STATE OF MICHIGAN

COURT OF APPEALS

ELLEN M. MOOK and DAVID M. MOOK, Plaintiffs-Appellants, v GENERAL MOTORS COMPANY, Defendant, and DRAPER CHEVROLET COMPANY, Defendant-Appellee.	UNPUBLISHED June 25, 2013 No. 309147 Bay Circuit Court LC No. 10-003655-NP

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Ellen and David Mook purchased a 2004 Chevrolet TrailBlazer from Draper Chevrolet on August 30, 2004. Four years later, Ellen was injured in a serious front-end collision during which the vehicle's airbags failed to deploy. The Mooks filed suit against the car dealership and the manufacturer alleging breach of express and implied warranties. The Mooks dismissed their claims against General Motors (GM), the manufacturer, due to its bankruptcy. Thereafter, the circuit court summarily dismissed the warranty claims against Draper because GM, not the dealership, made the cited warranties and because Draper disclaimed all warranties in the sales contract. We affirm.[1]

I. BACKGROUND

In the summer of 2004, the Mooks visited the Draper dealership in contemplation of purchasing a Chevrolet TrailBlazer. They saw a description affixed to the subject vehicle's window, indicating that it was equipped with "dual stage front air bags." The Mooks asked a

[1] Draper complains that the Mooks filed their breach of warranty action beyond the statute of limitations. Draper waived this claim by failing to raise it in the circuit court "in the responsive pleading or by motion as provided" in the court rules. MCR 2.111(F)(2).

Draper sales representative "for an explanation as to how dual airbags worked and under what circumstances they were designed to deploy." The representative provided the vehicle's owner's manual and, according to the Mooks, told them that "an explanation of how the dual airbag system worked was contained within." The manual described that the airbags "are designed to inflate in moderate to severe frontal or near-frontal crashes. But they are designed to inflate only if the impact exceeds a predetermined deployment threshold." "Dual stage" airbags, according to the manual, "adjust the restraint according to crash severity . . . . For moderate frontal impacts, these airbags inflate at a level less than full deployment." The manual stated that "the threshold level for the reduced deployment is about 9 to 16 mph" and "about 18 to 25 mph" for full deployment. The manual further provided that a warning signal would illuminate on the dashboard control panel in the event of an "airbag electrical system . . . malfunction[.]"

At the time of purchase, the Mooks entered into a "Retail Instalment [sic] Sale Contract" with Draper, which stated in relevant part, "the Seller makes no warranties, express or implied." Draper also provided a document entitled "Buyer's Guide," which warned the Mooks that the vehicle came only with a "limited warranty" for the "remainder of [the] factory warranty."

Draper advised the Mooks at the time of sale regarding the availability of a service contract—the "GM Protection Plan," which the Mooks decided to purchase. (The Mooks also refer to this plan as an "extended limited warranty.") "GM Protection Plan," also named as the contracting party, provided warranty coverage over "[a]ll GM accessories sold by GM and all parts that are permanently installed on a GM vehicle prior to delivery" and promised to repair or replace the vehicle in covered circumstances.

On October 4, 2008, Ellen Mook was involved in a head-on collision. The TrailBlazer was equipped with a "Crash Data Retrieval" system (CDR). The CDR recorded the vehicle's change of velocity at the time of impact as 34.78 mph. Despite the severity of this front-end collision, the vehicle's airbags did not deploy. Ellen suffered serious injuries as a result. An expert accident reconstructionist later opined that the airbag system was "miscalibrated"—a perceived flaw in the 2004 Chevrolet TrailBlazer line—so it did not register the need to deploy the airbags. The expert believed a more expensive alternate design should have been used.

The Mooks' initial complaint very basically described a product liability action based on the defective design of the TrailBlazer's airbag system. The Mooks generally alleged a breach of warranty based on the airbag's failure to deploy as described in the owner's manual and based on the airbag's noncompliance with an implied warranty of merchantability. After Draper's initial motion for summary disposition, the Mooks filed an amended complaint more specifically describing alleged breaches of express warranties based on "affirmations of fact" provided in the vehicle's owner's manual, of limited warranties based on the GM Protection Plan, and of implied warranties based on Draper's failure to remedy the defects in the airbag system despite that it allegedly should have known of this condition.

The circuit court granted Draper's renewed motion for summary disposition of the Mooks' warranty claims. The court determined that Draper created no express warranty by directing the Mooks to review the owner's manual and expressly disclaimed any warranty on its part. The court noted that GM would be the proper party to hold liable. This appeal followed.

II. STANDARD OF REVIEW

"We review a trial court's decision on a motion for summary disposition de novo." *Zaher v Miotke*, ___ Mich App ___; ___ NW2d ___ (Docket No. 307394, issued March 28, 2013), slip op at 3.

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher*, slip op at 3-4.]

"We review de novo underlying issues regarding the interpretation and applicability of a statute[.]" *Id.* at 4.

> The goal of statutory interpretation is to discern the Legislature's intent based on the statutory language. "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). [*People v Nix*, ___ Mich App ___; ___ NW2d ___ (Docket No. 311102, issued May 23, 2013), slip op at 2.]

III. DRAPER DISCLAIMED ALL WARRANTIES

The circuit court correctly determined that Draper could not be held liable for Ellen Mook's injury as it specifically disclaimed all warranties. The Legislature allows a party to decide whether to provide a warranty for a product. MCL 440.2316 permits a party to disclaim warranties as follows:

> (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence [MCL 440.2202] negation or limitation is inoperative to the extent that such construction is unreasonable.
>
> (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 . . . .

As provided in subsection (2), "[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. . . . Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. . . ." MCL 440.1201(10).

In the retail installment sale contract drafted by Draper and agreed upon by the Mooks, Draper clearly and in bold print disclaimed making any warranty:

> **Unless the Seller makes a written warranty, or enters into a service contract within 90 days from the date of this contract, the Seller makes no warranties, express or implied, on the vehicle and there will be no implied warranties of merchantability or of fitness for a particular purpose.**
>
> This provision does not affect any warranties covering the vehicle that the vehicle manufacturer may provide. [Bold in original.]

In the "Buyer's Guide" provided at the time of sale, Draper noted that only the limited *factory* warranty covered the vehicle. Draper made no written warranty in any document it issued. And Draper did not enter into a service contract—GM was actually the party that extended the GM Protection Plan. Accordingly, Draper cannot be liable under any warranty and the circuit court properly dismissed the Mooks' claims against the dealership.

IV. OWNER'S MANUAL DID NOT CREATE A WARRANTY

Even absent the disclaimer, we would conclude that Draper did not create an express warranty by providing the Mooks with the TrailBlazer's owner's manual. MCL 600.2947(6)(b) limits a non-manufacturer seller's liability in a products liability action to a situation where the seller makes an express warranty, the product does not conform to the warranty and the buyer is injured as a result. MCL 440.2313 governs the creation of express warranties:

> (1) Express warranties by the seller are created as follows:
>
> (a) An affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
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> (b) A description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) A sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
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> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he or she have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty . . . .

An "affirmation of fact" as used in subsection (1)(a) is "[a] statement concerning a subject-matter of a transaction which might otherwise be only an expression of opinion but which is affirmed as an existing fact material to the transaction, and reasonably induces the other party to consider and rely upon it, as a fact." Black's Law Dictionary (6th ed), p 59.

The Mooks contend that Draper made an express warranty by providing them with the owner's manual in relation to their queries about the airbag system. The manual, the Mooks argue, contains affirmations of fact and descriptions regarding the airbag system that they relied upon in deciding to purchase a 2004 TrailBlazer. Even if the manual did provide an express warranty, the creating party would be GM, not Draper. The owner's manual was drafted by GM and Draper did not adopt any potential warranties simply by providing the owner's manual to a party interested in the vehicle. In this regard we find instructive *Ducharme v A & S RV Ctr, Inc*, 321 F Supp 2d 843 (ED Mich, 2004). In *Ducharme*, the plaintiffs sued the seller as well as the manufacturers of their camper trailer. The plaintiffs accused the seller of breaching an express warranty, specifically a "delivery checkout form." The checkout form was "a Fleetwood [manufacturer] document," not a document created by or for the seller. *Id.* at 850. Draper provided the owner's manual to the Mooks just as the seller in *Ducharme* provided the delivery checkout form to the buyers. Neither document was created by the seller and neither created an express warranty by the seller.

Contrary to the Mooks' assertion, the owner's manual also is not the type of "promotional material" that can form a warranty. The manual was not an advertising tool; it was an instruction booklet given to users. Warranties are created only where the manufacturer or seller tells the world through its advertisement that its product is fit for a particular purpose or functions in a certain way. *Soderberg v Detroit Bank & Trust Co*, 126 Mich App 474, 481; 337 NW2d 364 (1983); *Cova v Harley Davidson Motor Co*, 26 Mich App 602, 616 n 32; 182 NW2d 800 (1970); *Gherna v Ford Motor Co*, 246 Cal App 2d 639, 652; 55 Cal Rptr 94 (1966).

V. DRAPER DID NOT BREACH THE GM PROTECTION PLAN

Contrary to the Mooks' complaints, Draper did not breach the provisions of the GM Protection Plan and the plan does not fail of its essential purpose. The Mooks contend that Draper is liable for a breach of the following provision:

> Defects in the mechanical, electrical, sheet metal, paint, trim, and other components of your vehicle may occur at the factory or while it is being transported to the dealer facility. Normally, any defects occurring during assembly are identified and corrected at the factory during the inspection process. *In addition, dealers inspect each vehicle before delivery. They repair any uncorrected factory defects and any transit damage detected before the vehicle is delivered to you.* [Emphasis added.]

Even if Draper failed to inspect the vehicle before delivery, the Mooks would not be entitled to the relief sought. The GM Protection Plan is a limited warranty covering repairs. The exclusive remedies provided are "[p]erformance of repairs and needed adjustments." The plan specifically excludes the type of personal-injury damages sought by the Mooks—"GM shall not be liable for incidental or consequential damages such as, but not limited to, lost wages or

vehicle rental expenses, resulting from breach of this written warranty or any implied warranty." Sellers and manufacturers are permitted to limit remedies in this fashion. MCL 440.2719(1) provides:

> Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, *as by limiting the buyer's remedies* to return of the goods and repayment of the price or *to repair and replacement of nonconforming goods or parts*; and
>
> (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy. [Emphasis added.]

Further, the GM Protection Plan specifically advises a buyer on the manner to seek repair of a pre-existing defective condition if the dealer misses the problem during inspection:

> Any defects still present at the time the vehicle is delivered to you are covered by the warranty. If you find any defects, advise your dealer without delay. For further details concerning any repairs which the dealer may have made prior to your taking delivery of your vehicle, ask the dealer.

The plan requires the Mooks to bring any uncorrected defects to Draper's attention for repair. That never happened in this case and Draper could not repair the defect under the warranty.

Finally, contrary to the Mooks' contention, the GM Protection Plan does not fail of its essential purpose based on the failure of the warning signal to illuminate, at least in relation to Draper. MCL 440.2719(2) provides for the negation of a contractually limited remedy when the contract fails of its essential purpose: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act," i.e. the Uniform Commercial Code. "[A] warranty fails of its essential purpose where unanticipated circumstances preclude the seller from providing the buyer with the remedy to which the parties agreed[.]" *Severn v Sperry Corp*, 212 Mich App 406, 413; 538 NW2d 50 (1995). Assuming that the inability of the TrailBlazer's sensors to detect the miscalibration of the airbag system prevented the Mooks from discovering the defect and presenting it for repair, the remedy was promised by GM, not Draper. The Mooks would have brought the vehicle to Draper to seek out the repair but the promises under the warranty were made by *GM*. GM is the contractually responsible party and the party liable if the contract failed of its essential purpose.

VI. DRAPER DID NOT VIOLATE ANY IMPLIED WARRANTY

Further, even if Draper had not disclaimed any implied warranties, we would agree with the circuit court that Draper breached no such warranty. MCL 600.2947(6)(a) provides for a non-manufacturer seller's liability in a product liability action in relation to a breach of implied warranty. Under the statute, a seller may be held liable if it "fail[s] 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."

To establish a breach of an implied warranty, a plaintiff must establish a non-manufacturer seller's "independent negligence." *Konstantinov v Findlay Ford Lincoln Mercury*, 619 F Supp 2d 326, 331 (ED Mich, 2006). "To establish a seller's 'independent negligence' under MCL 600.2947(6), plaintiff must show that the seller knew or had reason to know the product was defective. A seller has no duty to inspect a product unless the seller has reason to know that it is defective or the defect is readily ascertainable." *Id.* at 332.

Assuming that the vehicle was actually defective, the Mooks presented no evidence establishing that Draper should have known of its condition. The Mooks presented numerous online consumer reports from the National Highway Traffic Safety Administration (NHTSA) to support that Draper at least had reason to know the TrailBlazer's airbag system was defective. Just because complaints were made to the NHTSA does not mean that a defect actually existed, however. As noted on the NHTSA website, the complaint information reported to the administration is used "to determine if a safety-related trend exists." The site indicates that the volume of complaints is not necessarily indicative of a problem: "We do not have to receive a specific number of complaints before we look into a problem. We gather all available information on a problem." See NHTSA, Keeping You Safe, available at <https://www-odi.nhtsa.dot.gov/ivoq/> (accessed June 14, 2013). The Mooks do not dispute that the NHTSA never conducted an investigation into the Chevrolet TrailBlazer's airbag system despite the consumer complaints. It is a reasonable assumption that the NHTSA decided that no "safety-related trend exist[ed]."

In this regard, we find instructive *Williams v Kia Motors Amer, Inc*, 58 UCC Rep Serv 2d (Callaghan) 275 (ED Mich, 2005),[2] in which the plaintiff attempted to establish that the North American Kia distributor had reason to know that the Kia Spectra's engine was prone to catch fire from "a list of 47 consumers, who apparently have reported fires in Kia Spectras." The court found, "The list, standing alone, is insufficient as a matter of law, to show that [the distributor] knew of any consumer complaints about the Kia Spectra or that the fires occurred under circumstances akin to those giving rise to the fire in Plaintiff's Kia Spectra."

While the NHTSA complaints are in the public domain, there is no indication that Draper was actually aware of them. The Mooks presented no information comparing the various consumer complaints with the circumstances in this case. We have no way to know whether the incidents underlying the consumer reports involved frontal collisions with a severe enough

[2] There are no pinpoint pages within the opinion to the UCC Reporter. These quotes are from the paragraph directly preceding section III.A.2 "Implied warranty of merchantability."

change in velocity to trigger airbag deployment. Like in *Williams*, the evidence lacks sufficient information to prove that Draper was aware of or should have been aware of a defect in the Chevrolet TrailBlazer's airbag system.

Affirmed.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens