

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 14, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-1232  
STATE OF WISCONSIN**

Cir. Ct. No. 01-SC-1131

**IN COURT OF APPEALS  
DISTRICT IV**

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**RANDALL G. BOBHOLZ AND DORIS A. BOBHOLZ,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**JOHN BANASZAK,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Columbia County:  
RICHARD REHM, Judge. *Affirmed.*

¶1 ROGGENSACK, J.<sup>1</sup> John Banaszak appeals a small claims judgment awarding Randall and Doris Bobholz damages for breach of warranty.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

The Bobholzes purchased a boat from Banaszak based on Banaszak's representation that the boat was in "perfect condition." Shortly thereafter, it was discovered that the engine's intake manifold had irreparable damage. The court awarded the Bobholzes \$4220, the replacement cost of the engine, and statutory costs. Banaszak argues that the circuit court erred by: (1) admitting into evidence an advertised description of the boat, (2) finding that the engine's defect existed at the time of sale, (3) finding that his description of the boat constituted an express warranty, (4) finding that he breached the warranty and (5) awarding an unreasonable amount of damages. We conclude that: (1) the court properly admitted the eBay advertisement, (2) the court's findings of fact that the engine's defect existed at the time of sale, that the advertisement constituted a warranty and that the warranty was breached are not clearly erroneous and (3) the court's award of \$4220 in damages was proper. Accordingly, we affirm the judgment of the circuit court.

## **BACKGROUND**

¶2 In July 2001, Randall Bobholz purchased a 1998 Glastron GS185 ski-boat from Banaszak. Bobholz discovered the boat while searching the Internet. It was advertised on two separate web sites, eBay, an Internet auction site, and American Boat Listing. The eBay ad described the boat as "in perfect condition" and American Boat Listing described it as "in excellent condition." Both advertisements noted that Banaszak had used the boat only minimally, approximately twenty-one to twenty-four hours, since he purchased it. Based on those representations, Bobholz contacted Banaszak to discuss the boat. In the course of their conversation, Banaszak again stated that the boat was in excellent condition, that it had been properly maintained and winterized and that he had personally winterized the boat the year prior. Accordingly, Bobholz offered to

purchase the boat for \$12,500, and Banaszak accepted. The following day, Bobholz and Banaszak met in Madison to transfer the check, boat and title. Banaszak briefly inspected the boat, which appeared to be in “meticulous” condition.

¶3 Approximately two weeks later, Bobholz was operating the boat when the engine started to lose power and then “just died.” He took the boat to a marina to investigate the problem and learned that the intake manifold on the boat’s engine had two cracks in it allowing water into the engine which caused irreparable damage. According to the service manager, the two cracks were the result of improper winterization of the engine. The marina replaced the engine at a cost of \$4220, and Bobholz filed a small claims action to recover that amount.

¶4 In his complaint, Bobholz alleged that because the defect in the boat’s engine existed at the formation of the contract, Banaszak had breached his warranty that the boat was in “excellent” and “perfect” condition. The small claims court commissioner ruled in favor of Bobholz for \$4220. Banaszak requested a trial *de novo*. Following a trial that included testimony by three experts, the circuit court found that the cracks in the manifold existed at the time of sale, that Banaszak had represented that the boat was in “perfect” condition and that the presence of the engine’s defect breached his warranty as to the quality of the boat. Accordingly, the circuit court affirmed the court commissioner’s award of damages in the amount of \$4220. Banaszak, *pro se*, filed a motion for a new trial which the circuit court denied. Banaszak now appeals.

## DISCUSSION

### Standard of Review.

¶5 The decision to admit evidence is committed to the sound discretion of the circuit court, and we will uphold its decision so long as it examined the relevant facts of record, applied the correct legal standard and reached a conclusion that a reasonable judge could reach. *State v. Gray*, 225 Wis. 2d 39, 48, 590 N.W.2d 918, 925 (1999).

