

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

SHAWN EMMONS and CYNTHIA	)	
EMMONS, h/w,	)	
	)	C.A. No. N10C-09-172 EMD
Plaintiffs,	)	
	)	
v.	)	
	)	TRIAL BY JURY OF TWELVE
TRI SUPPLY AND EQUIPMENT INC., a	)	DEMANDED
Delaware Corporation and JCB, INC., a	)	
Maryland Corporation,	)	
	)	
Defendants.	)	
	)	

Submitted: May 8, 2013
Decided: July 29, 2013

Upon Defendants' Motions for Summary Judgment
GRANTED IN PART and DENIED IN PART

Gary W. Aber, Esquire, Wilmington, Delaware, *Attorney for Plaintiffs Shawn and Cynthia Emmons.*

Kevin J. Connors, Esquire, Marshall, Dennehey Warner Coleman & Goggin, *Attorney for Defendant Tri Supply and Equipment, Inc.*

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DAVIS, J.

INTRODUCTION

This is a products liability and negligence action brought by Plaintiffs Shawn Emmons and Cynthia Emmons against Defendants Tri Supply and Equipment, Inc. ("Tri Supply") and JCB, Inc. ("JCB"). The Emmons seek damages in connection with an October 6, 2008 incident involving Mr. Emmons. At that time, Mr. Emmons was an ironworker with Fortress Steel

Service, Inc. (“Fortress Steel”). Mr. Emmons was operating a rough terrain forklift – a JCB Model No. 508C LoadAll (the “LoadAll”) – and moving 4,000 pounds of rebar when the LoadAll turned over, resulting in injuries to Mr. Emmons. JCB designed and manufactured the LoadAll. Tri Supply purchased the LoadAll from JCB, rented it out for several years, and then sold it to Fortress Steel. The Emmons allege the accident occurred as a result of “a defect malfunction and/or improper service of” the LoadAll. Before the Court are (i) JCB’s Motion for Summary Judgment (Under Delaware Law) (“the JCB Motion”) and (ii) Tri Supply’s Motion for Summary Judgment (Under Delaware Law) (“the Tri Supply Motion, and collectively with the JCB Motion, the “Motions”). For the reasons stated herein, the Motions are **GRANTED** in part and **DENIED** in part.

PROCEDURAL BACKGROUND

The Emmons filed their Complaint in this action on September 22, 2010. They filed their Amended Complaint on April 8, 2011. On July 20, 2012, Tri Supply filed a Motion for Summary Judgment and Motion for the Application of Maryland Law. On July 24, 2012, JCB filed a Motion for Summary Judgment and Motion for the Application of Maryland law. The Court concluded, in an Opinion of October 17, 2012, that Delaware law applies to the Emmons’ claims because Delaware has the most significant relationship to the occurrence and the parties.

In a letter to the parties’ counsel on October 25, 2012 (the “October 25, 2012 Decision”), the Court denied Defendants’ Motions for Summary Judgment. The Court observed that “[t]he major distinction between Delaware and Maryland, relevant to this case, is that Maryland allows the defense of contributory negligence to be used as a complete bar to recovery while Delaware allows the use of comparative negligence to reduce a plaintiff’s recovery.”¹ In considering a

¹ Letter from the Hon. Peggy L. Ableman, Superior Court Judge, to Kevin J. Connors, Esq., Theodore J. Segletes, Esq., and Gary W. Aber, Esq., at 2 (Oct. 25, 2012).

request by Defendants to resubmit the briefs in support of their Motions for Summary Judgment under Delaware law, the Court expressed confidence that its decision not to grant summary judgment would be the same under either Delaware or Maryland law and denied the request.² In denying summary judgment, the Court determined that there was the existence of multiple genuine issues of material fact. The Court articulated the various genuine issues as: whether the LoadAll's sway cylinder was covered by a Major Component Protection Plan; the circumstances surrounding how Mr. Emmons became separated from the LoadAll; whether the LoadAll was stopped when it overturned; the degree of the incline of the surface of the ground beneath the LoadAll; whether the sway cylinder caused the accident; and whether Tri Supply conveyed express warranties to Fortress Steel.³

On March 12, 2013, JCB filed the JCB Motion. On March 13, 2013, Tri Supply filed the Tri Supply Motion. The Emmons filed their responses to the Motions on April 23, 2013. The Court heard argument on the Motions on May 8, 2013. The following is the Court's decision.

