43934-4
No. ~~649394-4-II~~

COURT OF APPEALS – DIVISION TWO
IN AND FOR THE STATE OF WASHINGTON

CHUCK BABB, an individual

Appellant,

v.

REGAL MARINE INDUSTRIES, INC., a foreign corporation

Respondent.

FILED
COURT OF APPEALS
DIVISION II
2013 APR -3 PM 2:40
STATE OF WASHINGTON
BY ______
DEPUTY

OPENING BRIEF OF RESPONDENT REGAL MARINE INDUSTRIES, INC.

Bromagen & Rathet, PA,
Brooks Rathet, FSBA # 39251
Admitted *Pro Hac Vice*
135 2nd Avenue North, Suite 1
Jacksonville Beach, Florida 32250
(904) 242-0860 Phone
(904) 242-0830 Fax
Email: brooks@bromagenlaw.com

Law Offices of Robert A. Green, Inc., P.S.
Robert A. Green, WSBA # 12659
1900 West Nickerson Street
Fishermen's Center, Suite 203
Seattle Washington 98119
(206) 285-9481 Phone
(206) 284-4525 Fax
Email: robert@rgreenlaw.com

TABLE OF CONTENTS

Table of Authorities.. iii-iv

Response to Assignments of Error..................................v

Statement of the Case 1

Background 1-2

Facts 2-4

Argument 4-16

Consumer Protection Act...5-9

Warranties..9-16

Express Warranties...9-15

Implied Warranties..15

Conclusion...15

TABLE OF AUTHORITIES

WASHINGTON CASES

Aubrey's R.V. Ctr. Inc. v. Tandy, 46 Wn. App. 595, 731 P.2d 1124 (1987)....................5,7

Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980)..........4

Baughn v. Honda Motor Co., Ltd., 107 Wn. 2d 127, 150, 727 P.2d 655 (1986)....................13

Del Guzzi Constr. Co. v. Global Northwest, 105 Wn.2d 878, 888-89 (1986)....................11

Donald B. Murphy Contrs. v. King Cty., 112 Wn. App. 192, 199-200 (2002)....................11

Fed. Signal Corp. v. Safety Factors, Inc., 125 Wn. 2d 413, 424-25, 886 P.2d 172 (1994)....................14

Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 214, 969 P.2d 486 (1998)....................6

Indoor Billboard v. Integra Telecom of Washington, Inc., 162 Wn.2d 59, 84, 170 P.3d 10 (2007)....................8

Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992)....................4

Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997)....................5

Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)..............4

Seven Gables Corp v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)....................12

Seybold v. Neu, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001)....................4

Summer Pond Props. v.Transamerica Title Ins. Co., 91 Wn. App. 1031 (1998)..11

Tex Enterprises, Inc. v. Broackway Standard, Inc., 149 Wn.2d 204, 66 P.3d 625 (2003)..15

Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland, 95 Wn. App. 896, 907, *review denied*, 139 Wn.2d 1005 (1999)..10

Wallace v. Lewis County, 134 Wn. App. 1, 26 (2006) 11

Wilson v. Horsley, 137 Wn.2d 500, 507 (1999)...11

Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)......4

STATUTES

RCW 62A.2-313(1)..13

RCW 62A.2-313(2)..14

RCW 62A.2-714 14

OTHER CITATIONS

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 10

RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err when it granted summary judgment dismissing Appellant's Consumer Protection Act claim for failing to prove that Regal's "advertisements" were unfair or deceptive.

2. The trial court did not err when it granted summary judgment dismissing Appellant's warranty claims because the engine was excluded from the warranty, the "advertisements" did not create a warranty, there was no privity of sale between Appellant and Regal required for an implied warranty claim, Regal disclaimed implied warranties, there was no proof of causation or damages.

STATEMENT OF THE CASE

A. Background

Appellant filed a five-count Complaint against Regal as follows:

Breach of Contract;

Consumer Protection Act (CPA) Violation;

Breach of Warranty;

Good Faith and Fair Dealing;

Rescission.

On appeal, Appellant has raised issues only with respect to the Consumer Protection Act and Breach of Warranty. Therefore, Appellant has apparently abandoned any claims on appeal regarding breach of contract, good faith and fair dealing and rescission.

Appellant has never had any legal or factual basis to bring any action against Regal. He complained about and sued the wrong party. Appellant appears to have had sales issues, issues with an aftermarket part and non-Regal engine issues caused by lack of or improper maintenance. None of these problems involve Regal factually or legally. For whatever reasons, Appellant did not file a complaint against the seller or the engine manufacturer. Instead, he alleged causes of action against Regal that failed as a matter of law.

The trial court held a summary judgment hearing and dismissed all of Plaintiff's claims other than his warranty claims. The trial court offered Plaintiff additional time to direct the trial court to evidence in the record that created an issue of fact with respect to warranty claims. Instead, on July 13, 2012, 19 days before a scheduled trial, Plaintiff submitted an expert report for the first time. The trial court rejected this attempt to offer new evidence because it did not comport with her directive or to procedure. The trial court allowed Appellant additional time to cite to the existing record with respect to the warranty claims and dismissed them. Appellant failed to do so and the trial court dismissed his claims.

B. Facts

On or about July 10, 2007, Appellant purchased the 2007 Regal 2000, HIN RGMFFM356F607 from PowerBoatsNW in Fife, Washington. CP 32, 49-50. The invoice sets forth above the signature block and under the heading "Implied Warranty Negotiation" that the dealer makes no warranty to any parts unless warranted by the manufacturer or implied in writing. CP 32, 49-50. Appellant signed the invoice as did the salesperson for PowerBoatsNW. CP 32, 49-50.

Appellant used the boat without incident from June, 2007 until the first winter layup or storage period in the winter of 2007. CP 33, 97. During the startup of the vessel in the spring of 2008, Appellant noted an

issue with water in his engine oil. CP 33, 98. This was most likely caused by freeze damage. CP 33, 98-99. Plaintiff alleged that "the boat ran rough." CP 105. Plaintiff's son noticed "performance issues." CP 105. Plaintiff's son-in-law "took the boat out, but found that it repeatedly stalled and had to be towed back into shore." CP 105.

On or about May 21, 2009, A&J Auto/Truck/Marine performed repairs on Appellant's engine, including replacing the long block. CP 33, 82-84. On or about July 20, 2009, counsel for Appellant sent an e-mail to Mark Skrzypek of Regal regarding an issue with "the motor on his boat being delivered to him with a cracked block." CP 33, 85-91. On or about July 23, 2009, Appellant made a "formal claim for warranty repair" to Regal through counsel. CP 33, 85-91. On July 24, 2009, Mr. Skrzypek sent an e-mail to Appellant's attorney attaching the Regal Limited Warranty applicable to Appellant's vessel. CP 34, 85-91. The Regal Limited Warranty does not cover engines, damage caused by negligence, or lack of maintenance. CP 34, 92-94.

The Regal Limited Warranty does not cover boats damaged by accident and boats damaged while being loaded onto, transported upon or unloaded from trailers, cradles, or other devices used to place boats in water, remove boats from water or store or transport boats on or over land. CP 34, 92-94. The warranty excludes costs or charges derived from

inconveniences or loss of use, commercial or monetary loss due to time loss, and any other special, incidental or consequential damage of any kind or nature whatsoever. CP 34, 92-94. Regal's warranty excludes all implied warranties. CP 34, 92-94. On or about July 23, 2009, Mr. Skrzypek sent an e-mail to Appellant's attorney notifying him of Regal's position that the Appellant's complaints were based upon faulty winterization services that had nothing to do with Regal. CP 36, 85-91.

ARGUMENT

Summary judgment is appropriate if the record before the court shows that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). A material fact is one upon which the outcome of the litigation depends. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). defendant in a civil action is entitled to summary judgment if the defendant shows that the Appellant lacks evidence to support an element essential to the Appellant's claim. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (citing *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). Summary judgment in favor of a defendant is appropriate if the Appellant fails to establish a prima facie case concerning an essential element of his claim. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d

1068 (2001). In response to a motion for summary judgment, the Appellant may not simply rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. *Id.* An affidavit must contain facts within the affiant's personal knowledge and which are admissible at trial. *Id.*

A. CONSUMER PROTECTION ACT

The trial court correctly decided that the first element of Appellant's Consumer Protection Act (CPA) claim had not been met. There is no evidence in the record of an unfair or deceptive act. RP (June 22, 2012) at 25. Appellant argues that Regal's "advertisements" were somehow unfair or deceptive. What he calls advertisements were selected statements found on Regal's website that were in no way deceptive.

