

STATE OF MICHIGAN
COURT OF APPEALS

FRED JAMES WILLIAMS,

Plaintiff/Counter Defendant-
Appellant,

v

GENERAL MOTORS ACCEPTANCE
CORPORATION (GMAC),

Defendant/Counter Plaintiff-Third
Party Plaintiff,

and

WILLIAMS CHEVROLET, INC.,

Defendant/Third Party Defendant-
Appellee.

UNPUBLISHED
October 25, 2011

No. 299345
Grand Traverse Circuit Court
LC No. 09-027524-NZ

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right challenging the trial court's orders dismissing his various claims against defendant pursuant to MCR 2.116(C)(10), and sanctioning plaintiff's attorneys approximately \$16,500 for signing a frivolous complaint in contradiction to MCR 2.114. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

On April 8, 2008, plaintiff purchased a 1997 Cadillac DeVille from defendant Williams Chevrolet, Inc. (the dealership). The purchase price was \$4,995 and the vehicle had approximately 135,000 miles. Plaintiff signed a retail installment sales contract with the dealership to complete the purchase. The dealership assigned this contract to co-defendant General Motors Acceptance Corporation (GMAC).¹

¹ GMAC settled with plaintiff and has no stake in this appeal. Because the dealership is the only party that has an interest at stake on appeal, we will use the singular "defendant" to refer to it.

As part of the transaction, plaintiff signed a document entitled “Vehicle Order.” This document stated that the vehicle was “sold as is” with “no warranty.” It also included an integration clause: “The front and back hereof comprise the entire agreement pertaining to this purchase and no other agreement of any kind, verbal understanding or promise have been made.”

According to plaintiff, he asked the salesperson for a “safe and reliable used vehicle,” the salesperson showed him the Cadillac at issue, and told him that the Cadillac “had been inspected by the dealership and had been found to have no mechanical problems or deficiencies.” Plaintiff claimed that he relied on the salesperson when he decided to purchase the vehicle. Defendant acknowledged that the vehicle “had a safety inspection and an oil change,” but has otherwise denied plaintiff’s allegations. Plaintiff also claimed that there was no “buyer’s guide” in the vehicle’s window and that he did not otherwise receive one.

According to plaintiff, when he drove the vehicle approximately 80 miles back to his residence, the service engine light came on and the vehicle began lurching. Plaintiff took the vehicle to a nearby GM dealership, where a mechanic performed a throttle body cleaning and replaced the fuel filter. Shortly thereafter, the vehicle “suffered ... another mechanical failure” and was towed to Maxx Garage, where \$436.76 worth of repairs were completed. The mechanics at Maxx Garage also discovered that the vehicle needed additional repairs. Plaintiff claimed that the mechanics at Maxx Garage told him that had the dealership performed a proper inspection, it would have recognized that the vehicle required these additional repairs.

Subsequently, the dealership reimbursed plaintiff \$436.76 for the Maxx Garage repairs and performed some additional repairs for free, but refused to repair all the problems discovered by Maxx Garage. After attempts to resolve the problems directly with the dealership failed, plaintiff stopped making payments² on the vehicle and filed a complaint alleging ten causes of action against the dealership. Plaintiff claimed (I) Fraud and/or misrepresentation; (II) Breach of express warranty; (III) Breach of implied warranty; (IV) Breach of implied warranty of fitness for particular purpose; (V) Revocation of acceptance; (VI) Violation of the Magnuson-Moss Warranty Act (“MMWA”), 15 USC 2301 *et seq.*; (VII) Violation of the Michigan Motor Vehicle Code, MCL 257.1 *et seq.*; (VIII) Violation of the Michigan Consumer Protection Act (“MCPA”), MCL 445.901 *et seq.*; (IX) Breach of contract/rescission; and (X) Violation of the Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq.*

On December 1, 2009, defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff responded, and the trial court held a hearing on December 21, 2009. The trial court granted the motion in part, dismissing with prejudice counts I, II, III, IV, V, VII, IX, and X. The trial court requested additional briefing regarding counts VI and VIII.

On February 16, 2010, defendant moved for summary disposition as to counts VI and VIII. Defendant also requested costs and attorney fees pursuant to MCR 2.114. Plaintiff responded, and a hearing was held on March 15, 2010. The trial court granted the motion and, additionally, awarded costs in the amount of \$285.74 and attorney fees in the amount of \$16,120.

² Again, plaintiff settled his dispute over payment of the sales contract with GMAC, agreeing to pay GMAC \$2,500 and consent to an order dismissing all of plaintiff’s claims with prejudice.