¶6 We will uphold the circuit court's findings of fact unless they are clearly erroneous. *Community Nat'l Bank v. Medical Benefit Adm'r, LLC*, 2001 WI App 98, ¶6, 242 Wis. 2d 626, 626 N.W.2d 340.

### Admission of Evidence.

¶7 Banaszak argues that the circuit court erroneously admitted the eBay advertisement describing the boat as "in perfect condition." Banaszak argues that because Bobholz did not purchase the boat via eBay, the ad is irrelevant. We disagree.

¶8 Small claims actions are governed by ch. 799 of the Wisconsin Statutes. WISCONSIN STAT. § 799.209 provides for the admission of evidence and states in relevant part: "The proceedings shall not be governed by the common law or statutory rules of evidence .... The court or circuit court commissioner shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments." Section 799.209(2). Here, one of the critical issues was whether Banaszak's representations as to the quality of the ski-boat created a warranty. The eBay ad had significant probative value because it tends to prove or disprove a fact in dispute, whether Banaszak made

representations regarding the quality of the boat. Therefore, the circuit court properly admitted the eBay ad.

### **Findings of Fact.**

¶9 Banaszak next argues that the circuit court’s finding of fact that the two cracks in the engine’s intake manifold existed at the time of sale was clearly erroneous. Again we disagree. It is the function of the circuit court, not the appellate court, to weigh the credibility of witnesses, fairly resolve conflicts in their testimony, and to draw reasonable inferences from basic facts to ultimate facts. *Rivera v. Eisenberg*, 95 Wis. 2d 384, 388, 290 N.W.2d 539, 541 (Ct. App. 1980). The parties presented the circuit court with testimony of three well-qualified experts, each of whom had an “opinion” as to how the engine sustained the cracks in its intake manifold. Bobholz’s expert testified that the cracks were caused by improper winterization of the engine. Conversely, Banaszak’s experts testified that it was “very, very unlikely” that Bobholz could have used the boat prior to it breaking down if it had been improperly winterized the previous year. The experts’ testimony created contradictory inferences, which the circuit court properly resolved. *See id.*

### **Express Warranty.**

¶10 Banaszak also argues that the circuit court erroneously found that his eBay advertisement describing the ski-boat as “in perfect condition” constituted an express warranty. He argues that because he is a “casual seller,” the doctrine of caveat emptor or “buyer beware” applies and any representation as to the quality of the boat made in course of the sales negotiation did not constitute a warranty. We again disagree.

¶11 A warranty is “an assurance by one party to a contract of the existence of a fact upon which the other party may rely.” *Dittman v. Nagel*, 43 Wis. 2d 155, 160, 168 N.W.2d 190, 193 (1969) (citation omitted). Additionally, whether a statement constitutes a warranty is a question of fact for the circuit court. See *Ewers v. Eisenzopf*, 88 Wis. 2d 482, 488-89, 276 N.W.2d 802, 804-05 (1979); Michael B. Apfeld et al., *Contract Law in Wisconsin* § 6.15 (2d ed. 2000). Most commonly, a warranty is a representation as to the quality or quantity of goods sold and it “relieve[s] the promisee of any duty to ascertain the fact for himself, and amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue.” *Dittman*, 43 Wis. 2d at 160, 168 N.W.2d at 193 (citation omitted). Therefore, a warranty places the burden of ascertaining the truth of the representation on the seller and the beneficiary of a warranty is not required to confirm the warranted facts. Stated otherwise, where a product is warranted to be without defects, the common law doctrine of caveat emptor, or “buyer beware,” does not apply.