Regal was entitled to judgment as a matter of law with respect to Appellant's claim that Regal violated the Consumer Protection Act (CPA). *Aubrey's R.V. Ctr. Inc. v. Tandy*, 46 Wn. App. 595, 731 P.2d 1124 (1987). In order to maintain a private CPA action, Appellant must establish five elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to Appellant in his or her business or property, and (5) a causal link between the unfair or deceptive acts and the injury suffered by the Appellant. The CPA does not define "unfair or deceptive act or practice." *Leingang v. Pierce County*

Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997); *see also Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 214, 969 P.2d 486 (1998).

There is no evidence of an unfair or deceptive act or practice. First, the statements on Regal's website did not specifically address Appellant's purchase, complaints or service. They are general statements of Regal's commitment to its products and customers. Appellant acknowledges he saw that J.D. Power had given Regal high ratings. According to Appellant, Regal expressed on its website a commitment to excellence and that Regal strives to provide exceptional customer service. None of those general statements are inconsistent with a specific scenario where a specific consumer is displeased with the service he receives. There is no evidence in the record that Regal is not committed to excellence or does not strive to provide exceptional customer service. Appellant does not believe Regal lived up to its commitment. There is no evidence that Regal is not a family business, nor that it fails to stand behind its products. In fact, as discussed more fully below, Appellant acknowledges Regal stands behind its products with a warranty. That warranty does not cover the Volvo engine and does not cover damages caused by lack of maintenance. Regal's limits on its warranty and exceptions for another manufacturer's part are not inconsistent with its commitment to its product. There is no evidence that

Regal lacks strong values, business integrity, or honesty. Appellant's subjective belief that Regal did not live up to his expectations does not create a cause of action.

Appellant purchased the boat and, with it, the warranties that covered certain items, excluded others and included warranty procedures. Regal delivered a boat to a boat dealer that transferred it to another dealer that sold it to Appellant. Regal covered the boat under the terms of a Limited Warranty. Regal replaced Appellant's tower and assisted Appellant in finding a repair facility to diagnose engine issues. Regal did all this despite the fact that Appellant did not act in accordance with the terms of the warranty. Regal never refused to address anything covered under the Limited Warranty. Appellant's allegations are that Regal did not pay to fix things on Appellant's boat that were expressly excluded from Regal's Limited Warranty coverage. Regal had no contractual or legal duty to fix things that its warranty expressly said it would not fix and did not have any obligations outside the warranty terms or warranty period.

Appellant's dissatisfaction over Regal not paying to repair his engine damaged due to lack of maintenance or Volvo workmanship, and not covered under Regal's warranty, does not meet the public interest requirement under the CPA. *Aubrey's R.V. Center, Inc. v. Tandy Corp.*, 46 Wn. App. 595, 609-610, 731 P.2d 1124 (1987). Plaintiff offered as

"evidence" *ad hominem* attacks on Regal's reputation based on two other non-Washington lawsuits involving two of the thousands of boats Regal has sold since Plaintiff bought his. One, a federal case in Ohio, *Risner v. Regal,* is still pending. The other, a Florida state case, *Munns v. Regal,* was dismissed in Regal's favor on summary judgment. CP 276, 281-301.

Also, to establish CPA causation, Appellant must show that the deceptive act was a cause which "in direct sequence . . . produce[d] the injury complained of and without which such injury would not have happened." WPI 310.07; *see also Indoor Billboard v. Integra Telecom of Washington, Inc.,* 162 Wn.2d 59, 84, 170 P.3d 10 (2007) ("plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury."). In *Indoor Billboard,* the Washington Supreme Court held that, in CPA cases where a defendant is accused of making affirmative misrepresentations of fact, a plaintiff must establish that the misrepresentation was a proximate cause of the injury. 162 Wn.2d at 83-84 (rejecting plaintiff's argument that it only needed to demonstrate a causal link between the unfair practice and the injury). Here, Appellant's alleged injury is a cracked Volvo engine. There is no evidence that Regal's general website representations caused that damage.

B. WARRANTIES

Express Warranties

Regal was entitled to judgment as a matter of law with respect to Appellant's claim against Regal for Breach of Warranty. Appellant argues that he never waived his warranties with Regal. Waiver was not an issue below. It was not a basis for the trial court's decision. Appellant ignores the valid argument that the limited warranty at issue is exactly that – limited – and excludes certain claims. With respect to the express warranty claims, the Court initially did not grant summary judgment, allowing the Appellant the opportunity to point out where in the record an issue of fact existed with respect to the breach of express warranty claim. RP (June 22, 2012) at 25-26. The trial court later ruled that it was clear that there was an engine problem that was ***excluded*** from the warranty from Regal. RP 11 (August 17, 2012). The question before the court was whether there was some other portion of the warranty and some other defect to the boat apart from the engine that would allow the case to survive summary judgment. RP 12 (August 17, 2012).

