THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

SHIRLEY ZWIERCAN, et al.,	:	June Term, 1999
Plaintiffs	:	
	:	No. 3235
v.	:	
	:	Commerce Case Program
GENERAL MOTORS CORP., et al.,	:	
Defendants	:	Control No. 021062

OPINION

Defendant General Motors Corporation ("GM") has filed a motion for summary judgment ("Motion") as to Plaintiff Shirley Zwiercan's claims for breach of implied warranty and violations of Pennsylvania's consumer protection law. For the reasons set forth in this Opinion, the Motion is granted in part and denied in part.

BACKGROUND

This action centers on vehicles manufactured by the GM between 1990 and 1999 ("Vehicles").[1] According to the Plaintiff, the Vehicles' front seats are designed in such a way that they fail to adequately protect front seat passengers from the impact of rear-end collisions. Although the Plaintiff has not suffered a rear-collision and accompanying harm, she has brought claims on behalf of herself and a class of similarly situated individuals for violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL")[2] and breach of implied warranty of

[1] The Buick Park Avenue automobiles manufactured from 1996 on are exceptions to this classification.

[2] 73 Pa. C.S. §§ 201-1 to 201-9.3.

merchantability.[3] GM has filed the Motion, which seeks summary judgment on the Plaintiff's two remaining claims due to the fact that the Plaintiff has not suffered a manifestation of the defect in her Vehicle.

DISCUSSION

This case bears remarkable similarity to Grant v. Bridgestone Firestone Inc., Nos. 01081054 and 01081047, 2002 WL 372941 (Pa. Com. Pl. Jan. 10, 2002), in which this Court considered preliminary objections to a complaint alleging UTPCPL and breach of implied warranty claims. Both Parties cite to Grant and several other decisions issued by this Court extensively. For reasons similar to those in Grant, the Motion is granted as to the Plaintiff's breach of implied warranty claim and is denied as to the Plaintiff's UTPCPL claim.

I. The Motion Is Not Precluded by the Law of the Case Doctrine

As an initial matter, the Plaintiff asserts that Judge Stephen Levin ruled on the arguments presented in the Motion when he overruled the sundry preliminary objections to the Plaintiff's numerous complaints. This, the Plaintiff contends, prevents the Court from considering these arguments again in the context of the Motion. The Plaintiff cites no case law other than that presented in the Motion to support her assertion in this regard.

The Superior Court recently reviewed a situation similar to the one at hand in D'Errico v. Defazio, 763 A.2d 424 (Pa. Super. Ct. 2000). In D'Errico, the trial court had granted a motion for

[3] Two additional claims originally asserted by the Plaintiff have since been dismissed.

summary judgment on grounds similar to those presented in preliminary objections that another judge had overruled. The Superior Court affirmed the trial court's action:

> Here, preliminary objections were . . . denied without an opinion. While we recognize that that fact, standing alone, does not entitle a second judge hearing the same matter to overrule the first judge, we note that the record before the second court in this case included evidence in the form of deposition testimony not available to the first court. The summary judgment court therefore had a more complete record upon which to conclude that appellants were unable to state a claim on which relief could be granted. Furthermore, allowing the parties to proceed to trial would have been a waste of judicial resources as well as a time-consuming and expensive burden to the parties.

763 A.2d 424, 435-36 (citations omitted). Similar wisdom was expounded in Rosenfield v. Pennsylvania Automobile Insurance Plan, 431 Pa. Super. 383, 636 A.2d 1138 (1994):

> Ordinarily, a trial judge should not place himself or herself in a position to overrule a decision by another judge of the same court in the same case. However, this rule is not intended to preclude granting summary judgment following the denial of preliminary objections. This is especially true if the preliminary objections were denied without an opinion. When reviewing preliminary objections the trial court looks to the pleadings, but, in considering a motion for summary judgment the trial court weighs the pleadings, depositions, answers to interrogatories, admissions and affidavits. There is no reason to fail to grant a motion for summary judgment if the record warrants such action.

431 Pa. Super. at 390, 636 A.2d at 1142 (citing Solcar Equip. v. Pa. Manufacturers' Ass'n, 414 Pa. Super. 110, 606 A.2d 522 (1992), and Salerno v. Philadelphia Newspapers, 377 Pa. Super. 83, 546 A.2d 1168 (1988)).

Here, Judge Levin did not issue an opinion in support of his order to overrule GM's preliminary objections to the claims under consideration. Moreover, it is uncontested that the Parties have engaged in extensive discovery that sets the Complaint's allegations in a different context from the preliminary

objections stage of this matter. Accordingly, the Court is not precluded from reviewing the arguments raised in the Motion.