FACTUAL BACKGROUND

Mr. Emmons was employed as an ironworker with Fortress Steel. On October 6, 2008, Mr. Emmons was operating the LoadAll to move 4,000 pounds of rebar when the machine began to tip over. Mr. Emmons jumped or fell out of the operator's cab of the LoadAll. As a result, he sustained injuries.

JCB manufactured the LoadAll – JCB LoadAll Model 508C with serial number 588007. Fortress Steel purchased the LoadAll from Tri Supply on February 13, 2008. The sales invoice for the transaction contains a provision for the "Terms and Conditions of Sale."⁴ Additionally,

² *Id.* at 3.

³ *Id.* at 4-5.

⁴ Tri Supply's Mot. Ex. A.

the sales invoice shows that the LoadAll included a “Major Component Warranty Good To 3/31/09.”⁵

The “Terms and Conditions of Sale” provision contains a “used products” section stating that the buyer “acknowledges that the product(s) described on the reverse side [of the invoice] which is the subject of this sale is a ‘used product’ and is being sold on and [sic] ‘as is’ and ‘with all faults’ basis.”⁶ It also provides:

The Dealer as the seller, makes NO expressed [sic] warranties of MERCHANTABILITY OF FITNESS FOR A PARTICULAR PURPOSE and the DEALER does NOT make any implied warranties of MERCHANTABILITY OF FITNESS FOR A PARTICULAR PURPOSE or any other warranties unless the DEALER has so provided in writing and the writing is signed by an AUTHORIZED REPRESENTATIVE OF THE DEALER.

The Major Component Protection Plan submitted to the Court is marked with JCB’s logo and professes to provide “a lower cost option that enables customers to protect their investment against major failures.”⁷ It specifies that the main items guaranteed “against manufacture defect” include items listed, and that “[a]ll components not specified above are expressly excluded” from the plan.⁸ The listed items include the “Valve Blocks[:] Main Loader Control Valve, Main Excavator Control Valve,” and “Rams[:] Cylinders, Piston Rods, Piston Head, Gland Bearing, End Cap,” among others.

The LoadAll was subject to a JCB Certificate of Warranty, which provided that JCB or a dealer would repair any defects arising from faulty material or workmanship within the warranty period. The warranty period was one year for rough terrain forklifts.⁹ The warranty period started on the date of delivery of the machine to the first buyer or when a dealer first leased or

⁵ Tri Supply’s Mot. Ex. C.

⁶ *Id.*

⁷ Tri Supply’s Mot. Ex. D.

⁸ *Id.*

⁹ JCB’s Mot. Ex. 12.

rented the machine.¹⁰ The JCB invoice for sale of the LoadAll to Tri Supply bears a date of January 25, 2005.¹¹ According to a JCB representative, the warranty began on March 31, 2006.¹²

In November 2005, JCB issued a Technical Bulletin (“the Bulletin”) advising of “[a] possible manufacturing defect” in the sway ram control valve body, resulting in sticking of the control valve spool, “causing the machine to continue to sway when the operating lever is released.”¹³ The Bulletin states that 506C, 506CHL, and 508C LoadAlls are affected and provides a range of serial numbers of specifically affected machines on an attached page. The Bulletin recommends that the machines listed be fitted with a new control valve spool designed to rectify the defect. The serial number of the LoadAll at issue here, 588007, is not included in the Bulletin’s list of affected machines.¹⁴

PARTIES’ CONTENTIONS

Tri Supply

Tri Supply contends that the Emmons have failed to meet their burden to establish a *prima facie* case against Tri Supply as to breach of express and implied warranties. Tri Supply argues that: it made no express warranties; it disclaimed all warranties in the Terms and Conditions of Sale with Fortress Steel; and, it sold the LoadAll to Fortress Steel “as is” and “with all faults.”¹⁵ Tri Supply argues that the Emmons have not alleged that Fortress Steel made known to Tri Supply any particular purpose for its use of the LoadAll that varied from normal

¹⁰ *Id.*

¹¹ JCB’s Mot. Ex. 5.

¹² JCB’s Mot. Ex. 4.

¹³ Pls.’ Resp. to JCB’s Mot. Ex. M.

¹⁴ *Id.*

¹⁵ Tri Supply’s Mot. ¶ 5.

usage. Tri Supply adds that the only warranty provided to Fortress Steel for the LoadAll was the Major Component Plan issued by JCB.