¶12 However, many representations that are made in the course of a sales negotiation do not constitute warranties. Sellers are expected to make generalized statements regarding the quality of their product. “Puffery,” as it is termed, is considered an expression of the seller’s opinion and, as such, the buyer has no right to rely on such statements. *Loula v. Snap-On-Tools Corp.*, 175 Wis. 2d 50, 54, 498 N.W.2d 866, 868 (Ct. App. 1993). The distinction between a statement of opinion or “puffery” and a representation of fact is not easily drawn and is a question for the trier of fact. See *Lambert v. Hein*, 218 Wis. 2d 712, 724 & n.4, 582 N.W.2d 84, 89 & n.4 (Ct. App. 1998). In drawing the line, the court should “carefully consider and evaluate the circumstances surrounding transactions where there is a claim made of an express warranty in a sale.” *Ewers*, 88 Wis. 2d at 491,

276 N.W.2d at 806. And at a minimum, a warranty must be (1) an affirmation of fact relating to the goods that (2) becomes “part of the basis of the bargain.” WIS. STAT. § 402.313.<sup>2</sup> For example, in *Ewers*, the supreme court held that a seller’s statement that sea shells, a piece of coral and a driftwood branch were “suitable for salt water aquariums, if they were rinsed” constituted an express warranty because it affirmed the quality of the goods sold and was a factor in the buyer’s decision to purchase the goods. *Ewers*, 88 Wis. 2d at 488-90, 276 N.W.2d at 804-05.

¶13 Here, Banaszak represented to Bobholz via the eBay advertisement and during the sales negotiation that the ski-boat was “in perfect condition.” Banaszak did not couch the statement as his “opinion” or “belief.” In addition, when Bobholz viewed the boat he saw nothing to indicate a contrary condition. Therefore the circuit court’s finding that the statement was an affirmation of fact relating to the quality of the ski-boat is not clearly erroneous. With regard to the second factor, Bobholz testified that Banaszak’s representation regarding the quality of the boat was a “basis of the bargain” because it induced him to purchase the boat. See *Hellenbrand v. Bowar*, 16 Wis. 2d 264, 271, 114 N.W.2d 418, 422 (1962) (“Any affirmation of fact ... relating to the goods which ... induce[s] a buyer to purchase and which is relied upon by the buyer constitutes an express warranty.”). Accordingly, the circuit court’s finding that Banaszak’s

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<sup>2</sup> Banaszak argues that because he is a casual seller, the Wisconsin Uniform Commercial Code does not apply to this transaction and the definition of a warranty provided in WIS. STAT. § 402.313 is inapplicable. We disagree. Although the UCC does distinguish between “merchants” and the occasional seller and applies certain rules only to a merchant, for example, WIS. STAT. § 402.314, § 402.313 is not such a rule. It applies to a “seller,” defined as a person who sells goods, and is therefore applicable here. See WIS. STAT. § 402.103.

representation that the boat was in perfect condition constituted a warranty is not clearly erroneous.

### **Breach of Warranty and Damages.**

¶14 Banaszak next argues that the circuit court erroneously found that the warranty regarding the boat’s “perfect” condition was breached. Because we sustain the circuit court’s findings that (1) Banaszak created an express warranty as to the quality of the boat and (2) that the cracks in the intake manifold existed at the time the sale occurred, this argument falls aside. Contrary to Banaszak’s representation, the boat was not in “perfect condition.” The engine was defective. The circuit court properly found that the warranty was breached and that Bobholz was entitled to indemnification from Banaszak for the resulting loss. *See Dittman*, 43 Wis. 2d at 160, 168 N.W.2d at 193.

¶15 Banaszak’s final argument that the circuit court erred in awarding Bobholz \$4220, the cost of a replacement engine, is also without merit. Banaszak appears to argue that the damages were not reasonably proved. We disagree. The record demonstrates unequivocally that the cracks in the engine’s intake manifold destroyed the engine and that a new engine cost \$4220. A warranty “amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue.” *Id.* Here, the resulting loss was the price of a new engine. Therefore, the circuit court properly awarded Bobholz \$4220.

### **CONCLUSION**

¶16 Because we conclude that: (1) the court properly admitted the eBay advertisement, (2) the court’s findings of fact that the engine’s defect existed at the time of sale, that the advertisement constituted a warranty and that the warranty



was breached are not clearly erroneous and (3) the court properly awarded Bobholz damages in the amount of \$4220, we affirm the judgment of the circuit court.

*By the Court.*—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