II. The Plaintiff Has Sustained Her UTPCPL Claim

The first substantive battle presented by the Parties is over whether the damages incurred by the Plaintiff are sufficient to sustain a UTPCPL claim against GM. The crux of this dispute is over the term "ascertainable loss," as it is used in the UTPCPL. The Court accepts the Plaintiff's interpretation of this term, and finds the Plaintiff's claim sustainable.

In Grant, the lead plaintiffs asserted that they had suffered ascertainable losses compensable under the UTPCPL because they had received defective tires on their vehicles and had incurred out-of-pocket costs in replacing them. The Court concluded that these damages fell within the scope of the UTPCPL:

> Section 9.3 of the UTPCPL, which allows a private action, . . . requires that the Plaintiff have suffered an "ascertainable loss." 73 Pa. C.S. § 201-9.2. The UTPCPL "is to be construed liberally to effect its object of preventing unfair or deceptive practices." Commonwealth by Creamer v. Monumental Props., Inc., 459 Pa. 450, 460, 329 A.2d 812, 817 (1974) (citations omitted). See also Brunwasser v. Trans World Airlines, Inc., 541 F. Supp. 1338, 1346-47 (W.D. Pa. 1982) (holding that the term "ascertainable loss" must be liberally construed and that "the ascertainable loss requirement of this act is designed merely to insure that individuals bringing suit have in fact been damaged by a deceptive trade practice"). Even where damages are not easily quantified or where a claim has failed to quantify the damages suffered, a UTPCPL claim does not fail as a matter of law. In re Milbourne, 108 B.R. 522, 544 (Bankr. E.D. Pa. 1989); In re Chapman, 77 B.R. 1, 6 (Bankr. E.D. Pa.1987); In re Jungkurth, 74 B.R. 323, 335-36 (Bankr. E.D. Pa. 1987). Given these broad guidelines, the Court believes that Pennsylvania law is in accord with the conclusions of Judge Barker and that the Plaintiffs have alleged an "ascertainable loss" as required by the UTPCPL.

> The Pennsylvania cases cited by the Defendants are not to the contrary.[4] While each of these cases holds that a plaintiff may not bring a cause of action based on speculative damages, such is not the case here: the Complaint alleges that the Plaintiffs incurred real out-of-pocket costs in replacing their Tires. Complaint ¶¶ 41-45, 81. This allegation of specific losses also defeats the Defendants' legitimate arguments as to the policy considerations against allowing "no injury" claims. Moreover, the Defendants' assertion that a full refund is available to the Plaintiffs is not included in the Complaint and thus cannot be considered when evaluating the Objections. Eckell v. Wilson, 409 Pa. Super. 132, 136 n.1, 597 A.2d 696, 698 n.1 (1991) (noting that "a demurrer cannot be a 'speaking demurrer' and cannot be used to supply a fact missing in the complaint"). See also Caskie v. Philadelphia Rapid Transit Co., 321 Pa. 157, 160, 184 A. 17, 19 (1936) ("A speaking demurrer is bad."). For these reasons, the Court holds that the Plaintiffs' allegations of damages are sufficient to sustain their UTPCPL claim.

2002 WL 372941, at *4 (footnotes omitted).

GM attempts to distinguish Grant on the grounds that the Plaintiff in the instant case has not suffered any out-of-pocket expenses as the Grant plaintiffs allegedly did. This distinction is meaningless. In Solarz v. DaimlerChrysler Corp., No. 2033, 2002 WL 452218 (Pa. Com. Pl. Mar. 13, 2002), cited by the Plaintiff, this Court found that the plaintiffs' failure to allege actual loss or out-of-pocket costs was not fatal to their UTPCPL claim. 2002 WL 452218, at *6-*7. Similarly, the fact that the Plaintiff has not specified the amount necessary for repairs is not significant, as "a UTPCPL claim does not fail as a matter of law even where damages are not easily quantified or where a claim has failed to quantify the damages suffered." Id., 2002 WL 452218, at *7 (citing In re Milbourne, 108 B.R.

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[4] The Defendants cite the following cases, inter alia: Cleveland v. Johns-Mansville Corp., 547 Pa. 402, 690 A.2d 1146 (1997); Simmons v. Pacor, Inc., 543 Pa. 664, 674 A.2d 232 (1996); Sixsmith v. Martsolf, 413 Pa. 150, 196 A.2d 662 (1964); Angus v. Shiley, Inc., 989 F.2d 142 (3d Cir. 1993).

