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DISTRICT IV

April 26, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2424 Liberty Towing Service, LLC v. Navistar, Inc.
(L.C. #2011CV3121)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Liberty Towing Service, LLC, appeals a circuit court order denying its motion for summary judgment and granting summary judgment in favor of Navistar, Inc., on Liberty Towing's Wisconsin Lemon Law claim against Navistar. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The material facts are not in dispute. Liberty Towing is a vehicle towing business located in Wisconsin. Navistar is the original manufacturer of a truck that Liberty Towing leased.

The truck was originally transferred in what Liberty Towing calls "paper" transactions from Navistar to Miller Industries through Lee Smith International, a Navistar authorized dealer. Miller Industries then sold the truck to Zip's Truck Equipment, Inc., an Iowa company. The truck remained at Navistar's facility before it was shipped to Zip's location in Iowa upon the sale. Zip's then leased the truck to Liberty Towing.[2] A Zip's representative drove the truck from Iowa to Wisconsin for delivery to Liberty Towing.

Liberty Towing alleged that, during the first year of the lease, it experienced multiple mechanical engine failures with the truck. These alleged failures led to its Wisconsin Lemon Law claim against Navistar.

The circuit court granted summary judgment to Navistar, and dismissed Liberty Towing's claim, based on the court's conclusion that the Lemon Law applies only to "new" vehicles and that the truck Liberty Towing leased was not "new," as that term was interpreted in ***Schey v. Chrysler Corp.***, 228 Wis. 2d 483, 597 N.W.2d 457 (Ct. App. 1999). Whether summary judgment should have been granted is a question of law that we review without deference to the circuit court's analysis, but using the same methodology as the circuit court. ***Gaertner v. Holcka***, 219 Wis. 2d 436, 446, 580 N.W.2d 271 (1998).

[2] According to Liberty Towing, the only physical transfer of the truck before Liberty Towing leased it was a transfer from Navistar to Zip's. To the extent there is any factual dispute on this point, we conclude that it is not material.

We begin by noting an argument that Navistar makes, which is that Wisconsin law does not apply to this case. We need not address this argument because, assuming without deciding that Wisconsin law applies, Liberty Towing fails to persuade us that the circuit court was incorrect in its application of ***Schey***.

The vehicle in ***Schey*** had been leased for six months, returned to a dealer, then purchased at auction before being sold to the plaintiff in "as is" condition with 6,713 miles. ***Schey***, 228 Wis. 2d at 486. The issue was whether the Lemon Law could be applied to a "previously-owned" vehicle, if the vehicle otherwise meets the Lemon Law criteria. ***Id.*** at 485, 489. The court determined that, despite the Lemon Law statute's reference to "new" vehicles, certain provisions in the statute render it ambiguous as to whether it covers a previously owned vehicle that otherwise meets the statute's criteria. ***Id.*** at 488-89 & n.2. The court concluded, based on the evident purpose of the statute to protect purchasers of new motor vehicles and the legislative history, that the statute was not intended to apply to previously owned vehicles. ***Id.*** at 486, 489-90. The court noted that the statute's definition of a motor vehicle includes "executive" and "demonstrator" vehicles, which, while "used" in some sense, have never left the control of the dealer. ***Id.*** at 491. In contrast, the previously leased vehicle with 6,713 miles had left the control of the manufacturer and dealer before the plaintiff purchased it. *See* ***id.*** at 486, 491.

Here, it is undisputed that the truck was purchased and owned by Zip's, had left the control of Navistar, and had left the control of (or was never in the control of) Navistar's dealer, all before Zip's leased the truck to Liberty Towing. Therefore, as the circuit court concluded, the truck falls within the ***Schey*** court's reasoning and qualifies as a previously owned vehicle to which the Lemon Law does not apply.

Liberty Towing argues the truck was "new" under the Lemon Law when Liberty Towing leased it because its manufacture ended only thirty-five days before the lease and it had only ten miles on it, because Liberty Towing was the first and only real "consumer" of the truck, because the truck remained in Navistar's control until it was shipped to Zip's, and because Liberty Towing had a reasonable expectation that it was leasing a "new" truck. However, none of these arguments show that the truck was not previously owned within the meaning of ***Schey*** when Liberty Towing leased it. While the truck was not "used" to the same extent as the vehicle in ***Schey***, Liberty Towing does not satisfactorily explain how any particular difference in the facts here might matter under any aspect of ***Schey***'s reasoning.

Accordingly, we conclude that the circuit court properly granted summary judgment in favor of Navistar.

IT IS ORDERED that the order appealed is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals