STATE OF MICHIGAN

COURT OF APPEALS

TODD A. MIEKSTYN and DAVID MIEKSTYN, Plaintiffs-Appellees, v BMC CHOPPERS and AMERICAN DISCOUNT CYCLEMART, Defendants-Appellants.	UNPUBLISHED April 10, 2007 No. 266439 Oakland Circuit Court LC No. 2003-055070-CP

Before: Wilder. P.J., and Sawyer and Davis, JJ.

PER CURIAM.

In this breach of warranty action, defendants appeal as of right the judgment entered in favor of plaintiffs following a jury trial. Defendants also appeal as of right the award of costs and attorney fees in favor of plaintiffs. We reverse and remand for further proceedings consistent with this opinion.

On April 24, 2003, plaintiffs Todd Miekstyn ("Todd") and David Miekstyn ("David") purchased a motorcycle from defendant American Discount Cyclemart ("ADC"). The motorcycle was manufactured by defendant Big Mike's Choppers ("BMC"). The motorcycle was covered by a one-year, 12,000 mile limited warranty. On August 5, 2003, Todd took the motorcycle to ADC because the motorcycle was leaking oil and would not start. ADC resealed the oil lines on the motorcycle. The repair was done under warranty, at no charge to plaintiffs. ADC returned the motorcycle to Todd on August 28, 2003. The motorcycle continued to leak oil and, on September 12, 2003, Todd took the motorcycle to Stevenson Cycle for service. Stevenson did not return the motorcycle to Todd until November 8, 2003. The delay was allegedly attributable to BMC's need to produce new oil lines for the motorcycle. Todd stored the motorcycle in David's garage for the winter. The motorcycle continued to leak oil while it was in storage.

On December 23, 2003, plaintiffs initiated this action against defendants, alleging that the motorcycle was defective and that defendants breached the express warranty, the implied warranty of fitness, and the implied warranty of merchantability. Plaintiffs asserted that they were entitled to recover the purchase price of the motorcycle, as well as costs and attorney fees, under the federal Magnuson-Moss Warranty Act ("MMWA"), 15 USC 2301 *et seq*., and that they were entitled to recover damages and reasonable attorney fees under the Michigan Consumer Protection Act ("MCPA"), MCL 445.901 *et seq.*

At trial, Todd testified that, when he changed the oil in the motorcycle, he filled the oil reservoir to one inch below the top of the reservoir, based on the instructions that he received from a service technician at ADC. The motorcycle did not come equipped with an oil dipstick, there were no lines inside of the oil reservoir indicating how much oil to add to the motorcycle, and the owner's manual did not mention the oil capacity of the motorcycle. Plaintiffs maintained that the motorcycle leaked oil because it was defective. Defendants' witnesses testified that the motorcycle was not defective; it leaked oil because Todd overfilled the oil reservoir, which caused the motorcycle to "blow gaskets."

The jury found that defendants did not breach any express or implied warranties, that plaintiffs were not entitled to revoke the purchase agreement for the motorcycle, and that defendants did not violate the MCPA. The jury also found, however, that defendants violated the MMWA. The trial court entered a judgment of no cause of action in favor of defendants on plaintiffs' breach of warranty claims and MCPA claim, and a judgment against defendants, and in favor of plaintiffs, in the amount of $10,000 on plaintiffs' MMWA claim. The trial court awarded $24,722.85 in costs and attorney fees to plaintiffs under the MMWA.

Defendants contend that, because plaintiffs failed to prove that defendants breached any warranty under state law, they could not maintain a breach of warranty action under the MMWA. We agree.

The interpretation and application of the MMWA presents a question of law that we review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29, 32; 658 NW2d 139 (2003). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Title Office, Inc v Van Buren Co Treasurer,* 469 Mich 516, 519; 676 NW2d 207 (2004), quoting *In re MCI Telecommunications Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). In construing a statute, we must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the statute's purpose. *Morris & Doherty, PC v Lockwood,* 259 Mich App 38, 44; 672 NW2d 884 (2003). "The MMWA expressly states three purposes: 'to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.'" *Abela v Gen Motors Corp*, 257 Mich App 513, 521-522; 669 NW2d 271 (2003), quoting *Davis v Southern Energy Homes, Inc*, 305 F3d 1268, 1272 (CA 11, 2002). The MMWA is remedial in nature and must be liberally construed to effectuate its intended goals. *Jordan v Transnational Motors, Inc,* 212 Mich App 94, 98; 537 NW2d 471 (1995).

The MMWA provides, in part, that "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, may bring suit for damages and other legal and equitable relief . . . ." 15 USC 2310(d)(1). There is no dispute that the motorcycle was a consumer product, that plaintiffs were consumers, and that defendants were considered suppliers or warrantors for purposes of the MMWA. See 15 USC 2301. Thus, plaintiffs were entitled to recover under the MMWA, in this case, if they established: (1) that they were damaged by defendants' failure to comply with any obligation under the MMWA, (2) that they were damaged by defendants' failure to comply with an obligation under a written warranty; or (3) they were damaged by defendants' failure to comply with an obligation under an implied warranty.

For purposes of the MMWA, "[t]he term 'implied warranty' means an implied warranty *arising under State law* . . . . in connection with the sale by a supplier of a consumer product." 15 USC 2301(7) (emphasis added). "The MMWA does not create implied warranties." *Parsley v Monaco Coach Corp*, 327 F Supp 2d 797, 805 (WD Mich, 2004). Thus, "[a]lthough the Magnuson-Moss Act creates a separate federal cause of action for breach of an implied warranty, courts must look to the relevant state law to determine the meaning and creation of any implied warranty." *Gusse v Damon Corp*, ____ F Supp 2d ____ (CD Cal, 2007), slip op at 5. Under Michigan law, the burden is on the buyer to establish any claimed breach of an implied warranty. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 316-317; 696 NW2d 49 (2005). In this case, plaintiffs failed to prove that defendants breached any implied warranty under state law. Plaintiffs did not challenge the jury's verdict in this regard. Thus, to the extent that plaintiffs' MMWA claim was based on defendants' alleged breach of any implied warranty, their MMWA claim must fail as a matter of law. Cf. *Computer Network, supra* at 321.

The one-year, 12,000 mile warranty provided by BMC was a "written warranty" for purposes of the MMWA. 15 USC 2301(6). Plaintiffs assert that they were entitled to recover under the MMWA because defendants "*failed to remedy the defect or malfunction such that they failed to conform to the warranty.*" 15 USC 2304(a) requires, in part, that the warrantor "must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty." Plaintiffs relied on this section of the MMWA in making out their claim, as evidenced by the MMWA jury instruction, which provided, in part, that plaintiffs were required to prove by a preponderance of the evidence:

> D. That the following occurred:
>
> A. *One or both Defendants failed to remedy a defect, malfunction or failure to conform to the written warranty within a reasonable time and without charge*, OR
>
> B. One of [sic] both Defendants violated an Implied Warranty, Service Contract or Express Warranty.

Plaintiffs alleged that, by failing to repair the motorcycle after having had a reasonable amount of time to do so, defendants failed to conform to the minimum standards for written warranties set forth in 15 USC 2304(a).

However, the written warranty in this case was a limited warranty. 15 USC 2303; 15 USC 2304(a). Limited warranties are not subject to the federal minimum standards set forth in 15 USC 2304(a). See *MacKenzie v Chrysler Corp*, 607 F2d 1162, 1166 n 7 (CA 5, 1979) ("The remedies set forth in 15 USC § 2304 are applicable only to 'full' warranties"); *Kruger v Subaru of America, Inc,* 996 F Supp 451, 458 n 18 (ED Pa, 1998) ("section 2304(a) of the MMWA implies that its minimum standards of protection pertain to full warranties and not to a limited warranty"); *Mayberry v Volkswagen of America, Inc,* 278 Wis 2d 39, 50 n 8; 692 NW2d 226 (2005) ("The federal minimum standards for warranties provided in § 2304(a) apply only to full warranties"). Thus, plaintiffs could not predicate their MMWA claim on defendants' alleged failure to conform with any requirements set forth in 15 USC 2304(a). "[A] consumer would not be entitled to bring an action for violation of the standards included in section 2304(a) if he

received a warranty designated as a "limited warranty." *Mydlach v DaimlerChrysler Corp,* 364 Ill App 3d 135, 138; 846 NE2d 126 (2005).

