**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 9, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-0632** **Cir. Ct. No. 01-CV-1434**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**MARK REGAL,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GENERAL MOTORS CORPORATION,**

**DEFENDANT-APPELLANT,**

**JOHN LYNCH CHEVROLET-PONTIAC SALES, INC.,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. General Motors Corporation (GM) has appealed from a judgment in favor of Mark Regal in the amount of $97,014.93, plus interest

at the rate of 12% from October 17, 2001. The judgment was based upon Regal's "lemon law" claim under WIS. STAT. § 218.0171 (2001-02).[1] It included $78,578.90, representing a doubling of Regal's pecuniary loss as provided in § 218.0171(7). It also included attorney's fees, and double costs and disbursements of $1753.64. We reverse the portion of the judgment awarding 12% interest from October 17, 2001, on the award of double costs and disbursements. We also reverse a portion of the award of costs, and direct that, on remand, the $441.56 award of costs for expert witness fees be reduced by $255.81.[2] We affirm the remainder of the judgment, and remand the matter for entry of a judgment consistent with this opinion.

¶2 Regal's claim arose from his purchase of a new Chevrolet Suburban on April 28, 2000. The Suburban was subject to a new vehicle warranty. Regal commenced this action against GM on June 12, 2001, alleging that water leaked into the passenger compartment of the vehicle, that the vehicle had been the subject of at least five attempts to repair the defect within one year of delivery to Regal, and that the defect was not repaired. Regal alleged that on December 1, 2000, he demanded that GM provide a refund of the purchase price in accordance with WIS. STAT. § 218.0171(2)(b)2.b, and that GM refused.

¶3 Under Wisconsin's "lemon law," manufacturers and dealers are required to repair any motor vehicle "nonconformity" covered under an express warranty if the consumer reports the nonconformity to the manufacturer or dealer

[1] All references to the Wisconsin Statutes are to the 2001-02 version.

[2] The $441.56 award of costs for expert witness fees constitutes the award before doubling. The doubled costs will thus be reduced by $511.62.

and makes the vehicle available for repair before the expiration of the warranty or one year after first delivery of the vehicle to the consumer, whichever is sooner. WIS. STAT. § 218.0171(2)(a). A "nonconformity" is defined in part as "a condition or defect which substantially impairs the use, value or safety of a motor vehicle." Sec. 218.0171(1)(f). If the same nonconformity has not been repaired after four attempts, or if the vehicle is out of service for at least thirty days, the consumer may elect any one of several remedies, including a refund. Sec. 218.0171(1)(h) and (2)(b). If the manufacturer refuses, the consumer may sue the manufacturer and is entitled to recover twice the amount of his or her pecuniary loss. Sec. 218.0171(7). In addition, the statute awards the consumer his or her costs, disbursements, and reasonable attorney fees. ***Id.***

¶4 After filing his complaint, Regal moved for summary judgment. He also filed a motion to strike GM's answer and for default judgment, alleging that the answer was not timely served and filed. GM responded with a motion for sanctions under WIS. STAT. §§ 802.05(1)(a) and 814.025(1), alleging that the motion to strike and for default judgment was frivolous. It also moved for a denial of Regal's motion for summary judgment or, alternatively, to postpone resolution of the motion for summary judgment until discovery was completed. At a hearing on September 24, 2001, Regal withdrew his motion to strike and for default judgment. The trial court denied the motion for sanctions, but continued the hearing on the motion for summary judgment to permit discovery to occur. Subsequently, it granted Regal's motion for summary judgment.

¶5 We review a trial court's grant or denial of summary judgment de novo. ***Waters v. U.S. Fid. & Guar. Co.***, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law." ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). In our review we, like the trial court, are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. ***Id.*** This court, like the trial court, must view the evidentiary facts, or the inferences therefrom, in the light most favorable to the party opposing the motion. *See* ***Kraemer Bros., Inc. v. U.S. Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979).

¶6 GM contends that the trial court erred in granting summary judgment because material issues of fact exist for trial. It contends that material factual issues exist as to the presence of a nonconformity, the number of repair attempts, and whether the nonconformity continued. We reject all of these arguments.

¶7 As stated above, a "nonconformity" is defined in part as "a condition or defect which substantially impairs the use, value or safety of a motor vehicle." WIS. STAT. § 218.0171(1)(f). Based upon the summary judgment record, the trial court determined that the Suburban leaked water into the passenger compartment when driven in the rain, and that this constituted a condition or defect which substantially impaired the use, value, or safety of the vehicle. We agree with the trial court that the water leak substantially impaired the safety of the vehicle, and therefore find it unnecessary to address the other standards.

¶8 In support of his motion for summary judgment, Regal submitted an affidavit stating that after purchasing the Suburban on April 28, 2000, he noticed

water leaking into the driver's side of the passenger compartment and soaking the carpet. He stated that he reported the leak to Hall Chevrolet on June 12, 2000, but that Hall did not find the leak. He indicated that he returned the vehicle to Hall because of the leak on June 22, 2000, August 8, 2000, September 11, 2000, and September 20, 2000. Regal indicated that the water leak continued into the passenger compartment after September 20, 2000, soaking the driver and passenger side flooring and carpeting on long trips in the rain. He also attached a copy of a video he took showing what he alleged were the results of water infiltration of the passenger compartment on a return trip from northern Wisconsin on Memorial Day weekend in 2001.

¶9 Regal's allegations concerning the dates on which he brought the Suburban to Hall for repair of the water leak are consistent with the affidavit of Donald Frohmader, which was filed by GM in opposition to Regal's motion for summary judgment. Frohmader stated that he was the service manager at Hall, that he had reviewed the repair records from Hall, and that he had personally seen and examined Regal's Suburban.[3] Frohmader stated that Hall repaired a leak in the Suburban three times. He stated that Regal brought the vehicle in for repair of a water leak on June 12, 2000, but that no leak was found. He stated that Regal again brought the vehicle in for repair of a water leak on June 22, 2000, and that

[3] GM contends that the trial court permitted Regal to submit inadmissible evidence in support of his motion for summary judgment when it permitted him to rely on repair records from Hall. GM contends that Hall is not a party to this lawsuit, and that no foundation was laid for admission of the records. We find it unnecessary to address GM's objection because Frohmader's affidavit also set forth the relevant information from the records regarding the dates on which Regal brought the Suburban to Hall complaining of a water leak, and the dates on which Hall found and repaired leaks. Because this information was presented through Frohmader's affidavit, even assuming arguendo that the trial court erred in permitting Regal to rely on the records in his affidavit, the error was harmless.

Hall resealed a leaking body seam. He stated that Regal returned on August 8, 2000, for repair of a leak, but that Hall did not find a leak. Frohmader stated that he suggested to Regal that he bring the vehicle in on a rainy day. Frohmader stated that Regal returned with the Suburban again on September 11, 2000, and September 20, 2000. He attested that Hall resealed a small leak caused by a leaking seam on September 11, 2000, and that on September 20, 2000, Hall found a leak caused by a hole in the firewall and in the left rear wheel area. He stated that Hall resealed the leaking body seam. Frohmader stated that the Regal vehicle was not brought back for repair of a water leak after that date.

¶10 GM contends that a factual issue exists as to whether a water leak substantially impaired the safety of the Suburban. Whether a set of facts fulfills a legal standard is a question of law. ***Dobbratz Trucking & Excavating, Inc. v. PACCAR, Inc.***, 2002 WI App 138, ¶13, 256 Wis. 2d 205, 647 N.W.2d 315. Whether a vehicle is subject to a nonconformity which substantially impairs its use, value, or safety requires factual findings which are intertwined with a legal conclusion: whether the facts fulfill the legal standard of substantial impairment. ***Chmill v. Friendly Ford-Mercury of Janesville, Inc.***, 144 Wis. 2d 796, 803, 424 N.W.2d 747 (Ct. App. 1988). The determination that something is "substantial" requires a value judgment heavily dependent upon the interpretation and analysis of underlying facts. ***Id.***

¶11 The material facts of this case are undisputed. The summary judgment affidavits establish that the Suburban purchased by Regal repeatedly leaked water into the floor area on the driver's side of the passenger compartment. This constituted a substantial safety hazard because it could cause a driver's foot to slip on the brake or accelerator pedals.

¶12 GM contends that an issue of fact exists because its expert witness, Wade Greenisen, stated in his affidavit that brake and accelerator pedals are designed with the possibility of a wet shoe in mind, and pointed out that drivers' shoes also get wet from rain, sleet and snow. However, as cogently stated by the trial court, the test for substantial impairment of safety is not whether the vehicle is going to be dangerous in some other way even without the nonconformity. The question is whether the specific nonconformity—leaking water into the carpet in the passenger compartment—substantially impairs safety. The trial court correctly concluded that the answer is "yes" because there is an additional risk of slipping on the brake or accelerator pedals which would not exist except for the nonconformity. Greenisen's statement that brake and accelerator pedals are designed with the possibility of wet shoes in mind may mean that pedals are designed to reduce the danger of slippage from wet shoes, but it does not permit an inference that wet feet do not present a safety hazard when driving. Because the water leakage in Regal's Suburban increases that hazard, and because the consequences of a wet foot slipping when accelerating or braking could be severe, we conclude that the undisputed facts establish a substantial impairment of the Suburban's safety as a matter of law.

¶13 In upholding the trial court's determination that the water leak substantially impaired the safety of the Suburban, we reject any claim that a material issue of fact existed merely because Greenisen, as an expert witness, opined that a wet shoe on the brake or accelerator pedal did not present a condition that substantially impaired the vehicle's safety. Expert testimony is not required when a lay person, as a matter of common knowledge and experience, can reach a conclusion regarding a vehicle's impairment. *See* ***Vultaggio v. Gen. Motors Corp.***, 145 Wis. 2d 874, 882-83, 429 N.W.2d 93 (Ct. App. 1988). The only

reasonable conclusion that can be drawn from the underlying facts concerning the water leakage in Regal's Suburban is that a substantial impairment of the vehicle's safety exists as a matter of law. An expert opinion is not needed to reach this conclusion, nor can it alter this conclusion.

¶14 GM also contends that an issue of fact exists as to the number of times repairs were attempted. To recover under WIS. STAT. § 218.0171(2)(b)1, the consumer must show that after a reasonable attempt to repair the nonconformity, it is not repaired. A reasonable attempt to repair exists if the same warranted nonconformity is subject to repair at least four times within one year of the vehicle's delivery date, and the nonconformity continues. Sec. 218.0171(1)(h)1.

¶15 Despite the undisputed evidence that Regal brought the Suburban in on five occasions between June and September 2000 complaining of a water leak in the passenger compartment, GM contends that only three repair attempts were made because leaks were found only three of the five times. GM further contends that no repairable defect existed because Regal stated that the vehicle leaked only in the rain, but brought it in for repairs when it was not raining.

¶16 These arguments are specious. The plaintiff in a "lemon law" case need not identify the exact cause of the vehicle's malfunction. ***Dobbratz Trucking***, 256 Wis. 2d 205, ¶12. Moreover, a defect may be "subject to repair" within the meaning of WIS. STAT. § 218.0171(1)(h)1 when the owner presents the vehicle for repair, even if the defect cannot be verified by the repair facility, and the repair facility does not attempt to fix it. ***Chmill***, 144 Wis. 2d at 806.

¶17 Both Regal and Frohmader attested that Regal brought the vehicle in and complained of a water leak on June 12, 2000, and August 8, 2000, as well as

on the other three occasions when leaks were repaired. This clearly established that the Suburban was subject to repair on four occasions. *See* ***id***. Moreover, nothing in the law required Regal to bring the Suburban in while it was raining in order to prove to Hall that a defect existed. This is particularly true here, where Hall could have attempted to replicate rainy conditions in order to check for leaks.

¶18 We also reject GM's contention that an issue of fact existed as to whether the leak continued after four repair attempts. Significantly, when Regal brought the Suburban in to Hall and a leak was repaired on September 20, 2000, this constituted the fifth repair attempt, thus conclusively establishing that the leak continued after the fourth time it was subject to repair. In addition, Regal stated in his affidavit that leaks continued after September 20, 2000, leading him to videotape the water infiltration on Memorial Day weekend in 2001. Evidence of water infiltration in May 2001 established that the leak continued between September 2000 and April 28, 2001, which was one year after the date of delivery of the Suburban to Regal. Neither the testimony of a GM expert indicating that he was unable to find evidence of a leak when he examined the vehicle in November 2001, nor Regal's failure to request repair of the leak by Hall after September 20, 2000, creates an issue of fact as to whether the leak continued after September 11, 2000, the fourth time the Suburban was subject to repair by Hall.

¶19 Regal's motion for summary judgment on the "lemon law" claim was therefore properly granted. We also conclude that the trial court acted within the scope of its discretion in denying GM's motion for sanctions.

¶20 As set forth above, after GM's answer was served and filed, Regal filed a motion to strike the answer and for default judgment, alleging that the answer was not timely served and filed. GM responded with a motion for

sanctions under WIS. STAT. §§ 802.05(1)(a) and 814.025(1), alleging that the motion to strike and for default judgment was frivolous. At the September 24, 2001 hearing on these motions and the initial motions related to summary judgment, Regal withdrew his motion to strike and for default judgment. The trial court denied GM's motion for sanctions, concluding that the withdrawal of the motion was a factor to consider in deciding the motion for sanctions, and that Regal's motion resulted at most from a negligent misunderstanding of the law, not from recklessness or improper motive.

¶21 It is undisputed that Regal erred when he contended that GM's answer was untimely as to service or filing.[4] The sole issue is whether the trial court's denial of sanctions must be reversed.