JCB

JCB contends that the Emmons have failed to adduce evidence that the LoadAll was defective at the time it left the manufacturer. JCB argues that JCB disclaimed any express or implied warranties. JCB argues that the Major Component Protection Plan applies to neither the sway ram control valve or sway ram control valve spool. JCB adds Mr. Emmons has failed to eliminate the possibility that he was the cause of the accident.

JCB also contends that the Emmons' negligent failure to warn claim fails because the operator's manual and cab warning stickers for the LoadAll, provided to both Tri Supply and Fortress Steel, warned that failure to use seatbelts and jumping out of the cab could cause injury or death, yet Mr. Emmons exited the LoadAll instead of sustaining the rollover. JCB points out that Mr. Emmons' injuries were caused by his impact to the ground after jumping from the cab. JCB argues that no reasonable jury could find that JCB owed Mr. Emmons a duty to warn that was not satisfied.

The Emmons

The Emmons contend that, under law of the case doctrine, Defendants are precluded from raising their bases for summary judgment because the Court considered the same issues under the same facts in the October 25, 2012 Decision. The Emmons further contend that: they have developed credible and convincing evidence that the LoadAll was defective at the time it left JCB. They point to the Bulletin acknowledging a manufacturing defect of sway control valve sticking in units that are the same model as the LoadAll at issue. Additionally, they argue that

the particular LoadAll had an observed history of tilting without operator input, as did LoadAlls of the same model.

The Emmons deny that Fortress Steel purchased the LoadAll “with all faults” or in “as is” condition. They also deny that the Major Component Protection Plan excluded the sway ram valve cylinder, because the plan includes valve cylinders. Additionally, the Emmons deny that there were warning stickers on the LoadAll’s cab window, which was a replacement for the original, at the time of the accident or that Mr. Emmons voluntarily and knowingly chose to exit the LoadAll as it overturned.

The Emmons contend that Tri Supply knew that Fortress Steel purchased the LoadAll to move and transport rebar, creating an implied warranty of fitness for a particular purpose. The Emmons argue the LoadAll was not fit for the particular purpose for which it was sold. Additionally, the Emmons contend that the LoadAll was covered by the Major Component Warranty.

STANDARD OF REVIEW

The Court may grant a motion for summary judgment made pursuant to Superior Court Civil Rule 56 where the movant can show from the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, that no material issues of fact exist so that the movant is entitled judgment as a matter of law.¹⁶ In considering a motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party.¹⁷ The Court should deny summary judgment where, “a plaintiff may recover

¹⁶ Super. Ct. Civ. R. 56(c); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

¹⁷ *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”¹⁸

¹⁸ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

DISCUSSION

A. Law of the case doctrine bars the majority of Defendants' bases for summary judgment.

The "law of the case" is established when a specific legal principle is applied to an issue presented by facts that remain constant during the subsequent course of the same litigation.¹⁹

"The 'law of the case' doctrine requires that issues already decided by the same court should be adopted without relitigation, and 'once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears.'"²⁰ The Court may reconsider or revisit a prior decision if it is "clearly wrong, produces an injustice or . . . because of changed circumstances."²¹

This Court, albeit with another judicial officer, addressed the bulk of Defendants' arguments/claims/bases for summary judgment in the October 25, 2012 Decision. Indeed, the Court carefully compared the Motions currently before the Court to those motions submitted by Defendants under Maryland law and found that Tri Supply's Motions are nearly identical and JCB's Motions are highly similar. The Court has already addressed that genuine issues of material fact exist as to whether the sway cylinder is covered by the Major Component Protection Plan. Additionally, the Court concluded that the circumstances of how Mr. Emmons became separated from the LoadAll are disputed such that the issue of comparative negligence is one best left for the jury. The Court also held that genuine issues of material fact existed as to

¹⁹ *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990).

²⁰ *Taylor v. Jones*, 1498-K, 2006 WL 1510437 (Del. Ch. May 25, 2006).

²¹ *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000).

“whether the sway cylinder valve caused the accident and whether the part was defective when it left the manufacturer.”

The Court finds no basis to revisit the October 25, 2012 Decision as to the issues addressed in that decision. The facts and circumstances of this case have not changed. The October 25, 2012 Decision cites most of the facts the parties present in their papers for the current Motion. Additionally, Defendants have not presented any basis why the Court’s prior decisions are clearly wrong or produce any injustice. For these reasons, the law of the case doctrine prevents the Court from addressing issues relating to the Major Component Protection Plan, comparative negligence, and whether the LoadAll was defective at the time it left JCB.

