State of Connecticut
Department of Consumer Protection
Automobile Dispute Settlement Program

Rick's Pump & Water Service LLC v. Mercedes Benz USA, LLC

Case Number: 2015-2634

Pursuant to Connecticut General Statutes, Chapter 743b, the undersigned arbitrators, having been appointed by the Commissioner, and having duly considered the proofs and allegations of the parties, decide the following:

Summary

I. Consumer meets the requirements for relief under the Lemon Law.

1. Consumer, as purchaser, is entitled to enforce warranty obligations during the express warranty period.

2. Consumer purchased the Vehicle in Connecticut, where it is registered as a passenger vehicle.

4. Consumer notified Manufacturer of the Lemon Law claim.

5. The defects are covered by Manufacturer's warranty.
    a. The defect involves the sudden failure of the engine. The engine sputters, shakes, and spontaneously turns off.

6. Manufacturer was unable to conform the Vehicle to the express warranty after three repair attempts on the warranty-covered defects.

    a. Consumer is entitled to the presumption that reasonable repair attempts were made because more than two repair attempts have been made and the defect is likely to cause death or serious bodily injury.

7. The defects substantially impairs the vehicle's use, safety, or value.

8. The manufacturer did not successfully raise any affirmative defense.

II. Consumer is entitled to relief under C.G.S. § 42-179(d).

Findings of Fact

1. Rick's Pump and Gas Water Service, LLC ("Consumer") purchased a 2015 Mercedes-Benz Sprinter ("Vehicle") from the Mercedes-Benz of Danbury ("Dealer"). The consumer purchased the vehicle on June 26, 2015 and picked up the vehicle on July 7, 2015.

2. Consumer filed a Request for Arbitration on October 30, 2015.

3. Consumer gave notice of intent to file Lemon Law claim with the Mercedes-Benz Customer Assistance Center on October 30, 2015.

4. An arbitration hearing was held on February 23, 2016. At the hearing, Consumer was represented by Brett Stafford, the owner of Rick's Pump and Water Service. Stafford was accompanied by one employee, Carl Rainford, who was primarily responsible for operating the Vehicle. Keith Rose, Esq., ("Manufacturer's Representative") represented Mercedes-Benz USA ("Manufacturer") and called one expert witness: David Kowel, shop foreman at the Mercedes-Benz of Danbury. Tim Clark served as the State Technical Expert.

5. Vehicle had 178 miles on it when Consumer took delivery of it. On the day of arbitration, February 23, 2016, the vehicle had 5,338 miles on it.

6. The first repair attempt occurred between August 5, 2015 and August 11, 2015 (7 days). Consumer testified that on August 5, 2015, the engine warning light turned on, the vehicle lost power and began to sputter. Rainford, who was driving the vehicle, turned off the vehicle and restarted the power. The engine light turned off, and Rainford drove to the Dealer for repairs. At this time, the car had 2,532 miles on it.

7. During the first repair attempt, Dealer identified a problem within the fuel system that was producing low fuel pressure or a restriction in the system. The Dealer concluded that the low side fuel pump was supplying enough fuel to the system and that therefore the problem was a restriction in the system. Dealer claims that a visual inspection showed dark fuel (the color of iced tea) with a hint of a gasoline smell. Consumer contested the manufacturer's visual examination. Stafford contended that the color was light tan with a hint of blue coloring consistent with ultra low sulfur diesel fuel. Kowel claims that laboratory tests were not run in order to save the vehicle's warranty for future repairs.

8. Consumer testified that he owns two other diesel vehicles. Stafford testified that he has never had a problem with gasoline contamination in other vehicles. His employee, Rainford, testified that he is the only person who filled up the vehicle. Rainford has worked for Stafford for 10 years and has filled up the vehicles exclusively with diesel fuel in that time.

9. State Technical Expert ruled out the possibility that the Manufacturer or Dealer put gasoline fuel in the original tank before the Vehicle was delivered to the Consumer, because gasoline in the tank would have caused problems within the first few hundred miles.

10. Consumer took fuel sample, and gave the sample to Dealer upon requests to run tests. The Dealer did not submit the sample for laboratory testing. The sample was subsequently destroyed or lost.

