

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

HUGH MICHAEL MCLAREN	)	
and VIVIENNE M. DIXON-MCLAREN,	)	
Plaintiffs,	)	
v.	)	C.A. No. 04C-04-019-PLA
	)	
MERCEDES BENZ USA, LLC,	)	
Defendants.	)	

Submitted: February 21, 2006

Decided: March 16, 2006

UPON DEFENANT’S MOTION FOR  
SUMMARY JUDGMENT. **GRANTED.**

Harshal Purohit, Esquire, Wilmington, Delaware, Attorney for Plaintiffs.

Somers S. Price, Jr., Esquire, Wilmington, Delaware, Attorney for  
Defendants.

ABLEMAN, JUDGE

Before the Court is a Motion for Summary Judgment filed by Defendant Mercedes Benz, USA, LLC (“Mercedes Benz”) in this lemon law action filed by Plaintiffs Hugh and Vivienne McLaren (“McLarens”). Plaintiffs allege violations of the Delaware Automobile Warranty Act, the Magnuson-Moss Warranty Improvement Act, the Delaware Consumer Fraud Act, and the Delaware Deceptive Trade Practices Act due to a “vibration condition” they claim renders their vehicle undriveable. Plaintiffs maintain that despite repeated attempts Mercedes Benz has been unable to repair the condition, which substantially impairs the use, value and safety of the vehicle.

Having considered the arguments carefully, the Court finds that the testimony offered by the McLarens’ expert must be excluded because it is not the product of any scientific method. Rather, the opinions are the subjective feelings the expert experienced when test-driving the vehicle in question. The Court further finds that without any expert testimony, Mercedes Benz is entitled to summary judgment because the McLarens cannot prove that Mercedes Benz failed to remedy a defect in the warranted vehicle, or even that a defect exists. The Motion for Summary Judgment is therefore **GRANTED**.

## **I. Statement of Facts**

The McLarens purchased a Mercedes Benz S430 sport utility vehicle on August 11, 2003. The vehicle experienced a number of problems during its first 12,000 miles, including moisture condensation inside the side mirrors, a loose trunk liner, a leaking transmission conductor plate, and a cracked center console. All of these problems were apparently promptly fixed by Mercedes Benz when the McLarens brought the vehicle in for warranty servicing.

The McLarens also made a number of complaints about aspects of the vehicle that were operating as designed. For example, the McLarens complained that the interior lamp would not always turn on when unlocking the door, but were informed by the Mercedes Benz technician that the lamp had a light sensor and would not turn on unless it was dark. The McLarens also complained that the steering wheel made strange noises when moving up and down, and that the seat would not hold the memory settings. They were informed that the noise from the steering wheel was normal motor noise, and that both times the technician checked the seat the memory settings were functioning properly.

During these repeated visits for warranty repair the McLarens also complained a number of times that they felt the vehicle vibrated excessively

at highway speeds. Mercedes Benz responded to the complaints by re-balancing the wheels, re-aligning the propeller shaft and replacing the tires. The McLarens claim that these repair attempts were futile and that continued vibrations render the vehicle unusable.

The McLarens filed this action on April 2, 2004, alleging the vehicle is a “lemon,” or a vehicle requiring excessive repeated repairs, due to this “vibration condition.” In support of their claim they offer the testimony of Scot Turner, a mechanic permanently employed full-time as an expert witness for lemon law litigation by Kimmel & Silverman, P.C., the law firm representing the McLarens. The McLarens wish to have Mr. Turner testify as an expert that the vehicle exhibits abnormal shaking at highway speeds and is “substantially impaired” as a result. During deposition, Mr. Turner testified that he did not use any instrumentation or methodology in diagnosing the “vibration condition.” Rather, Mr. Turner testified that “if you drive the car, if you feel it vibrating, you can pretty much determine whether it is some kind of a normal thing or not.” Mr. Turner agreed that the road where he test-drove the McLarens’ vehicle was under construction and “not the smoothest road.” Mr. Turner maintained, however, that the vibration was not due to the road conditions, that he “felt the vibration and it was not a normal vibration.”

