

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001218-MR

JIM M. HENSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 02-CI-01598

WESTERN STAR TRUCK SALES, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Jim M. Henson appeals from a summary judgment entered in favor of Western Star Truck Sales, Inc., by the Jefferson Circuit Court. The issues in this case involve the Uniform Commercial Code. We conclude that the circuit court properly awarded summary judgment in favor of Western Star, and we thus affirm.

Henson is the owner/operator of a trucking business. On March 7, 2001, he purchased a truck from Gulick Truck Parts

and Service for \$114,000. Western Star manufactured the truck in Canada and shipped it to Indiana for delivery to Henson.

Gulick sold the truck to Henson and gave a New Truck Warranty.<sup>1</sup> Within the warranty, Western Star warranted that the truck "shall be free from defects in workmanship and material under normal use and service and in accordance with the application under which the Truck was purchased." Further, the warranty was for a period of one year with unlimited mileage.

The warranty further provided as follows:

If, within the time or mileage limitations from the Date of Delivery as shown below, the Truck does not meet the specified warranty and if the Purchaser at his own expense, and within the applicable time and mileage limits, returns the Truck to any Western Star authorized Dealer for inspection, Western Star or its authorized Dealer shall correct such defect(s) either by repairing or, at Western Star's option, replacing any such defective part or parts according to the applicable provision of this warranty, The repair or replacement of defective parts shall be the sole and exclusive remedy of the Purchaser for the failure of the Truck to meet the specified warranty.

. . . .

TO THE EXTENT PERMITTED BY LAW, THIS WARRANTY IS GIVEN EXPRESSLY IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, (INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE) AND OF ALL OTHER OBLIGATIONS OR LIABILITIES ON THE PART

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<sup>1</sup> The truck had been driven approximately 2,500 miles. That fact apparently has no significance to the issues in this appeal.

OF WESTERN STAR. Western Star neither assumes nor authorizes anyone else to assume for it any other obligation or liability, or to give any other warranty to make any other representation on its behalf in connection with the sale or use of any motor vehicle.

. . . .

TO THE EXTENT PERMITTED BY LAW, IT IS AGREED THAT WESTERN STAR SHALL NOT IN ANY CASE BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES including, but not limited to, loss of use or income, downtime expenses, towing expenses, legal fees, damage to the Truck or its cargo, injuries to or death of persons, and any liability Purchaser may have in respect to any other person.

Henson testified in his deposition that he immediately experienced problems with the truck after taking delivery of it. He stated that he spent a great deal of time between April 2001 and March 2002 attempting to get the alleged defects repaired by Western Star-authorized mechanics and by non-authorized mechanics. He also stated that he took the truck to Mid-West Truck Center, which was a Western Star-authorized dealer, at least five different times during the warranty period. Henson also had warranty work performed by Western Star of Commerce, California, during 2001. He further testified concerning several occasions where the truck broke down while he was on the road and had to be towed for repairs.

Henson concluded that Western Star and Gulick were either unable or unwilling to fix the many alleged defects with

the truck. Therefore, on March 1, 2002, he filed a civil complaint in the Jefferson Circuit Court against both Western Star and Gulick. Henson alleged breach of warranty (both express and implied), breach of contract, and violation of Kentucky's Consumer Protection Act.<sup>2</sup> Gulick was subsequently dismissed from the case after it filed for protection under the U.S. Bankruptcy Code.

Western Star moved the court to award it summary judgment on Henson's claims. On June 17, 2003, the court entered an order granting Western Star's motion for summary judgment in all respects, except regarding Henson's claim of a leaky windshield. On October 21, 2003, the court denied Henson's motion to set aside its previous order. This appeal followed.<sup>3</sup>

As noted above, the New Truck Warranty provided that the repair or replacement of defective parts was the "sole and exclusively remedy" for any failure of the truck to meet the given warranty. Further, the New Truck Warranty specifically extinguished any potential liability for incidental or consequential damages. Henson has not challenged Western Star's

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<sup>2</sup> The causes of action for breach of contract and violation of the Consumer Protection Act are not at issue in this appeal. Henson never asserted a breach of contract claim against Western Star, and he did not appeal from the court's order dismissing the Consumer Protection Act claim.

<sup>3</sup> Henson's claim as it regards the leaky windshield was settled between the parties.

rights in this regard, and the aforementioned provisions are allowable under KRS<sup>4</sup> 355.2-719, which provides as follows:

- (1) Subject to the provisions of subsections (2) and (3) of this section and of KRS 355.2-718 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.
- (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter.
- (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in this case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Furthermore, Western Star had the right to restrict all warranties in the manner that it did in the New Truck Warranty.

See KRS 355.2-316.

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<sup>4</sup> Kentucky Revised Statutes.

Henson's main argument in this case is that the warranty's limitation of his remedy to the repair or replacement of defective parts failed of its essential purpose and that he was, therefore, entitled to other remedies allowed by the Uniform Commercial Code. His argument is based on KRS 355.2-719(2), which provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter." Henson contends that the inability or unwillingness of Western Star to repair or replace defective parts caused that remedy to fail of its essential purpose.

In Ford Motor Co. v. Mayes, 575 S.W.2d 480 (Ky.App. 1978), this court agreed with the following analysis:

The purpose of an exclusive remedy of replacement or repair of defective parts, whose presence constitute a breach of an express warranty, is to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct and consequential damages that might otherwise arise. From the point of view of the buyer the purpose of the exclusive remedy is to give him goods that conform to the contract within a reasonable time after a defective part is discovered. . . . The limited, exclusive remedy fails of its purpose and is thus avoided under § 2-719(2), whenever the warrantor fails to correct the defect within a reasonable period.

Id. at 484, quoting Beal v. General Motors Corp., 354 F.Supp. 423, 426 (D.Del. 1973). See also Middletown Eng'g Co. v.

Climate Conditioning Co., Inc., 810 S.W.2d 57, 59 (Ky.App. 1991). Also, the court in Gooch v. E.I. Du Pont De Nemours & Co., 40 F.Supp.2d 863(W.D. Ky. 1999), stated:

A remedy does not "fail of its essential purpose" simply because it limits the recovery of a particular relief sought. *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287 (4th Cir. 1982). A limitation of remedy provision fails of its essential purpose when it deprives a party of the substantial value of its bargain. For example, the "failure of essential purpose" exception best applies to situations where the contract limits liability to repair or replacement of a product and that product is in a condition where the defect cannot be fully corrected by the repair or replacement of the defective part or product.

Id. at 870.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR<sup>5</sup> 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991). "The party opposing a properly presented summary judgment motion cannot defeat it without

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<sup>5</sup> Kentucky Rules of Civil Procedure.

presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." City of Florence, Kentucky v. Chipman, 38 S.W.3d 387, 390 (Ky. 2001).

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

In awarding summary judgment to Western Star, the circuit court stated that "the only complaint to which Western Star did not submit evidence of a valid repair concerns the driver's side windshield." Then, in its order denying Henson's motion to set aside the previous order, the court stated that "the Plaintiff's own testimony, except for the windshield, fails to provide affirmative evidence to defeat the Defendant's Motion For Summary Judgment." The court indicated that it had reviewed Henson's deposition prior to ruling on the motion.

Although Henson has cited in his brief at least eighteen separate alleged defects in the truck which cumulatively, he claims, would cause the limited remedy to fail of its essential purpose, Western Star has responded to each of these with references to Henson's deposition indicating no improper or negligent action or inaction on Western Star's part. Henson has referred us to very few supportive references in the

record to contradict this. See CR 76.12(4)(c)(iv) and (v). We decline to search the record to find evidence to support Henson's contentions. See Young v. Newsome, 462 S.W.2d 908, 910 (Ky. 1971); Sharp v. Sharp, 491 S.W.2d 639, 644-45 (Ky. 1973). As we noted earlier, "[t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." Chipman, 38 S.W.3d at 390. Henson failed to present such evidence.

It has been said that "[w]hether a limited remedy fails of its essential purpose is a question of fact that has been litigated hundreds of times." Leibson & Nowka, The Uniform Commercial Code of Kentucky (3<sup>rd</sup> Ed. 2004). However, even though we review the circuit court's summary judgment decision de novo because only legal questions and no factual findings are involved,<sup>6</sup> Henson has failed to persuade us that the circuit court erred in determining that there were no genuine issues of material fact and that Western Star was entitled to judgment as a matter of law.

Henson had put nearly 200,000 miles on the truck by the time he filed suit against Western Star, and the truck had over 350,000 miles on it by the time he gave his deposition. Based on the record as it has been presented to us, we conclude

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<sup>6</sup> See Barnette v. Hospital of Louisa, Inc., 64 S.W.3d 828, 829 (Ky.App. 2002).

that there is no fact issue concerning whether Western Star failed to correct any significant defect within a reasonable period of time. Further, because Henson had driven the truck over 350,000 miles since purchasing it, the facts here are unlike those in Cox Motor Car Co. v. Castle, 402 S.W.2d 429 (Ky. 1966), where the vehicle was found to have a "serious vibration or shimmy" and was determined to be "one big defective part." Id. at 431. Rather, the facts in this case are akin to those in Ford Motor Co. v. Olive, 234 So.2d 910 (Miss. 1970), where the plaintiff had driven the car more than 24,000 miles within six months of its purchase. Therein, the court noted that "continued use of an automobile for a long period of time after it has been repaired in compliance with the manufacturer's warranty is sufficient to show that the repair was satisfactory to the purchaser." Id. at 913.

Finally, Henson argues that the circuit court prematurely entered summary judgment in Western Star's favor because it did not consider relevant portions of his deposition. The court's order entered on October 21, 2003, however, clearly states that the court did review the deposition.

The orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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