11. **We found the consumer's testimony more credible than the manufacturer's expert because (1) Mercedes-Benz of Danbury had the opportunity to test the fuel sample, but did not; (2) Mercedes-Benz of Danbury lost or disposed of the Consumer's fuel sample; (3) the Consumer has never had a problem with gasoline contamination with his other vehicles; and (4) the vehicle in question exhibited problems very early in its lifespan. Of course, a lab test would have been the best evidence of fuel contamination. Since Kowel is responsible for the unavailability of this evidence, we draw an adverse inference against the manufacturer. *See* John Henry Wigmore, *Evidence at Trials in Common Law* § 278, at 133 (James H. Chadbourn ed., rev. ed. 1979).**

12. Dealer drained and refilled the tank. Dealer claims that they also recommended replacing the fuel filter, and pumping multiple gallons through the fuel system to flush it out. Dealer claims that fuel system was flushed out. No specific mention of flushing was made on the repair invoice issued (Invoice # 116709). Dealer charged Consumer $880.47 for repairs, claiming that this defect was caused by an outside influence and was not covered by warranty protection. Consumer paid for these repairs.

13. The second repair attempt is disputed. Consumer claims that the second repair attempt occurred from August 17, 2015 through August 21, 2015 (totalling 5 days). At the time, the Consumer claims there were 2,730 miles on the vehicle. Manufacturer denies this repair attempt. Since there is no written evidence of a second repair attempt, we assume, without deciding, that the repair attempt from 8/17/15-8/21/15 did not take place.

14. Consumer reported that the engine light turned on, the car lost power, resulting in loss of control of steering and brakes, and sputtered. As with the first reported incident, the driver (Rainford) restarted the vehicle and the engine warning light turned off and the car operated normally.

15. The Arbitration Panel finds a second[1] repair attempt occurred from September 2, 2015 through September 24, 2015 (totalling 23 days).

16. Consumer reported that driver (Rainford) lost control of vehicle, which began to sputter. Driver restarted the vehicle, but check engine light stayed on. Driver drove to the Dealer.

17. Dealer found fuel contamination and, according to Consumer's testimony, suggested to Consumer that fuel system had a bacterial infection. Dealer pulled apart fuel rails and found jelly substance.

18. All parties agree that by the third repair attempt, there was sludge in the fuel system.

19. Dealer recommended a replacement of fuel system for $9,491.45 plus labor costs, but said this would not be covered under warranty due to outside contamination. Consumer opted not to pay for replacement of fuel system. Dealer drained tank, flushed fuel system, and replaced water filtration system.

20. The third repair attempt occurred on October 15, 2015 (totalling 1 day).

21. Consumer reported that the vehicle lost power and control and began to sputter. After restarting the vehicle three times, the sputtering ceased. The van continued to operate with limited power. Consumer contacted the Dealer, who has not responded to request for repair.

22. After third repair attempt, Consumer has ceased to drive vehicle due to fear of safety. At the time of the hearing, the vehicle defect persisted.

Findings of Law

In order to recover under the Lemon Law, the consumer has the burden of showing eligibility. The consumer must prove that (1) the defect or condition was covered by the applicable express warranty; (2) the vehicle was subject to a reasonable number of repair attempts; and (3) the defect or condition substantially impaired the use, safety, or value of the vehicle. C.G.S. § 42-179(d).

As we shall discuss below, Consumer successfully made a *prima facie* showing that the defect is covered by the applicable express warranty, effectively shifting the burden to the

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[1] As noted above, the panel assumes *arguendo* that the 8/17/15-8/21/15 repair attempt did not occur. Therefore, we refer to the 9/2/2015-9/24/2015 repair attempt as the second repair attempt and to the 10/15/2015 repair attempt as the third repair attempt. By referring to these repair attempts as the second and third repair attempts, respectively, we do not intend to imply a finding of fact as to whether the 8/17/2015-8/24/2015 repair attempt did in fact occur.

manufacturer to show otherwise. The Consumer successfully showed that the vehicle was subject to a reasonable number of repair attempts and that the defect substantially impaired the use, safety, or value of the vehicle. The Manufacturer failed to raise an affirmative defense. Accordingly, Consumer is entitled to an award under the Lemon Law.

1. The defects were covered by the warranty.

As a threshold matter, we must resolve whether Manufacturer's assertion that the defects are not covered by the warranty should be treated as a challenge to this case's eligibility for arbitration or an affirmative defense. Respondent asserts that the Warranty Handbook explicitly disclaims any liability for damage resulting from gasoline contamination. Respondents argue that the defects in the vehicle are the result of gasoline contamination or other outside contamination. Respondents further argue that since the defects are not covered by the warranty, the case is not eligible for arbitration. Characterizing this as an eligibility issue instead of an affirmative defense has significant ramifications. The burden of proof for eligibility is on the consumer, whereas the burden of proof for an affirmative defense is on the manufacturer.

We hold that the Consumer has made a *prima facie* showing that the defects are covered by the warranty.[2] Given the *prima facie* showing that the defects are covered, we further hold that the Manufacturer's assertions that the defects are not covered by the warranty are best treated as an affirmative defense for several reasons. First, we begin with the text of the statute. The Connecticut Lemon Law provides that "it shall be an affirmative defense [to any Lemon Law Claim] . . . that a nonconformity is the result of abuse, neglect, or unauthorized modifications or alterations of a motor vehicle by a consumer." C.G.S. § 42-179(d). Filling a diesel vehicle with gasoline or other contaminated fuel would clearly fall into the category of "consumer abuse."

Second, the Manufacturer is estopped from asserting that these defects are not covered by the express or implied warranties. "[E]stoppel always requires proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury." Boyce v. Allstate Ins. Co., 236 Conn. 375, 385, 673 A.2d 77, 82 (1996).

In this case, the Manufacturer's Expert testified that it is standard practice to test a fuel sample when contamination is suspected. After a visual inspection, the Manufacturer's Expert testified that the color was consistent with gasoline contamination and that he smelled a hint of gasoline. However, the expert did not obtain a lab test to confirm his suspicions. He testified that he did not obtain a lab test because he did not want to void the Consumer's warranty. Relying on this representation, the Consumer paid $880 for a non-warranty repair so that the warranty would not be voided for future repairs. Nevertheless, the Manufacturer proceeded to void the

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[2] We consider this argument below.

warranty, and is now claiming that the warranty never applied to the first repair or subsequent repairs. Even if these actions do not estop the Manufacturer's argument, it would contort our notions of fair play and substantial justice to permit the Manufacturer to circumvent their standard practice of obtaining a lab test before voiding the warranty, only to rely on a voided warranty in the hearing. For those reasons and those stated in the "facts" section, we simply do not find the Manufacturer's argument, nor their Expert's testimony regarding the visual inspection, credible.

Third, other courts have treated similar cases as an affirmative defense. Interpreting the federal Magnusson-Moss Act, the Alaska Supreme Court held that "[i]n a car warranty case, the consumer must offer credible evidence that the defect is materials or workmanship related. Such evidence establishes a prima facie case of breach of an express warranty. The burden then shifts to the dealer or manufacturer to prove consumer abuse. To impose an unreasonably heavy burden on consumers is to deny them a meaningful remedy." Universal Motors, Inc v. Waldock, 719 P.2d 254, 259 (Alaska 1986).[3] *See also* MAN Engines & Components, Inc. v. Shows, 434 S.W.3d 132, 135 (Tex. 2014) (holding that an express disclaimer of warranty should be treated as an affirmative defense). It is important to note that the Connecticut Lemon Law was passed to solve many of the difficulties consumers faced in making a claim under the Magnusson-Moss Act. Thus, a reviewing court should consider placing an even lower burden on consumers than the one discussed in *Waldock* and the one adopted in this opinion.

Quoting *Universal Motors*, the Nebraska Supreme Court held that it would be "unfair and unconscionable" to place the burden on consumers to prove a specific defect in situations, such as this, where a consumer must repair their vehicle at an authorized dealership since the "dealer or manufacturer could tamper (whether intentionally or inadvertently) with the evidence." Genetti v. Caterpillar, Inc., 261 Neb. 98, 113, 621 N.W.2d 529, 542 (2001). This is exactly what the Consumer alleges in this case. The Consumer gave the Dealer/Manufacturer his own fuel sample to test for gasoline contamination and the Dealer/Manufacturer claims to have lost the sample. We find support for our holding in the Florida Court of Appeals, which held that "forcing consumers to identify the cause, rather than the effect, of a defect would be unreasonably burdensome." Mason v. Porsche Cars of N. Am. Inc, 688 So.2d 361, 367 (Fla. Dist. Ct. App. 1997). Thus, while there is conflicting testimony about the cause of the defect (mold, gasoline

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[3] Some courts have expressed a narrow view of the holding in *Waldock*. An Ohio Appellate Court ruled that a consumer must provide a "plausible explanation" for an engine failure that would point to a defect in materials or workmanship. *Roman v. Volkwagen of America*, 2008 WL 1921717 (Ohio App. Ct.). In that case, the manufacturer argued that the consumer did not properly maintain their vehicle and that the warranty excludes damages resulting from lack of proper maintenance. This case can be distinguished because the vehicle had been driven 40,000 miles before a problem manifested. In this case, the engine trouble began within the first 2,400 miles. Two pieces of evidence establish a prima facie showing of a defect in workmanship. First, the early-onset of the defect would indicate a defect in workmanship rather than consumer abuse. Second, the consumer provided credible evidence, discussed *infra*, that he did not fill their car with gasoline.

contamination, bacteria, engine defect), the burden is not on the Consumer to identify the cause for the panel. And while we may never know the precise cause of the defect, we are confident that the manufacturer has not carried their burden to prove their affirmative defense.

