

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2004

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. 03-1727
STATE OF WISCONSIN**

Cir. Ct. No. 01CV006902

**IN COURT OF APPEALS
DISTRICT I**

PAYROLLWISE, INC.,

PLAINTIFF-APPELLANT,

V.

STERLING TRUCK CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Payrollwise, Inc. appeals from an order denying its motion for summary judgment.¹ It claims the trial court erred in denying its

¹ The final judgment in this case followed the jury verdict on May 13, 2003. Payrollwise, however, does not challenge the jury verdict. Instead, it challenges the summary judgment order.

motion for summary judgment because there was no issue of material fact with respect to liability under Wisconsin's Lemon Law. Because the trial court did not err in concluding that there were reasonable competing inferences on material issues of fact, we affirm.

BACKGROUND

¶2 On or about June 13, 2000, Payrollwise, an over-the-road motor carrier, purchased a model year 2000 Sterling tractor (truck) from the Badger Truck Center of Milwaukee, Wisconsin. Accompanying the purchase was a written warranty, which warranted the vehicle "bumper-to-bumper" for one year, 100,000 miles, and warranted the performance of the transmission for three years and 300,000 miles. The truck was customarily used to make coast-to-coast runs delivering refrigerated and non-refrigerated goods.

¶3 On December 24, 2000, while on a run to New Mexico, the driver of the truck, Darin Damyanov suspected transmission problems. Specifically, he experienced difficulty when shifting into certain gears, and the transmission emitted an unusual sound. After conferring with his superiors, Damyanov was instructed to stop at a Sterling dealership in Albuquerque, New Mexico, to have the problem checked. On December 26, a Sterling dealer in Albuquerque test drove the truck and recommended that the truck be driven to a sister dealership in Las Vegas, Nevada, where a more experienced transmission mechanic could examine it. On the morning of December 27, Damyanov drove the truck to the Las Vegas Sterling dealership. He was received by the service manager, Russ Gubler, who had been notified via telephone by the Albuquerque dealership. After a cursory inspection, Gubler informed Damyanov that their truck transmission mechanic only worked during the second shift, and he would have to bring the

truck back after 3:30 p.m. Damyanov returned with the truck late that afternoon. Unfortunately, the mechanic did not come to work that day. Damyanov returned again the next day, December 28, with the truck. Upon inspection, it was determined that metal shavings were in the transmission oil and, consequently, the transmission would have to be replaced. On December 28, 2000, the Sterling dealer, with the approval of Ken Veltchev, the president of Payrollwise, ordered a new transmission from Eaton Fuller. It was agreed that the defective transmission would not be removed until a replacement had arrived so that the truck could be used in the interim.

¶4 Initially, it was expected that the new transmission would be received within three business days. Damyanov stayed with the truck over the New Year's weekend and came to the dealership on both January 2 and 3, expecting the arrival of the transmission. The expectations of the parties for the arrival of the transmission were not realized. Due to shipping problems, the transmission did not arrive until January 17, 2001. Damyanov was not able to return the truck to Las Vegas until January 19, 2001, because he was on other jobs. In the meantime, it was discovered that Eaton Fuller had shipped the transmission without an upgraded bell housing. Thus, the completed installation could not occur. The truck was out of service as of January 19, 2001. The bell housing finally arrived on January 26, 2001. Gubler informed Veltchev that the installation would be completed either late on January 26 or early on January 27 and, because of the weekend, the truck would be available January 29. Damyanov, however, was out on another job with a leased truck and was not able to return and pick up the repaired truck until February 3, 2001.

¶5 On July 27, 2001, Payrollwise filed suit against Sterling, alleging a violation of the Lemon Law. Payrollwise filed a motion seeking summary

judgment on liability. The trial court denied the motion and the case went to a jury. The jury found that the transmission defect constituted a substantial warranty nonconformity, but that there was no violation of the Lemon Law. Payrollwise does not appeal the jury's verdict, but rather appeals the order denying its motion for summary judgment.

ANALYSIS

¶6 Payrollwise contends Sterling violated Wisconsin's Lemon Law. It claims the trial court erred when it denied its motion for summary judgment because the record evidence demonstrates that there was no dispute of material facts on the issue of liability for two violations of the Lemon Law. We are not persuaded.