B. Defendants’ Motions for Summary Judgment are granted as to implied warranties of fitness and merchantability as to Tri Supply and the existence of an express warranty pursuant to the JCB Certificate of Warranty.

In the October 25, 2012 Decision, the Court considered the issue of implied warranties of fitness and merchantability. The Court determined that genuine material issues of fact existed such that the claims could be presented to a jury. However, the Court’s consideration of the existence of implied warranties appears limited to evidence that (i) Fortress Steel sought a machine in “top running condition” that was “safe for use,” and (ii) Fortress Steel possibly informed Tri Supply of its intended use for the LoadAll prior to purchasing it. The Court did not consider evidence that Tri Supply disclaimed any implied warranties. Additionally, the Court did not consider whether the LoadAll was subject to an express warranty pursuant to a JCB Certificate of Warranty. Therefore, the Court does not believe that the law of the case doctrine applies here to prevent the Court from considering these issues.

In Delaware, strict products liability is preempted by the Uniform Commercial Code's remedies for breach of warranty.²² Title 6 of the Delaware Code governs the existence of express warranties,²³ the implied warranties of merchantability²⁴ and fitness for a particular purpose,²⁵ and exclusion of warranties.²⁶ A plaintiff claiming breach of express warranties or of the warranties of merchantability and fitness based on defectiveness of a product must demonstrate that the product is defective.²⁷

An express warranty is an "affirmation of fact or promise" made by a seller that becomes the basis of the bargain, a description of the goods that becomes the basis of the bargain, or sample or model that becomes the basis of the bargain.²⁸ An express warranty creates the promise that goods sold will conform to the affirmation of fact or promise, description, or model creating the warranty.²⁹

"To be merchantable, a good must be "fit for the ordinary purpose for which such goods are used," among other criteria, unless such warranty is excluded or modified.³⁰ "[T]o be successful on a breach of warranty of merchantability claim, a plaintiff must prove: '(1) that a merchant sold the goods; (2) which were defective at the time of sale; (3) causing injury to the ultimate consumer; (4) the proximate cause of which was the defective nature of the goods; and (5) that the seller received notice of the injury.'"³¹ A plaintiff must demonstrate that a

²² *Cline v. Prowler Indus. of Maryland, Inc.*, 418 A.2d 968, 976 (Del. 1980).

²³ 6 Del. C. § 2-313.

²⁴ *Id.* § 2-314.

²⁵ *Id.* § 2-315.

²⁶ *Id.* § 2-316.

²⁷ See *Joseph v. Jamesway Corp.*, 93C-12-182, 1997 LEXIS 264, at *22 (Del. Super. July 9, 1997).

²⁸ 6 Del. C. § 2-313(1) (West 2012).

²⁹ *Id.* "[A]n affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." *Id.* § 2-313. A seller's promise that a product is safe for its intended use creates an express warranty.²⁹ See *White v. APP Pharmaceuticals, LLC*, N10C-04-061, 2011 WL 2176151, at *6 (Del. Super. Apr. 7, 2011).

³⁰ 6 Del. C. § 2-314.

³¹ *Reybold Grp., Inc. v. Chemprobe Technologies, Inc.*, 721 A.2d 1267, 1269 (Del. 1998).

manufacturing defect existed at the time a particular, individual product was delivered from a manufacturer to a distributor.³²

An implied warranty of fitness for a particular purpose warrants that goods are suitable for a buyer's required particular purpose, "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods"³³ To prevail on a claim for breach of the implied warranty of fitness for a particular purpose, a plaintiff must demonstrate: (1) he had a special purpose for the goods; (2) the seller knew or had reason to know of that purpose; (3) the seller knew or had reason to know the buyer was relying upon the seller's superior skill to select goods that fulfilled that purpose; and (4) the buyer in fact relied upon the seller's skill.³⁴ The commentary to § 2-315 provides: "Whether or not this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting."³⁵

The Uniform Commercial Code, as it is codified in Delaware in Title 6 of the Delaware Code, permits disclaimer of implied warranties. Section 2-316(2) states that disclaimers of implied warranties of merchantability or fitness for a particular purpose must be made through a "conspicuous writing."³⁶ The provision provides an example: "There are no warranties which extend beyond the description on the face hereof."³⁷ Section 2-316(3) provides a seller may exclude all implied warranties by using expressions such as "as is" and "with all faults."³⁸ "A

³² See *Joseph v. Jamesway Corp.*, 93C-12-182, 1997 LEXIS 264, at *11-12 (Del. Super. July 9, 1997). A design defect implicates "a product line flaw." *Id.* at *17.