Some courts require that the consumer make a prima facie showing of a product defect. No Connecticut court has adopted this view. Nevertheless, we find the requirement of a *prima facie* case to comport with the interpretation of the law in the Arbitrator's Handbook. The Handbook requires that consumers prove "the defect or condition is covered by the manufacturer's warranty." ARBITRATOR HANDBOOK at 7. Nevertheless, the Handbook admits that "Typically, defects encountered by an owner of a new car are covered by such a warranty." *Id.* In order to establish a *prima facie case*, several states have adopted a test set out in *Prosser's Law of Torts* which requires that consumers provide circumstantial evidence of a defect by meeting one of the following five factors:

(1) expert testimony as to possible causes; (2) the occurrence of the accident a short time after the sale; (3) same accidents in similar products; (4) the elimination of other causes of the accident; (5) the type of accident that does not happen without a defect.

Laing v. Volkswagen of Am., Inc., 180 Md. App. 136, 160, 949 A.2d 26, 40 (2008)

The consumer has satisfied this burden by meeting prongs two, three, and four. (2) The defects manifested within 2,400 miles and two months of the vehicle's purchase. (3) The manufacturer's expert says that he sees this kind of engine trouble regularly. And though he attributed the "engine trouble" to fuel contamination, the panel worries that the incidence of this defect is too large to attribute to consumer error in filling up their vehicles. (4) Given all of the evidence, we are confident that gasoline contamination did not cause the engine trouble.

Fifth, we place the burden on the manufacturer to raise this issue as an affirmative defense because to place the burden entirely on the consumer would essentially create a requirement to provide expert testimony. Connecticut courts have declined to require expert testimony because the Lemon Law contains no such requirement and "[a]s a practical matter, many consumers have neither the time, resources, or wherewithal to hire and pay an expert . . ." Gen. Motors Corp. v. Martin, No. CV 97569943, 1997 WL 805137, at *3 (Conn. Super. Ct. Dec. 16, 1997).

Sixth, the manufacturer is better positioned to carry their burden of proof. As a structural matter, their witnesses (the dealer's technicians) are always experts in their field. In this case, the manufacturer had the means and opportunity to test a gasoline sample (twice!), but declined to do so. Not only did the manufacturer refuse to test their own sample, but they lost the consumer's sample, provided for the sole purpose that the sample be tested to determine fuel contamination.

Given all of these considerations and the remedial purpose of the Lemon Law, we find that the Consumer has made a *prima facie* case of eligibility and that the burden shifts to the

Manufacturer to prove that the defects are not covered under the warranty because they are the result of consumer abuse.

2. The vehicle was subject to a reasonable number of repair attempts with respect to the warranty-covered defects.

The vehicle was subject to three repair attempts during the first year of ownership. The Lemon Law provides a presumption that a reasonable number of repair attempts have been completed if the vehicle is subject to two or more repair attempts in the first year and the defect results in a condition that is likely to cause death or severe bodily injury. C.G.S. § 42-179(f). We hold that the sudden shutdown of the engine in the middle of traffic is likely to cause death or severe bodily injury. Mr. Rainford was driving the vehicle when it shut down for the first time and testified that he feared for his life.

The vehicle also satisfies the reasonable number of repair attempts prong under the presumptions in C.G.S. § 42-179(e) because the vehicle was out of service by reason of repair 30 or more days during the applicable period.

3. The relevant defects substantially impair the use, safety, or value of the Vehicle.

The Supreme Court of Connecticut has stated that the standard for substantial impairment of use, safety, or value is both subjective and objective. Gen. Motors Corp. v. Dohmann, 247 Conn. 274, 291 (1998). Since the vehicle is currently inoperable, it is clear that under both tests, this defect has resulted in a substantial impairment of use. It has malfunctioned at least three times, resulting in a threat to life. The consumer has testified that the loss of control over steering and braking caused the driver to fear severe danger. We find this testimony to meet the subjective and objective standards for "reasonable fear."