¶22 GM sought sanctions under WIS. STAT. § 802.05(1)(a).[5] This statute provides that the signature of an attorney on a motion constitutes a certification that to the best of the attorney's knowledge, formed after reasonable inquiry, the motion is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that the motion is not used for an improper purpose, such as harassment. If the trial court determines that an attorney failed to make the required determinations before

[4] GM's answer was timely served by mailing on July 30, 2000, in compliance with WIS. STAT. §§ 801.14(2) and 801.15(1)(b), and WIS. STAT. § 802.06(1). It was timely filed on August 1, 2000, in compliance with § 801.14(4).

[5] It also requested sanctions under WIS. STAT. § 814.025(1). However, this statute applies only to frivolous actions, not motions. ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶28, No. 02-1427. We therefore address GM's arguments only as to WIS. STAT. § 802.05(1)(a).

signing a motion, it may impose sanctions, including reasonable expenses and attorney fees. ***Id.***

¶23 The trial court has discretion as to whether to impose sanctions under WIS. STAT. § 802.05(1)(a). ***State ex rel. Robinson v. Town of Bristol***, 2003 WI App 97, ¶36, No. 02-1427. This court will sustain a trial court's discretionary decision under § 802.05 if the trial court examined the relevant facts, applied a proper standard of law, and reached a conclusion that a reasonable judge could reach. ***Paulson v. Allstate Ins. Co.***, 2002 WI App 168, ¶12, 256 Wis. 2d 892, 649 N.W.2d 645, *review granted*, 2002 WI 121, 257 Wis. 2d 115, 653 N.W.2d 888 (Wis. Sept. 26, 2002) (No. 01-0991).

¶24 We acknowledge that, as it pertains to this case, the law regarding service and filing of an answer appears to be clear and well established, and that Regal's motion to strike and for default judgment was not warranted by existing law. We also recognize that in denying sanctions, the trial court concluded that Regal's counsel had no improper motive, but failed to address the reasonableness of the review of the law made by him before he filed the motion.

¶25 When a trial court fails to set forth adequate reasons for its decision, this court may examine the record to determine whether facts exist to support the trial court's decision. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982). While we reject Regal's implicit contention that GM's counsel should have specifically directed him to WIS. STAT. § 801.14(2) before filing the motion for sanctions,[6] based upon our review of the record we are not

[6] In fact, before filing its motion for sanctions, GM's counsel directed Regal to WIS. STAT. §§ 801.14(4) and 802.06(1), and advised him that a motion to strike GM's answer on the ground that it was untimely would be without merit.

persuaded that the trial court erroneously exercised its discretion in denying sanctions. Even if the motion to strike and for default judgment had not been filed, GM was required to appear at the September 24, 2001 hearing on the issues related to summary judgment. Moreover, Regal withdrew his motion at the commencement of the hearing, thus obviating the need for argument on the merits of the service and filing issues. While we recognize that GM expended resources to prepare its motion for sanctions in response to Regal's written motion, we are not persuaded that the amount reasonably expended to prepare such a motion is so significant as to conclude that the trial court erroneously exercised its discretion in declining to impose sanctions.[7]

¶26 GM's next argument is that the trial court erred in awarding Regal 12% interest pursuant to WIS. STAT. § 807.01(4) on his double costs and disbursements. GM relies on ***Nelson v. McLaughlin***, 211 Wis. 2d 487, 565 N.W.2d 123 (1997), and ***American Motorists Insurance Co. v. R & S Meats, Inc.***, 190 Wis. 2d 196, 526 N.W.2d 791 (Ct. App. 1994), for this proposition. Relying on ***Dobbratz Trucking***, 256 Wis. 2d 205, ¶¶29-31, Regal concedes error.[8] We

[7] We recognize that the trial court awarded Regal attorney's fees for the September 24, 2001 hearing, which included fees related to both the summary judgment motion and the motions to strike and for sanctions. However, we will not disturb the award because we cannot discern from the record which portion of the fees relate to the summary judgment motion and which do not, nor are we persuaded that the fees attributable to the motion to strike are more than de minimis.

[8] Regal appears to concede that the entire award of double costs and interest under WIS. STAT. § 807.01(3) and (4) was error. However, we will not address that issue because in its appellant's brief and reply brief, GM requests reversal only of the portion of the judgment awarding *interest* on double costs and disbursements. In its reply brief, GM acknowledges that Regal's concession of error is broader than this, but states that it chose not to appeal the trial court's decision to award double costs. It states that the propriety of that award is therefore not before this court.

therefore reverse the portion of the judgment awarding 12% interest from October 17, 2001, on the award of double costs and disbursements.

¶27 GM's final argument is that the trial court erroneously exercised its discretion when it awarded Regal $255.81 for an expert witness fee that had already been paid by GM. The trial court included this sum in the $441.56 it awarded for expert witness fees, prior to doubling those fees. Regal concedes that inclusion of the $255.81 was error. On remand, the $441.56 award of costs for expert witness fees must be reduced by $255.81.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.