³³ *Id.* § 2-315.

³⁴ *Atamian v. Ryan*, 03C-12-038, 2006 WL 1816936, at *4 (Del. Super. June 9, 2006) *aff'd*, 957 A.2d 1 (Del. 2008). "No recovery is available, however, where a product is used for its ordinary purpose." *Id.*

³⁵ 6 Del. C. § 2-315 cmt. 1.

³⁶ *Id.* § 2-316(2).

³⁷ *Id.*

³⁸ *Id.* § 2-316(3).

second purchaser who claims the protection of a warranty is subject to the same disclaimers, modifications or remedy limitations clauses that were the basis of the underlying sales agreement between the original purchaser and seller.”³⁹

³⁹ *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 166 (Del. Super. 1986).

1. The JCB Certificate of Warranty was expired by the time Fortress Steel acquired the LoadAll, and therefore it is inapplicable.

The JCB Certificate of Warranty reads clearly that the warranty period for the LoadAll was one year. The warranty period started on the date of delivery of the machine to the first buyer or when a dealer first leased or rented the machine. A representative from JCB testified at his deposition that the warranty began on March 31, 2006.⁴⁰ If that is the case, the warranty would have ended on March 31, 2007. The JCB invoice for sale of the LoadAll to Tri Supply bears a date of January 25, 2005.⁴¹ Under the circumstances, the warranty expired by the time Tri Supply sold and delivered the LoadAll to Fortress Steel on February 12 and 13, 2008, as well as by October 6, 2008. Therefore, even though the warranty covered any defects, the warranty is inapplicable as having expired prior to Mr. Emmons' use of the LoadAll on October 8, 2008. Consequently, Mr. Emmons cannot claim the benefit of express warranties arising from the Certificate of Warranty.

Mr. Emmons cites a JCB warranty guide to support that JCB acknowledges that a warranty is intended to protect users against defects in materials and workmanship.⁴² That guide was published in 2011 and includes a stated intent to supersede previously published warranty guides, but not previously published warranties.⁴³ The same document states warranties should be applied in a timely manner.⁴⁴ Considering the date of its publication, the warranty guide is irrelevant and otherwise has no bearing on the fact that the JCB warranty was expired at the time of the cause of action.

⁴⁰ JCB's Mot. Ex. 4.

⁴¹ JCB's Mot. Ex. 5.

⁴² See Pl.'s Resp. Ex. R.

⁴³ *Id.* at 2.

⁴⁴ *Id.*

2. Tri Supply properly disclaimed any implied warranties in the Sales Invoice.

As evidence that the LoadAll was covered by implied warranties, Mr. Emmons relies upon the deposition testimony of Fortress Steel's James Edwards. Specifically, Mr. Edwards testified that he specified the need for a safe LoadAll, in "top running condition," that could lift around 8,000 pounds, for use to "reposition rebar."⁴⁵ This is the type of evidence the Court could consider in an analysis of whether Tri Supply extended express or implied warranties to Fortress Steel. However, the Court holds that, despite this evidence, Tri Supply properly disclaimed any implied warranties in the invoice of sale for the LoadAll.⁴⁶

The invoice for the sale of the LoadAll to Fortress Steel expressly provides that no implied warranties of merchantability or fitness for a particular purpose existed unless they were provided by the dealer in writing, and the writing was signed by an authorized representative of the dealer.⁴⁷ The invoice's disclaiming language echoes the example cited in Section 2-316(2). Furthermore, the invoice contains a provision for the buyer to acknowledge purchase of goods on an "as is" and "with all faults" basis, which excludes all implied warranties, as per Section 2-316(3). Because these disclaimers are conspicuous and in writing, Tri Supply properly disclaimed all any implied warranties in the sales invoice.

⁴⁵ Pl.'s Ex. P at 22 -23; *see also* JCB's Mot. Ex. 15 at 16 (testifying Fortress Steel did not purchase any type of maintenance contract from Tri Supply).

⁴⁶ *See* Def.'s Ex. 9.

⁴⁷ *Id.*

CONCLUSION

For the reasons stated above, summary judgment is **GRANTED** in part and **DENIED** in part. As such, Count III for Breach of Warranties as to Tri Supply and any breach of warranty claim arising out of the JCB Certificate of Warranty are **DISMISSED**.

Dated: July 29, 2013
Wilmington, Delaware

Eric M. Davis
Judge