15 USC 2310(d), which authorizes a suit against a warrantor for failure to comply with any obligation under a written warranty, does allow consumers to sue for a failure to comply with a limited warranties. However, in order for plaintiffs to prove that they were harmed by defendants' alleged failure to comply with the written limited warranty, plaintiffs were first required to prove that defendants actually breached the warranty. This Court has held that the MMWA "provides remedies to consumers for *breaches of express and implied warranties*." *Computer Network, supra* at 319 (emphasis added). "Courts and commentators have generally recognized that [15 USC 2310(d)] confers a private right of action to consumers *who suffer a breach of a limited warranty*." *Pierce v Catalina Yachts, Inc,* 2 P3d 618, 626 (Al, 2000) (emphasis added). See also *Gusse, supra,* ____ F Supp 2d at ____, slip op at 6 ("Breach of an express limited warranty provides a federal cause of action under 15 U.S.C. § 2310(d)(1)"); *Parkerson v Smith,* 817 So2d 529, 534 (Miss, 2002) ("The language of the Act clearly indicates that by enacting it, Congress intended to preserve for consumers the right to bring suit for breach of written or implied warranties").

Plaintiffs were required to establish that defendants breached the warranty under state law. In *King v Taylor Chrysler-Plymouth, Inc,* 184 Mich App 204, 221; 457 NW2d 42 (1990), this Court held that the MMWA "allows recovery of attorney fees upon successful suit under a written or implied warranty *under state law*" (emphasis added). In *Michels v Monaco Coach Corp,* 298 F Supp 2d 642, 650 (ED Mich, 2003), the court opined:

> The MMWA defines an "implied warranty" as "an implied warranty arising under State law . . . in connection with the sale by a supplier of a consumer product." 15 U.S.C. § 2301(7). The Michigan courts have not interpreted this section. Those courts which have analyzed this definition, however, have concluded that the phrase "arising under" indicates that the obligations of the warranty are solely the creation of state law . . . .

In this case, the jury found that defendants did not breach any express warranty. Plaintiffs did not challenge the jury's verdict in this regard. Thus, plaintiffs failed to establish that defendants breached any written warranty under state law. Accordingly, to the extent that plaintiffs' MMWA claim was based on defendants' alleged breach of the written warranty, their MMWA claim must fail as a matter of law. "[T]he MMWA calls for the application of state written and implied warranty law, not the creation of additional federal law." *Hines v Mercedes-Benz USA, LLC*, 358 F Supp 2d 1222, 1234-1235 (ND Ga, 2005).

> Typically, private Magnuson-Moss actions allege breach of the written or implied warranty. For breach of the written warranty, the Magnuson-Moss cause of action is only valid if the plaintiff shows a breach of the express warranty. The consumer need not prove the exact cause of a defect to make a case for breach of warranty, however. A plaintiff may bring a Magnuson-Moss action for breach of the implied warranty even in the absence of any written warranty. Similarly, a consumer plaintiff may bring an action under the Magnuson-Moss Act for breach of a service contract. *These causes of action are based on state law and must meet the relevant state criteria*.

> *Breach of warranty actions that fail under state law will also fail under the MMWA.* [Consumer Protection & the Law, Chapter 14, § 19 (emphasis added).]

Plaintiffs did not assert any claims under MMWA independent of their breach of warranty claims under state law. Plaintiffs did not assert that defendants violated any other obligation under the MMWA.[1] Because plaintiffs failed to prove that defendants breached any implied or express warranty under state law, plaintiffs could not, as a matter of law, maintain any breach of warranty action under the MMWA.

Defendants next contend that the jury's verdict was inconsistent and contradictory and, therefore, defendants were entitled to a new trial or a judgment notwithstanding the verdict ("JNOV") on plaintiffs' MMWA claim.

We review the trial court's decision on a motion for a new trial for an abuse of discretion. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc,* 267 Mich App 625, 644; 705 NW2d 549 (2005). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "This Court reviews de novo a trial court's ruling on a motion for JNOV." *Detroit/Wayne Co Stadium Auth, supra* at 642. "When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law." *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123-124; 680 NW2d 485 (2004).

Defendants' assertion that they were entitled to a new trial is without merit. The fact that a jury's verdict is inconsistent or incongruent is not grounds for granting a new trial. *Kelly v Builders Square, Inc*, 465 Mich 29, 38-39; 632 NW2d 912 (2001). "Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside . . . ." *Lagalo v The Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998), quoting *Granger v Fruehauf Corp*, 429 Mich 1, 9; 412 NW2d 199 (1987).