## II. Parties' Contentions

Mercedes Benz objects to the admission of Mr. Turner's testimony as not sufficiently objective nor reliable under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*<sup>1</sup> Mercedes Benz notes that it is impossible for Mr. Turner's opinions to be subjected to peer review because they are based on Mr. Turner's subjective "feeling" of the vibrations in question. Although Mr. Turner acknowledged that electronic vibration analyzers are available to record vibration levels, Mr. Turner did not use one, nor has he ever used one. Additionally, Mercedes Benz challenges Mr. Turner's "expert" status, noting that while Mr. Turner is apparently a mechanic with many years of experience, he is unfamiliar with the Mercedes Benz S430. He has never worked on or driven the vehicle in question, nor has he been involved in buying or selling such a vehicle, or a similar vehicle.

Mercedes Benz thus contends that, without Mr. Turner's expert testimony, the McLarens cannot prove an element of their case: that of substantial impairment of the use, value or safety of their vehicle. It submits that summary judgment is therefore appropriate.

The McLarens argue in response that the service record, as well as their subjective testimony regarding the impairment to their vehicle, are

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<sup>1</sup> 509 U.S. 579 (1993).

sufficient to prove a *prima facie* claim under the Delaware Automobile Warranty Law.<sup>2</sup> The McLarens cite *Fatovic v. Chrysler Corp.*<sup>3</sup> for the proposition that the existence of a nonconformity in a vehicle may be inferred from lay testimony if the matter is within a layperson's common knowledge. Consequently, the McLarens argue, their claim must survive summary judgment even without the testimony of Mr. Turner.

### III. Standard of Review

A motion for summary judgment is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>4</sup> After the moving party makes this initial showing, the burden then shifts to the non-moving party to demonstrate that issues of material fact do exist.<sup>5</sup> The Court must view the facts in a light most favorable to the non-moving party and will accept as established all undisputed factual assertions.<sup>6</sup> The Court will then draw all rational inferences that favor the non-moving party.<sup>7</sup> Summary judgment will not be granted where there is a reasonable indication that a material fact is in

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<sup>2</sup> 6 *Del. C.* §§ 5001-09.

<sup>3</sup> 2003 WL 21481012 (Del. Super.).

<sup>4</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>5</sup> Super. Ct. Civ. R. 56(e); *Lum v. Anderson*, 2004 WL 772074 (Del. Super.) (citing *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979)).

<sup>6</sup> *Merrill v. Crothall-American, Inc.*, 606 A.2d 96 (Del. 1992).

<sup>7</sup> *Id.*

dispute, or where a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances.<sup>8</sup>

#### **IV. Analysis**

##### **A. The Admissibility of Plaintiff's Expert Testimony**

The proper standard for the admissibility of scientific, technical or other specialized knowledge is set forth in Delaware Rule of Evidence 702. This rule provides that if scientific, technical or other specialized knowledge will assist the trier of fact, a witness may testify in the form of an opinion if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts. In *Daubert v. Merrill Dow*<sup>9</sup> the Supreme Court of the United States held that when applying Rule 702<sup>10</sup> courts must use a two-fold test: (1) whether the testimony will assist the trier of fact, and (2) whether the testimony amounts to scientific knowledge. 'Scientific knowledge' consists of facts, or ideas inferred from facts, that are accepted as true on reliable grounds and are grounded in science's methods and procedures.<sup>11</sup> The issue of whether testimony amounts to scientific

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<sup>8</sup> *Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962).

<sup>9</sup> 509 U.S. 579.

<sup>10</sup> The Delaware Supreme Court has previously held that DRE 702 is identical to its federal counterpart, and adopted the U.S. Supreme Court's holding in *Daubert* as the correct interpretation of DRE 702. *Nelson v. State*, 628 A.2d 69, 75 (Del. 1993).

<sup>11</sup> *Daubert*, 509 U.S. at 589.

knowledge requires that an expert's testimony rest on both a reliable and a relevant basis.<sup>12</sup>

Therefore, a judge must make a preliminary assessment of whether the testimony at issue is scientifically valid and can properly be applied to the facts at issue. This assessment is based on several factors including: (a) whether the theory in question can be, and has been, tested; (b) whether the theory has been subjected to peer review and publication; (c) the theory's known or potential error rate, and the existence of standards controlling its operation; and (d) whether the theory has widespread acceptance within a relevant scientific community.<sup>13</sup>

Plaintiffs have failed to demonstrate how Mr. Turner's opinions are the product of any scientific method. Mr. Turner's opinions regarding the vibration condition are apparently based solely on the feelings he felt while test-driving the car, rather than reliable data that may be subjected to peer review. Although instrumentation is available to measure vibrations, Mr. Turner declined to make use of it. It would be impossible for Mercedes Benz to refute Mr. Turner's subjective testimony that he "felt" the vibration condition. It is unclear to this Court that Mr. Turner's expertise permits him to feel vibrations in a better or different manner than any layperson. Mr.