¶7 Although we benefit from the trial court's analysis, we review the denial of a motion for summary judgment independently because it presents a question of law. As has been often stated, summary judgment procedure has been designed to eliminate unnecessary trials. We review a summary judgment determination pursuant to the same standards as the trial court. *Frost v. Whitbeck*, 2002 WI 129, ¶4, 257 Wis. 2d 80, 654 N.W.2d 225. We are mindful that summary judgment procedure is not a substitute for trial, but rather a determination that there is no triable issue of fact presented. *See Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). The burden rests upon the moving party to establish a record sufficient to demonstrate to the satisfaction of the court that there are no triable issues of material fact on any issue presented. *Maynard v. Port Publ'ns, Inc.*, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980). "Summary judgment should not be granted if there is any reasonable doubt concerning the existence of a factual issue or if reasonable inferences leading to conflicting results

can be drawn from undisputed facts.” *Kemp v. Miller*, 154 Wis. 2d 538, 561-62, 453 N.W.2d 872 (1990). Finally, in analyzing whether there are genuine issues of material fact, we draw all reasonable inferences in favor of the nonmoving party. *Grams*, 97 Wis. 2d at 338-39.

¶8 For Payrollwise to establish a Lemon Law violation, it must demonstrate that the vehicle under consideration had: (1) a nonconformity that substantially impaired its use, value, or safety; and either (2) that the same conformity was subject to repair by the manufacturer at least four times and the nonconformity continued; or (3) that the vehicle was out of service for an aggregate of at least thirty days. WIS. STAT. §§ 218.0171(1)(h)1. and 2.

¶9 Payrollwise presented three bases in support of its motion for summary judgment. First, Payrollwise contended that the transmission defects substantially impaired the use of the truck as evidenced by Gubler’s request to keep the truck operating in close range to Las Vegas. Payrollwise interprets this request as a safety precaution to minimize the effects of any breakdown due to the defective transmission. Sterling responds that at no time did it indicate that the truck was unsafe to drive. It recommended short-range hauls so that in the event the transmission arrived at the expected time, the truck could promptly be returned for service. Sterling further argues that the transmission problems did not prevent Damyanov from making some medium-range runs and a long haul to the east coast. Thus, when considering this factor, it is not difficult to conclude that material issues of fact presented themselves for resolution by a fact finder.

¶10 Second, Payrollwise asserted that each time its driver, Damyanov, presented its truck to a Sterling dealership with the transmission problem, it constituted a distinct opportunity for the dealership to repair the truck. It bases

this claim on the assertion there is no factual dispute that six distinct opportunities were afforded Sterling to repair the same nonconformity.

¶11 Based upon the briefs of the parties, it appears to be undisputed that the first presentation for repair was made on December 26, 2000, at the Sterling dealership in Albuquerque, New Mexico. After testing and inspecting, no repair work was performed at the Albuquerque dealership. Instead, the dealership recommended that the truck be taken to a Las Vegas dealership where a more experienced transmission specialist could examine it. The truck was then driven to the Las Vegas dealership. The transmission specialist was not on duty at that time. Although the service manager and trailer mechanic “attempted to trouble shoot the problem,” they reached no conclusion and advised the driver to bring the truck back later in the day when the transmission specialist’s second shift began. Damyanov complied with the request, but the special mechanic did not come to work that day, so Damyanov had to bring the truck back the next day—December 28. After an inspection, the transmission problem was diagnosed and a replacement transmission was ordered.

¶12 The question becomes whether this initial Las Vegas episode constituted one opportunity or two for repair purposes. Quite naturally, Payrollwise claims that two distinct opportunities arose; Sterling claims only one opportunity occurred because, in effect, the interaction between Damyanov and Gubler was an opportunity in process that was not completed until the special transmission mechanic examined the transmission and determined it had to be replaced. Here, it is not unreasonable to draw either inference, which could lead to contrary factual determinations. Thus, the fact-finding process is required.