Appellant continues to glaringly omit that Regal's contention, and the trial court's decision, was that there is no record evidence of a defect covered under Regal's warranty and attributed to Regal material or workmanship at the time of delivery. True, Mr. Babb alleges that he had vibration issues early in his ownership. The record

evidence supports the existence of a cracked motor. The record is clear that Regal did not manufacture and did not warrant the Volvo engine. The record also is devoid of any evidence that Appellant has established with reasonable certainty a manufacturing defect as a cause of any damage for him to recover damages from Regal. Moreover, he cannot exclude other causes as required by law.

A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the "requirement[s]" imposed by an express warranty claim are not "imposed under State law," but rather imposed by the warrantor. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

At page 21 of his Brief, Appellant refers to an expert report that was properly barred by the trial court. On, July 13, 2012, 19 days before a scheduled trial, Appellant submitted the expert report. The trial court had not granted a continuance to present new evidence, but had rather given Appellant the chance to point out already-existing record evidence in a follow-up hearing. RP (August 17, 2012) at 11-12. Where parties have an opportunity to present evidence at a summary judgment hearing, the parties cannot present evidence after the opportunity passes. *Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, *review denied*, 139 Wn.2d 1005 (1999). Appellant's failure to follow procedure

and court order by not timely providing the information about the expert precluded use of the report. *See Summer Pond Props. v.Transamerica Title Ins. Co.*, 91 Wn. App. 1031 (1998); *Donald B. Murphy Contrs. v. King Cty.*, 112 Wn. App. 192, 199-200 (2002) (trial court reasonably denied motion to amend filed 10 days before summary judgment where it would affect witnesses, experts, and defenses); *Wallace v. Lewis County,* 134 Wn. App. 1, 26 (2006); *Wilson v. Horsley,* 137 Wn.2d 500, 507 (1999) (after being aware of factual basis for the proposed amendments, raising new issues on the eve of trial is unfair surprise); *Del Guzzi Constr. Co. v. Global Northwest,* 105 Wn.2d 878, 888-89 (1986) (no abuse of discretion when trial court denied a motion to amend pleadings filed a week before summary judgment).

Regardless of any report, the record is absent of any evidence that a Regal manufacturing defect, or indeed any manufacturing defect, existed at the time of delivery. It is the law that the Appellant must establish with reasonable certainty a manufacturing defect as a cause of the damage for him to recover damages from the defendant. In attempting so to do, if the evidence shows that the injury is equally or else with reasonable certainty attributable to other probable causes, he must also exclude such other causes. *Seven Gables Corp v. MGM/UA Entertainment Co.,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

In this case, Regal met its burden of showing an absence of a genuine dispute of fact as to the boat's vibration caused by an engine issue. Appellant offered no evidence, not even speculation to show a dispute of fact over whether it was a Regal-covered defect. It is pure speculation on the part of Appellant that any problems he had with his boat were caused by Regal manufacturing defects and it is indisputable that no problems that he reported are related to Regal's manufacturing of Regal parts. Such speculation fails as a matter of law to state a cause of action for breach of warranty. *Seven Gables Corp v. MGM/UA Entertainment Co.,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Where there are several alternative reasons why a marine engine can fail, there must be evidence that suggests the defendant's manufactured part caused the failure. *Id.* Here, it is pure speculation that the marine engine failed as a result of any breach of warranty by Regal.

Appellant attempts to circumvent the only Regal warranty in the case by arguing other warranties may exist. With respect to other express warranties, Appellant again refers to "guarantees listed on Regal's website" The record in this case from Appellant's side consists only of Regal's website and Regal's commitment to excellence, telling its customers Regal strives to provide excellent customer service, Regal is a family business that stands by its products, and the owners have strong

values. Appellant also refers to Regal's assertion it has business integrity and the phrase "be honest and do what's right" which accompanies the company's mission "With God's help and a steadfast commitment to integrity, we will develop a team of exceptional people and relationships to provide exceptional customer satisfaction."

The website references and record evidence create no issues of the existence of an express warranty other than Regal's written warranty and certainly no evidence of breach. Moreover, the record evidence includes Regal's Limited Warranty that sets forth in capital letters that it is the only Regal warranty. The statements Appellant references from the website are not a warranty covering repairs to a cracked Volvo engine.