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<sup>12</sup> *Id.* at 589-90.

<sup>13</sup> *Id.* at 593-94.



Turner's vibratory impressions are therefore nothing more than subjective opinions and cannot be accepted as expert testimony. Accordingly, because Mr. Turner's opinion is not based on sufficient facts or data and is not the product of reliable methods, it fails to meet the *Daubert* standard and is inadmissible.

B. The Resulting Legal Sufficiency of Plaintiff's Claim

Having decided that Mr. Turner's testimony must be excluded under *Daubert*, the Court must now decide whether any issues of genuine fact remain. The McLarens argue that the fact that they cannot present expert testimony does not bar their claims. Mercedes Benz contends that without expert testimony the McLarens are unable to prove that their vehicle is defective, or that any defects the vehicle may have substantially impair its use, value or safety. Plaintiffs have petitioned for damages under the Delaware Automobile Warranty Act,<sup>14</sup> the Magnuson Moss Warranty Act,<sup>15</sup> the Delaware Consumer Fraud Act,<sup>16</sup> and the Delaware Deceptive Trade Practices Act.<sup>17</sup> The Court will address each of these claims in turn.

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<sup>14</sup> 6 *Del. C.* §§ 5001-09.

<sup>15</sup> 15 U.S.C. §§ 2301-11.

<sup>16</sup> 6 *Del. C.* §§ 2511-27.

<sup>17</sup> *Id.* §§ 2531-36.

## 1. Delaware Automobile Warrant Act

The Delaware Automobile Warranty Act, or Delaware's Lemon Law, requires a manufacturer or its authorized dealer to repair and correct any nonconformity in the vehicle during the term of warranty.<sup>18</sup> The Act additionally provides that it is an affirmative defense to a claim under the Act that the nonconformity does not substantially impair the use, value or safety of the vehicle,<sup>19</sup> which defense Mercedes Benz has claimed. This Court has previously held that the question of whether a nonconformity substantially impairs value is an objective question that calls for something more than a plaintiff's assertion that the nonconformity impaired the value to him.<sup>20</sup> Additionally, the Lemon Law requires that a plaintiff provide the dealer with at least four opportunities to correct the alleged defect before a claim may be brought.<sup>21</sup>

In the instant case, the McLarens can offer nothing more than their own subjective testimony that the vibrations they feel when driving the vehicle substantially impair the value of the vehicle. Such testimony is insufficient to maintain a claim under Delaware's Lemon Law. Moreover, the "vibration condition" is the only alleged defect the McLarens have

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<sup>18</sup> 6 Del.C. §§ 5002-03.

<sup>19</sup> *Id.* § 5006.

<sup>20</sup> *Freedman v. Chrysler Corp.*, 564 A.2d 691, 699 (Del. Super. Ct. 1989).

<sup>21</sup> *Fatovic v. Chrysler Corp.*, 2003 WL 21481012 at \*4 (Del. Super.)

brought to the attention of Mercedes Benz at least four times. Because the McLarens cannot provide objective testimony that a vibration condition does, in fact, impair the value and use of their vehicle, and because this is the only alleged defect that has been brought to Mercedes Benz's attention at least four times, this count of the action must be dismissed.

## 2. Magnuson Moss Warranty Act

The Magnuson Moss Warranty Act<sup>22</sup> was enacted by Congress in response to the widespread misuse of merchants of express warranties and disclaimers. Congress therefore sought to provide guidelines in connection with written warranties, and to prevent attempts to disclaim implied warranties where a written warranty was provided.<sup>23</sup> Consumers who are damaged by the failure of a warrantor to comply with written or implied warranties may sue under the Act for damages and attorneys fees.<sup>24</sup> The question of what constitutes damages under the Act requires reference to state warranty law.<sup>25</sup>

In order for damages to exist under the Act, the vehicle must have a defect that is not repaired by the warrantor within a reasonable time.<sup>26</sup> While a manufacturing defect may sometimes be proven by circumstantial

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<sup>22</sup>15 U.S.C. §§2301-11.