¶13 Damyanov's visits to the Las Vegas dealership on January 2 and 3 have also been drawn into the dispute. Did the visits constitute separate distinct opportunities for repairing the nonconformity? On December 28, after the Sterling dealership had ordered the new updated transmission from Eaton Fuller, Gubler had conversations with both Veltchev and Damyanov indicating that he expected to receive the new transmission within two to three business days. During this period of time, the truck was not out of service, but was under Damyanov's control at a truck stop. For whatever reason, which is not clear from the record, Damyanov visited the dealership on both days to see if the transmission had arrived. When, on January 3, it became apparent that the arrival of the transmission would be delayed through no fault of Sterling, Veltchev arranged for Damyanov to make a run to Los Angeles and Phoenix. During this period, Veltchev was in frequent communication with Gubler as to the status of the transmission's arrival.

¶14 Payrollwise argues that Damyanov's return to the dealership for the purpose of replacing the transmission on January 2 and 3 constituted two separate presentments for repair that were unsuccessful. In its brief, Payrollwise asserts that Gubler "instructed" Damyanov to return on January 2 and 3. Sterling denies any such action on Gubler's part, and contends that Damyanov's visits to the dealership were strictly voluntary. The current state of the record sheds little light upon this dispute of facts. Veltchev, as Payrollwise's president, knew the status of the transmission's delivery because of his frequent conversations with Gubler. What information he relayed to Damyanov, and the extent of instructions he gave him, is evident only by inference. From this review, we can only conclude that in

regard to Damyanov's visits on January 2 and 3, there is a reasonable dispute of material facts as to whether the trips were opportunities to achieve conformity.²

¶15 Third, Payrollwise claims Sterling took at least thirty-five days to repair the warranty problem of the faulty transmission, thereby providing an alternative basis for a Lemon Law violation. Specifically, it claims that it is undisputed that for thirty-five days, the truck was not capable of rendering the service that Sterling warranted; this period ran from December 26, 2000, to February 1 or 2, 2001.

¶16 From the record, we know that the truck was out of service December 26, 27 and 28 and from January 19 to February 2. Payrollwise concedes that from January 8, 2001, to January 19, 2001, the truck was in full service. Between January 4 to January 8, it is questionable whether the truck was restricted in its runs because of any transmission problems. Payrollwise claims that its president was not told until February 1 or 2 that the truck repairs were completed. Yet, the testimony of both Veltchev and Gubler confirms that Gubler called Veltchev on January 26, 2001, to inform him that the repairs would be completed that night or early the next morning, January 27. Payrollwise did not pick up the truck until February 3 because Damyanov was still out on a run using a leased truck. How "out of service" time should be computed is in dispute. Thus,

² Payrollwise also contends that the period between January 19 to February 3 constituted another failed opportunity to achieve conformity. The requirement that at least four occasions or opportunities for repair must have occurred is circumscribed by the additional requirement that the nonconformity continue. Here, the facts are not in dispute. The truck was out of service waiting for the new parts to be installed. On February 3, Damyanov arrived back in Las Vegas to pick up the truck, the nonconformity having been corrected. Because the nonconformity did not continue, this occasion did not constitute a failed opportunity under the statute.

we conclude in this regard there was an issue of material fact that needed to be determined by a fact finder.

¶17 The trial court, in rendering an oral decision, commented:

[T]he parties disagree whether the problem [with] the truck's transmission substantially impaired the use, value and safety of the truck.

I think a reasonable jury could conclude the truck was not suffering from nonconformity, substantially impaired the use, value and safety of the truck when they had a defective transmission [sic]. And the manufacturer must have four chances to repair the same defect without success, or the vehicle is out of service for 30 days.... When we look at the attempts and whether he was called in, going to the various places, whether they were six opportunities, four opportunities, these are questions of fact whether it's one extended opportunity. It appears that they were waiting for a transmission. That is one reasonable inference. And the vehicle was used, so can we have every visit counted as an attempt to repair?

There are too many questions of facts here.

So was it 31 days or less? Was it 30 days?
Depends on how one counts.

¶18 From our review of the record, there is ample reasonable basis for the trial court to conclude that there were disputed issues of material facts relating to each one of the factors required to prove a violation of Wisconsin's Lemon Law. For these reasons, we affirm the trial court's decision denying the motion for summary judgment.

By the Court.—Order affirmed.

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