In Washington, an express warranty is created as follows:

> (a) Any 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.
>
> (b) Any 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) Any 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.

RCW 62A.2-313(1). General praise of a product is not a warranty. *Baughn v. Honda Motor Co., Ltd.*, 107 Wn. 2d 127, 150, 727 P.2d 655 (1986). The

general website claims regarding Regal quality and service cited by Appellant are not specific affirmations of fact or promises that the boat would conform to the general statements. The written Regal Limited Warranty contains the specific promises. All of Appellant's claims of dissatisfaction with Regal involve post-sale conversations that were not part of the basis of any bargain. Express warranties rest on "dickered" aspects of the individual bargain. Official cmt. 1, RCWA 62A.2-313. In order for an express warranty to be created, it is not necessary that the manufacturer use the terms "warrant" or "guarantee"; however, "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." RCW 62A.2-313(2). Factors the court can consider to determine whether an express warranty was made are: specificity of the statement, whether the statement related to the quality of the good, the buyer's actual or imputed knowledge of the true conditions of the good, and the nature of the defect. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn. 2d 413, 424-25, 886 P.2d 172 (1994).

Moreover, Appellant failed to present any evidence of the difference in value damages caused by any alleged breach of warranty. RCW 62A.2-714. The measure of damages for non-revocation claims is the difference at the time and place of acceptance between the value of the

goods accepted and the value they would have had if they had been as warranted. Plaintiff never presented any evidence of any amount of damages.

Implied Warranties

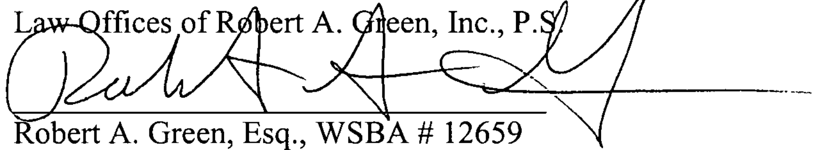
Any "implied" warranty claim against Regal is barred as a matter of law due to lack of privity and Regal's disclaimers of implied warranty in its written warranty. *See Tex Enterprises, Inc. v. Broackway Standard, Inc.*, 149 Wn.2d 204, 66 P.3d 625 (2003). He cannot bring a claim against Regal for implied warranty breach. Regal's warranty excludes all implied warranties. CP 92-94. The sales invoice sets forth above the signature block and under the heading "Implied Warranty Negotiation" that the dealer makes no warranty to any parts unless warranted by the manufacturer or implied in writing. CP 50. Appellant signed the invoice as did the salesperson for PowerBoatsNW. CP 50. Moreover, Appellant has not provided evidence that the boat was unfit for normal use.

CONCLUSION

Respondent Regal Marine Industries, Inc. respectfully requests that the Court affirm the decision of the trial court.

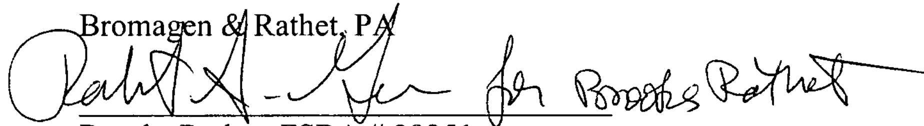
Respectfully, submitted this 3rd day of April 2013.

Law Offices of Robert A. Green, Inc., P.S.



Robert A. Green, Esq., WSBA # 12659
1900 West Nickerson Street
Fisherman's Center, Suite 203
Seattle, WA 98119
(206) 285-9481 Phone
(206) 284-4525 Fax
Email: robert@rgreenlaw.com

Bromagen & Rathet, P.A.



Brooks Rathet, FSBA # 39251
Admitted *Pro Hac Vice*
135 2nd Avenue North, Suite 1
Jacksonville Beach, Florida 32250
(904) 242-0860 Phone
(904) 242-0830 Fax
Email: brooks@bromagenlaw.com

Declaration of Service

I, Richard Donker, certify under the penalty of perjury, under the laws of the State of Washington that I served the foregoing by fax, email and hand delviery as follows:

Justin Elsner
Elsner Law Firm, PLLC
1501 North 200th Street
Shoreline, Washington 98133
206-447-1425 Phone
206-324-6321 Fax
Email: justin@elsnerlawfirm.com

Dated: April 3, 2013.

Richard Donker, Legal Assistant

FILED
COURT OF APPEALS
DIVISION II
2013 APR -3 PM 2:40
STATE OF WASHINGTON
BY ______
DEPUTY