Plaintiff first argues that the trial court erred in granting defendant summary disposition on the warranty, fraud, MCPA, and MMWA claims. We agree that the trial court erred in granting summary disposition on the fraud and MCPA claims, but conclude that the trial court did not err in granting summary disposition on the warranty and MMWA claims.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues, MCR 2.116(G)(4), and must support his position with affidavits, depositions, admissions, or other documentary evidence, *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The opposing party must then show, by submission of admissible evidence, that a genuine issue of material fact exists. *Mich Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The trial court ruled from the bench in dismissing the fraud and warranty claims, as follows:

Count I is fraud and misrepresentation, that's based on the claim that they--Paragraph 3 of the affidavit of Fred Williams, which is attached to the defendant's response, in making my decision to purchase the Cadillac I relied on defendant, dealer/salesperson, who told me Cadillac had been inspected by the dealership and found no mechanical problems or deficiencies, that would appear to be the explicit warranty that he's claiming was violated. I will grant the motion to dismiss for two reasons. One, there is no evidence that the dealership did not inspect, and there is no evidence there were actual mechanical problems or deficiencies at the time the thing was picked up. We're talking an 11-year old car with 135,000 miles on it. To the extent you construe something as shrimpy as this, warranting the car[']s going to be new, that would be ridiculous. In addition . . . the purchaser, signed [the vehicle order] and above that there is six lines of gray matter and immediately above that is terms of purchase and three vacant lines. And, written on those lines are in handwriting, larger than the type of the printed form by a lot, a lot larger, it says, customer agrees to above terms, vehicle sold as is, no warranty, and Mr. Williams signed it, that's a disclaimer of any expressed warranty. And consequently, so, A, they can't claim this is an expressed warranty and, B, there is no evidence to indicate the warranty was in fact invalid. Remember the warranty as recited in Paragraph 3, Williams affidavit is not that the vehicle will be without mechanical problems or deficiencies for an extended period of time, it's just warranting at the time that they inspected it and found, that's the word it says here, "found" no mechanical problems or deficiencies. There is no evidence whatsoever they did not inspect the Cadillac, and there is no evidence whatsoever they inspected it and did find mechanical problems or deficiencies. But, beyond that, you still have a waiver of any expressed warranty. So, I'm going to dismiss fraud, misrepresentation, Count II [sic].

Breach or [sic] express warranty, Count III [sic], is warranty for an implied purpose. Again, this “as is, no warranty” language handwritten right above the guy[’]s signature is a disclaimer of that also. So, implied warranty is dismissed, Count III.

I. WARRANTY CLAIM

Article 2 of the Uniform Commercial Code (UCC) applies to transactions in goods, MCL 440.2102, and the existence of a warranty arising out of such a transaction is evaluated under the terms of the UCC. *Heritage Resources, Inc v Caterpillar Fin Services Corp*, 284 Mich App 617, 633; 774 NW2d 332 (2009). Here, the 1997 Cadillac at issue in the immediate case was indisputably a good within the meaning of the UCC. MCL 440.2105(1); See also *Whitcraft v Wolfe*, 148 Mich App 40, 50; 384 NW2d 400 (1985) (recognizing that automobiles are goods).

Express Warranty

Plaintiff asserts that the salesperson told him the automobile had been inspected by the dealership and had been found to have no mechanical problems or deficiencies, and argues that such an express warranty may not be disclaimed. However, when parties reduce their sales agreement to writing and the writing expresses the parties’ intention that it represents “a final expression of their agreement,” then evidence of prior or contemporaneous oral agreements may not contradict the writing. MCL 440.2202. Here, plaintiff attempted to introduce parol evidence of a warranty despite a conspicuous warranty disclaimer and integration clause in the written vehicle order. Because no evidence of defendant’s warranty exists inside the written sales contract, and the integration clause forecloses parol evidence of the oral warranty, MCL 440.2202; MCL 440.2316, the trial court properly granted defendant summary disposition on plaintiff’s breach of express warranty claim.

Implied Warranty

Plaintiff’s count III alleged breach of implied warranty of merchantability, and count IV alleged breach of implied warranty of fitness for particular purpose. Although the implied warranties of merchantability and fitness for a particular purpose arise by operation of law under the UCC, MCL 440.2314; MCL 440.2315, both of these implied warranties may be excluded or disclaimed by the seller pursuant to MCL 440.2316. *McGhee v GMC Truck & Coach Div, Gen Motors Corp*, 98 Mich App 495, 500; 296 NW2d 286 (1980).

Here, the vehicle order stated that the vehicle was “sold as is” with “no warranty.” This document met the statutory requirements of MCL 440.2316(3)(a) and therefore operated to preclude liability for breach of any implied warranties. Plaintiff’s freedom to inspect the vehicle at the time of purchase also precluded his recovery under his implied warranty claims, MCL 440.2316(3)(b). Indeed, plaintiff himself claimed that an inspection would have revealed the

defects. As such, the trial court properly granted defendant summary disposition on plaintiff's breach of implied warranty claims.³

II. FRAUD CLAIM

Plaintiff argues that he raised a viable claim of fraud or misrepresentation regarding a statement defendant's employee allegedly made in connection with purchasing the automobile. Plaintiff claimed that defendant induced him into purchasing the automobile by fraudulently informing him that the automobile had been inspected by the dealership and had been found to have no mechanical problems or deficiencies.

The elements of a fraud or misrepresentation claim are: "(1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675; 599 NW2d 546 (1999). Additionally, the plaintiff's reliance upon the representation must have been reasonable. *Id.* at 690.

The trial court engaged in impermissible fact finding in granting defendant summary disposition on this issue. Although the burden of proving fraud by clear and convincing evidence is on the party alleging it, *Groth v Singerman*, 328 Mich 615, 619; 44 NW2d 155 (1950), reasonable minds could find that the dealership fraudulently informed plaintiff that the automobile had been inspected by the dealership and had been found to have no mechanical problems or deficiencies.

Defendant argued below and on appeal that plaintiff's fraud claim should fail because any reliance was unreasonable in light of the "as is, no warranty" clause. See *Novak*, 235 Mich App at 689 (plaintiff acted unreasonably in relying on oral statements that were contradicted by written contract). However, in the immediate case, it was not unreasonable for plaintiff to rely on the alleged oral statements because they were not contradicted by the written contract. An allegedly false assertion that a car has been inspected and found free of mechanical problems is not inconsistent with an "as is, no warranty" provision, because a vehicle can be sold "as is, no warranty" after an inspection is performed and reveals no problems.⁴

³ Plaintiff also argues that a question of fact existed whether defendant waived the "as is, no warranty" provision when it performed repairs on the vehicle, therefore reinstating the implied warranties. However, even assuming that this factual question was decided in plaintiff's favor, i.e., that defendant did waive the "as is, no warranty" provision, plaintiff's freedom to inspect the vehicle at the time of purchase would still preclude his implied warranty claim. MCL 440.2316(3)(b).

⁴ However, as discussed above, an "as is, no warranty" provision is inconsistent with a claim that defendant provided an oral *warranty* that the vehicle is free of mechanical problems, because a vehicle with a warranty cannot be sold as is.

It was undisputed that the car had mechanical problems after plaintiff drove it approximately 80 miles. The vehicle was repaired several times, including by defendant, but apparently remained inoperable at the time of the lower court proceedings due to mechanical problems that defendant refused to fix. Based on the vehicle breaking down so quickly and the need to repair it, a reasonable jury could find that the dealership fraudulently informed plaintiff that the automobile had been inspected by the dealership and had been found to have no mechanical problems or deficiencies. Summary disposition was inappropriate because there are many genuine issues of material fact, primarily concerning whether defendant made false or misleading statements, which must be decided in order to resolve the fraud claim.

III. MCPA CLAIM⁵

The trial court's reasoning for granting defendant summary disposition on this issue is somewhat unclear. Although it did not explain how, it appears that the trial court determined that the "as is, no warranty" clause defeated plaintiff's claims under the MCPA. Again, however, an allegedly false assertion that a car has been inspected and found free of mechanical problems is not inconsistent with an "as is, no warranty" provision. A vehicle can be sold "as is, no warranty" after an inspection is performed and reveals no problems.

The MCPA prohibits deceptive, unfair, and unconscionable trade practices that cause loss to consumers. MCL 445.903. An individual who suffers a loss from any of the acts enumerated in MCL 445.903 can bring suit under the MCPA. MCL 445.911. Under the statute, a loss includes unfulfilled or frustrated expectations. *Mayhall v A H Pond Co, Inc*, 129 Mich App 178, 185-186; 341 NW2d 268 (1983) (frustration of the plaintiff's expectation constitutes an injury under the MCPA, whereby a plaintiff may recover the difference between the actual value of the property and the value it would have possessed if the representation had been true).

Plaintiff alleged that defendant made false or misleading statements concerning whether the vehicle had undergone a safety inspection and had no mechanical problems or deficiencies. Plaintiff argues that he established valid claims based on MCL 445.903(c), (e), (n), (t), and (y), as follows:

(c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.

* * *

⁵ As defendant noted, plaintiff has abandoned some of his MCPA violations. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002) (stating that a party abandons an allegation of error by failing to brief its merits on appeal). Plaintiff originally alleged 17 violations of the MCPA; however, in his brief on appeal, he cited and addressed only five subsections of the MCPA, each corresponding to one of the 17 alleged violations. The 12 unaddressed violations have been abandoned.

(e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

* * *

(n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.

* * *

(t) Entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it.

* * *

(y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.

Viewing the evidence in the light most favorable to plaintiff, plaintiff presented sufficient evidence to establish valid claims under most of the sections quoted above. He alleged that defendant represented that the car had characteristics or a quality that it did not have. MCL 445.903(c), (e), or that defendant did not provide a mechanically sound car as promised, MCL 445.903(y). A reasonable factfinder could find that defendant's alleged representation caused plaintiff confusion as to his legal rights. MCL 445.903(n). However, a reasonable fact-finder could not find a violation of subsection (t), because plaintiff did not argue that the waiver was unclear. And again, summary disposition was inappropriate because there are many genuine issues of material fact, primarily concerning whether defendant made false or misleading statements, which must be decided in order to resolve defendant's MCPA claims. Given the existence of these genuine issues of material fact, the trial court erred in granting defendant summary disposition on this cause of action.

IV. MMWA CLAIM

The MMWA is designed to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 USC 2302(a). The statute permits "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract" to bring a cause of action against the warrantor for damages. 15 USC 2310(d)(1).

The Federal Trade Commission, pursuant to 15 USC 2309(b) of the MMWA, has enacted regulations and rules dealing with warranties and warranty practices in connection with the sale of used motor vehicles. The Used Motor Vehicle Trade Regulation Rule ("Used Car Rule") is found at 16 CFR 455.1, *et seq.* 16 CFR 455.1(c) states that "It is a violation of this Rule for any used vehicle dealer to fail to comply with the requirements set forth in §§ 455.2 through 455.5 of this part." 16 CFR 455.2(a) requires that before a used vehicle is offered for sale, a seller must

prepare, fill in as applicable, and display on the vehicle a “buyer’s guide.” If the seller offers the used vehicle without a warranty, the “as is” box should be marked on the buyer’s guide. 16 CFR 455.2(b)(i). A cause of action for violation of the Used Car Rule is authorized under § 2310(d)(1) of the MMWA, which allows a consumer to recover when he “is damaged by the failure of a supplier, warrantor, or service contract to comply with any obligation under this title.” 15 USC 2310(d)(1).

In the instant case, plaintiff alleged that defendant failed to comply with the Used Car Rule when it failed to display the buyer’s guide at the time the Cadillac was offered for sale. Defendant did not directly rebut plaintiff’s claim; however, it did assert that the buyer’s guide was affixed to the vehicle on March 19, 2008, approximately 20 days before plaintiff purchased the automobile. Plaintiff also claimed that had he received the buyer’s guide, he would have had a better opportunity to avoid the transaction.

Defendant was entitled to summary disposition on this claim because plaintiff failed to show that he was damaged as a result of the dealership’s alleged failure to provide the buyer’s guide. It is unclear how the lack of the buyer’s guide, which primarily concerns disclosure of the fact that the car was being sold “as is,” could have damaged defendant, when he signed a vehicle order that clearly disclaimed all warranties. As a matter of law, plaintiff cannot establish that he was damaged due to defendant’s failure to properly disclaim warranties in the buyer’s guide. Thus, the trial court properly granted defendant summary disposition on this claim.

In sum, the trial court properly granted summary disposition on plaintiff’s warranty and MMWA claims. However, the trial court erred in granting summary disposition on plaintiff’s fraud and MCPA claim, because a genuine issue of material fact existed whether the dealership fraudulently informed plaintiff.

V. SANCTIONS FOR FRIVOLOUS COMPLAINT

Plaintiff next argues that the trial court erred in sanctioning plaintiff’s attorneys for filing a frivolous claim. We agree.

“We review for clear error the trial court’s determination whether to impose sanctions under MCR 2.114.” *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). A decision is clearly erroneous when, although there may be evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Id.*

On appeal, plaintiff provides only general assertions that his counsel cited legal authority for her positions. He does not cite this authority or provide any specific argument how the ten causes of action he alleged in the complaint were not frivolous. This Court cannot analyze what plaintiff has not presented. “It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

However, given our conclusion that the trial court erred in granting summary disposition for plaintiff’s fraud and MCPA claim, these two claims were clearly well grounded in fact and

warranted by existing law. MCR 2.114(D)(2). As such, on remand, the trial court shall vacate the portion of the sanction award related to the fraud and MCPA claim.

VI. NEW JUDGE ON REMAND

Finally, plaintiff argues that the case should be reassigned to a different judge on remand. We disagree.

This Court “may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication.” *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). A party claiming judicial bias must overcome a heavy presumption of judicial impartiality. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001).

We find nothing in the record to indicate that the trial court would have substantial difficulty in setting aside previously expressed views or findings determined to be erroneous. Therefore, resentencing before a different judge is not warranted.

We affirm in part, reverse in part and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly