiff also contends that defendant had a duty to speak pursuant to the Michigan Consumer Protection Act (MCPA), MCL 445.903. However, review of the complaint in this matter reveals that plaintiff raised two causes of action entitled negligence and breach of warranty. Plaintiff did not move to amend the complaint in the lower court to add a count based on violations of the MCPA. Moreover, the first time the issue of application of MCPA was raised was in the reply brief filed on appeal. This issue was not raised, addressed, and decided in the trial court. Therefore, the issue is not preserved for appellate review. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

(b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

As noted above, in response to defendant's motion for summary disposition, plaintiff submitted letters between plaintiff's adjuster and defendant regarding defendant's request to inspect the golf cart as well as an affidavit from plaintiff's adjuster's legal counsel stating that defendant did not inform her that it was not the manufacturer until after the complaint was filed. This evidence does not establish that defendant was the manufacturer or designer of the golf cart, that defendant was negligent in some way in supplying the cart to the plaintiff's subrogors, or that defendant's warranty was ineffective. Furthermore, plaintiff argues that issues of fact remain regarding defendant's relationship with the manufacturer, defendant's duty to plaintiff, and defendant's fraud and other misconduct in responding to plaintiff's claims. However, plaintiff presented no evidence to the trial court regarding defendant's relationship to the manufacturer, defendant's duty, or fraud; mere allegations are insufficient. Therefore, plaintiff has failed to show any remaining issues of material fact, which would convince this Court to reverse the summary disposition granted to defendant.

Plaintiff finally asserts that an issue of material fact remains regarding whether plaintiff's subrogors received the limited warranty and that the trial court erred in finding that defendant's warranty disclaimer was conspicuous. Again, we disagree.

MCL 440.2314(1) regarding implied warranties provides as follows:

(1) Unless excluded or modified (section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. ...

MCL 440.2316(2) reads as follows:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

MCL 440.1201(10) defines "conspicuous" as follows:

(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 ... is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. ... *Whether a term or clause is "conspicuous" or not is for decision by the court.* [Emphasis added.]

A review of the disclaimer shows that it is in bold, all-caps type and, therefore, fits the definition given in MCL 440.1201(10).

Plaintiff argues that defendant has presented no evidence that plaintiff's subrogors *received* the owner's manual. However, defendant did present an affidavit from its legal counsel explaining that each owner of a golf cart received an owner's manual, which contained the limited warranty and warranty disclaimer. Plaintiff has presented no evidence to the contrary. *Quinto, supra*. Therefore, no issue of material fact remained concerning whether plaintiff's subrogors received the warranty. The warranty limited coverage to three years, and the fire occurred more than four years after plaintiff's subrogors purchased the cart. Therefore, the warranty was expired, and the trial court properly granted defendant's motion for summary disposition regarding plaintiff's breach of warranty claim.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Richard A. Bandstra

/s/ Patrick M. Meter