Nevertheless, we conclude that defendants were entitled to a JNOV on plaintiffs' MMWA claim. Based on the language of the MMWA jury instruction, the jury seemingly must have determined that "[o]ne or both Defendants failed to remedy a defect, malfunction or failure to conform to the written warranty within a reasonable time and without charge." However, that portion of the jury instruction, which was based on the requirements for a full warranty set forth in 15 USC 2304(a), did not apply in this case. The motorcycle was subject to a limited warranty, and not a full warranty. Thus, the MMWA instruction did not adequately and fairly convey the

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[1] It is possible for a plaintiff to state a claim under the MMWA without asserting any breach of warranty claims. See, for example, the requirements for creating, disclaiming, limiting, or modifying a warranty set forth in 15 USC 2302 and 15 USC 2308. Plaintiffs did not allege that defendants violated any of these obligations under the MMWA.

applicable law. Cf. *Chastain v Gen Motors Corp,* 254 Mich App 576, 591-592; 657 NW2d 804 (2002).

"Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Reversal is not required unless the failure to do so would be inconsistent with substantial justice. *Id.* Failure to reverse in this case would be inconsistent with substantial justice. The MMWA jury instruction misstated the law, as it pertained to this case. Allowing plaintiffs to recover under the MMWA where the jury determined that defendants did not breach any express or implied warranties under state law, would be inconsistent with substantial justice and not harmless error. Cf. *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 479; 663 NW2d 447 (2003). Even viewing the evidence in the light most favorable to plaintiffs, reasonable jurors—following the correct instructions—could not have reached different conclusions. Thus, reversal is mandated. See *King, supra* at 218.

Plaintiffs contend that because the jury's verdict was consistent with the jury instruction, and because defendants did not object to the jury instruction, defendants cannot now challenge the jury's verdict on the basis of the erroneous instruction. Plaintiffs assert that "[a] jury instruction not objected to constitutes the law of the case." However, plaintiffs failed to cite any authority in support of this assertion. Moreover, our Supreme Court has held that "[i]f a defendant bases its motion for judgment notwithstanding the verdict on the insufficiency of the evidence as a matter of law to support the claim, *a failure to object to an erroneous jury instruction does not prevent entry of judgment for the defendant*." *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 427; 487 NW2d 106 (1992) (emphasis added); see *Boyle v United Technologies Corp,* 487 US 500, 513-514; 108 S Ct 2510; 101 L Ed 2d 442 (1988); *City of St Louis v Praprotnik,* 485 US 112, 118-121; 108 S Ct 915; 99 L Ed 2d 107 (1988). Contrary to plaintiffs' contention, defendants did not waive this issue by failing to object to the MMWA instruction. Defendants' failure to object to the MMWA instruction did not render the instruction the law of the case and did not preclude the entry of a JNOV in favor of defendants on plaintiffs' MMWA claim. *Hickey, supra.*

Based on the jury's conclusion that defendants did not breach any express or implied warranties, defendants were entitled to judgment as a matter of law on plaintiffs' MMWA claim. A motion for a JNOV should be granted where the evidence, viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Sniecinski v Blue Cross & Blue Shield of Michigan,* 469 Mich 124, 131; 666 NW2d 186 (2003); *Hickey, supra* at 431. We reverse the trial court's denial of defendants' motion for JNOV and remand this matter to the trial court for entry of a judgment of no cause of action, in favor of defendants, on plaintiffs' MMWA claim.

Defendants next contend that the trial court erred in awarding costs and attorney fees in favor of plaintiffs. We generally review an award of costs for an abuse of discretion. *Lavene v Winnebago Industries*, 266 Mich App 470, 473; 702 NW2d 652 (2005). However, we review the issue de novo where it involves a question of statutory interpretation. *Id.*

15 USC 2310(d)(2) provides that a consumer who prevails in any action brought pursuant to the MMWA

> 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 prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

However, the MMWA "allows recovery of attorney fees *upon successful suit under a written or implied warranty under state law*" (emphasis added). *King, supra* at 221. Plaintiffs failed to prove that defendants breached any implied or express warranty under state law. Thus, plaintiffs were not entitled to recover any costs or attorney fees under the MMWA. "[T]he power to tax costs is wholly statutory, and 'costs are not recoverable where there is no statutory authority for awarding them.'" *Lavene, supra* at 473, quoting *Portelli v I R Constr Products Co, Inc*, 218 Mich App 591, 605; 554 NW2d 591 (1996). On remand, the trial court shall vacate the order awarding costs and attorney fees to plaintiffs.

Based on our conclusion that defendants were entitled to judgment as a matter of law on plaintiffs' MMWA claim, we decline to address defendants' remaining issues on appeal. The issues are moot. An issue is moot if events have rendered it impossible for the court to fashion a remedy. *In re Contempt of Dudzinski,* 257 Mich App 96, 112; 667 NW2d 68 (2003).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Alton T. Davis