<sup>23</sup>*Dalton v. Ford Motor Co.*, 2002 WL 338081 (Del. Super.); 59 A.L.R. Fed. 461 § 2(a).

<sup>24</sup> 15 U.S.C. § 2310(d).

<sup>25</sup> *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1012 (D.C. Cir. 1986).

<sup>26</sup> 15 U.S.C. §§ 2304(1), 2310(d)(1).

evidence alone, this Court has held that is only the case where the manufacturer's fault is the only reasonable inference to be drawn from the evidence.<sup>27</sup> Where the circumstantial evidence is insufficient to prove a manufacturing defect, testimony is then required. The Delaware Supreme Court has held that if a matter is within the common knowledge of laymen, expert testimony is not required,<sup>28</sup> as the McLarens have argued. However, the Supreme Court also held in that same case that to substantiate a *prima facie* claim for breach of warranty, a plaintiff must present either expert testimony that the product was defective, or such circumstantial evidence as indicates a manufacturing defect is the only reasonable cause of the defect.<sup>29</sup>

The McLarens are unable, with their testimony alone, to prove by circumstantial evidence that the only reasonable cause for the vibrations is a manufacturing defect. The McLarens, by their testimony, cannot rule out poor road conditions, vibrations due to knobby tires, or other conditions that could cause a vehicle to vibrate at high speed. Indeed, the McLarens cannot even prove that the engine vibrations of which they complain are anything other than normal engine vibrations. The question of how the S430 properly drives at high speed as compared to other vehicles is not a matter within the common knowledge of laymen, and therefore cannot be proven by

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<sup>27</sup> *Fatovic*, 2003 WL 21481012 at \*2-3.

<sup>28</sup> *Reybold Group, Inc. v. Chemprobe Tech., Inc.*, 721 A.2d 1267, 1270 (Del. 1998).

<sup>29</sup> *Id.*

circumstantial evidence or without expert testimony. Because the McLarens have no expert testimony to prove that their vehicle suffers a defect that has not been remedied by Mercedes Benz under the vehicle's warranty, the McLarens' Magnuson Moss claim must fail.

### 3. Delaware Consumer Fraud Act

The McLarens, by reference to Section 5009 of Title Six of the Delaware Code, have claimed a violation of the Consumer Fraud Act. Section 5009 provides that any violation of the Delaware Automobile Warranty Act is also a violation of Section 2513 of Title Six, the Consumer Fraud Act. Because the McLarens have failed to adduce any evidence by which a fact finder could reasonably find a violation of the Lemon Law, and because they have proffered no evidence that could possibly establish the use by Mercedes Benz of fraud, false pretenses, false promises, misrepresentations, or concealment, suppression or omission of material facts, the McLarens' Consumer Fraud Act claim must be dismissed.

### 4. Delaware Deceptive Trade Practices Act

The McLarens have pled that Mercedes Benz's representation that repairs would be made pursuant to the warranties given falls within deceptive trade practices. The McLarens' claim must fail because the McLarens have failed to prove that Mercedes Benz did not make all

necessary repairs to their vehicle as required by their warranty. Accordingly, their Deceptive Trade Practices claim must be dismissed.

### **V. Conclusion**

Mercedes Benz's Motion for Summary Judgment must be **GRANTED**. Mr. Turner's opinions are not the product of any scientific method, but instead constitute subjective feelings about the existence of a defect in the McLarens' vehicle. Therefore, they cannot meet the *Daubert* standard of admissibility and must be excluded.

Without expert testimony the McLarens are unable to prove that their vehicle suffers a manufacturing defect that Mercedes Benz has failed to remedy, or that any condition exists for which Mercedes Benz has fraudulently failed to provide warranty repairs.

For all of the foregoing reasons, the Defendant, Mercedes Benz, USA, LLC Motion for Summary Judgment is hereby granted.

**IT IS SO ORDERED.**

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**PEGGY L. ABLEMAN, JUDGE**

Original to Prothonotary  
cc: Harshal Purohit, Esquire  
Somers S. Price, Jr., Esquire