4. The Manufacturer did not successfully raise an affirmative defense:

Under the Connecticut Lemon Law, it is an affirmative defense that the alleged nonconforming condition is the result of abuse, neglect, or unauthorized modifications or alterations of the motor vehicle by a consumer. The defendant did not prove that the Consumer caused the damage due to negligence or abuse. We reach this decision on the basis of the following findings of fact:

(1) The manufacturer did not test the fuel sample to determine whether the fuel was contaminated by the Consumer;

(2) The manufacturer lost or destroyed the Consumer's fuel sample. Under binding Connecticut law, an adverse inference may be drawn against the Manufacturer because they intentionally destroyed or "lost" or "misplaced" the fuel samples. We find this

conduct to be intentional because (1) it is common practice to test the sample and (2) the manufacturer specifically requested the sample from the consumer. *See* Beers v. Bayliner Marine Corp., 236 Conn. 769, 675 A.2d 829, 832 (1996) ("[W]e adopt the rule of the majority of the jurisdictions that have addressed the issue in a civil context, which is that the trier of fact may draw an inference from the intentional spoliation of evidence that the destroyed evidence would have been unfavorable to the party that destroyed it.")

(3) We find Mr. Rainford's testimony credible that he did not fill the car with gasoline. He has worked for the Consumer for ten years. He has driven the vehicle exclusively. In ten years, he has never filled the vehicle with gasoline.

(4) The vehicle is new. Since the defect began to manifest itself shortly after purchase and delivery, it is more likely that the problem originated prior to being sold to the Consumer.

Considering all the evidence, we find the Manufacturer's theory that the Consumer filled the tank with contaminated fuel not credible. Therefore, the Manufacturer did not raise an affirmative defense.

5. The consumer is entitled to the following relief:

The Consumer is entitled to a refund of the total purchase price of the Vehicle (including tax), $38,900. The Consumer is additionally entitled to the cost of the first repair, $880.47. After the vehicle is returned to the Manufacturer, the Consumers shall pay the Manufacturer a reasonable use allowance, discussed below.

The evidence presented at the hearing demonstrates that the Consumers used the car for approximately one month and drove it a total of approximately 2,350 miles after it was delivered on July 7, 2015 (2532 miles on first repair attempt - 178 miles on the odometer upon delivery = 2,354 miles). The reasonable use allowance should only include the miles on the car until the first repair attempt. The total refund should be calculated as follows:

Contract price: $38,900
plus Cost of First Repair: $880.47
minus Reasonable Use Allowance: ($38,900 X 2,350 / 120,000) = $761.79
= $39,018.68

The Manufacturer shall provide the refund to the Consumers within 30 days of Manufacturer's receipt of this arbitration decision. The Consumers shall surrender the vehicle to the Manufacturer within 7 days upon receipt of the refund. The vehicle shall be surrendered at a location that is mutually convenient to the parties. The arbitration panel retains jurisdiction to decide any dispute about the reasonable use allowance or any interpretation of this award.

6. We decline to award the consumer relief for the following:

Consumer is not entitled to a refund for the cost of van lettering ($717.86) or the cost of the van shelves ($2267.84).[4] Such costs are not options provided for by the Manufacturer or Dealer, and therefore are outside the scope of the minimum refund required where a Consumer prevails under the Lemon Law.

Conclusion

IT IS HEREBY ORDERED that Consumer is entitled to relief under C.G.S. § 42-179(d).

We stress that the decision of the arbitrators does not replace any other remedies available under the applicable warranties, Connecticut General Statutes Chapter 743b, or the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 88 Stat. 2183 (1975), 15 U.S.C. § 2301 *et seq.*, as in effect on October 1, 1982.

Either Party may apply to the Superior Court within 30 days of receiving this decision to have the decision vacated, modified or corrected or within one year to have it confirmed as provided in Sections 42-181, 52-417, 52-418, 52-419 and 52-420 of the Connecticut General Statutes.

Nothing in this order shall prevent the parties from reaching an alternative, mutually satisfactory, agreement.

Signed March 21, 2016

Alexandra Perloff-Giles

Arbitrator (Chair): Alexandra Perloff-Giles

Arbitrator: Brian Mund

Arbitrator: Carter Greenbaum

[4] We note that, with respect to the van shelves, Consumer did not provide evidence of payment such as a receipt.