522, 544 (Bankr. E.D. Pa.1989), In re Chapman, 77 B.R. 1, 6 (Bankr. E.D. Pa.1987), and In re Jungkurth, 74 B.R. 323, 335-36 (Bankr. E.D. Pa. 1987)). Accordingly, the Plaintiff's assertion that she must incur costs in remedying the defective seats in her Vehicle is sufficient, and the fact that she has not suffered a manifestation of the defect in her Vehicle is of no import.

III. GM Is Entitled to Summary Judgment on the Plaintiff's Claim for Breach of Warranty

Under Pennsylvania's Uniform Commercial Code, goods sold by a merchant are required to be "merchantable" and must be "fit for the ordinary purposes for which such goods are used." 13 Pa. C.S. § 2314 ("Section 2314"). The key to determining the viability of the Plaintiff's breach of implied warranty of merchantability claim is whether a manifestation of the breaching defect is required for a claim to accrue. This Court has held before, and holds today, that it is.

This Court considered the degree of injury required for an implied warranty claim in Grant. There, the Court reviewed a Southern District of Indiana opinion addressing claims similar to those presented in Grant. While the federal court found that manifestation of a defect was not required for an implied warranty claim under Michigan or Tennessee law, the Court found that Pennsylvania law differed:

> Pennsylvania law is at odds with the line of cases that Judge Barker considered persuasive. Unlike the case law of states that require only that a breach occurs, a breach of implied warranty of merchantability theory in Pennsylvania states that a merchant is "only liable for harm caused by a defect in their product." Thomas v. Carter-Wallace Inc., 27 Pa. D. & C.4th 146, 149 (C.P. Monroe 1994) (citing Dambacher by Dambacher v. Mallis, 336 Pa. Super. 23, 485 A.2d 408 (1984)), aff'd, 449 Pa. Super. 711, 673 A.2d 412 (1995). See also Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1105 (3d Cir. 1992) (An implied warranty of merchantability plaintiff must establish, inter alia, "that the product malfunctioned"). Even Judge

> Barker noted that imposing a requirement that the defect manifest itself is not uncommon. 155 F. Supp. 2d at 1099-1100 (citations and footnote omitted). Indeed, other courts have stated that the manifestation requirement is the majority position in the United States. Based on the foregoing, the Plaintiffs have not presented a claim for breach of implied warranty pursuant to Section 2314, and Count II must be dismissed.

2002 WL 372941, at *5 (footnote removed).

The Plaintiffs rely on Foultz v. Erie Ins. Exchange, No. 3053, 2002 WL 452115 (Pa. Com. Pl. Mar. 13, 2002), which briefly compared a portion of the Uniform Commercial Code addressing damages in breach of warranty actions[5] with damages for breach of contract. However, Foultz is distinguishable from the instant action, in that it did not involve a breach of warranty claim. In the same vein, the Plaintiff's reliance on two opinions issued in Crawley v. Daimler Chrysler Corp., July Term, 1990, No. 4900 (Bernstein, J.) that addressed motions for decertification, is misplaced. See slip op. (Pa. Com. Pl. Mar. 5, 2000) (Bernstein, J.) (unpublished opinion); slip op. (Pa. Com. Pl. Apr. 29, 1998) (Levin, J.) (unpublished opinion). In neither of the Crawley opinions did Judge Bernstein or Judge Levin consider the question of when or how damages accrued from breach of a warranty.

While the Plaintiffs remaining citations are thought provoking, they are similarly unpersuasive. At best, those citations espouse a position antithetical to that taken by Pennsylvania and do nothing more than highlight the divide among jurisdictions over this issue.[6] Moreover, Pennsylvania is hardly

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[5] As stated in 13 Pa. C.S. § 2714(b), "[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

[6] In addition, several of the citations provided are not precisely on point. A breach of warranty claim requires proof of the following: "(1) a merchant sold goods, (2) which were not 'merchantable' at

alone in requiring a manifestation of a defect before a breach of warranty claim can be permitted.[7] As such, the fact that no defect in the Plaintiff's Vehicle has manifested itself precludes the Plaintiff from proceeding on her breach of warranty claim.

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the time of sale, (3) injury and damages to the plaintiff or its property (4) which were caused proximately and in fact by the defective nature of the goods, and (5) notice to seller of injury." 1 James J. White & Robert S. Summers, Uniform Commercial Code § 9-7 (4th ed. 1995) (footnote omitted). While the Court is concerned with the injury element, a portion of the Plaintiff's citations do not address the question of when damages accrue, but instead address when there has been a breach.

[7] In Chin v. Chrysler Corp., 182 F.R.D. 448 (D.N.J. 1998), for example, the court stated that "[i]n most jurisdictions, the courts recognize that unless a product actually manifests the alleged defect, no cause of action for breach of express or implied warranty or fraud is actionable." 182 F.R.D. at 460 (collecting cases). See also, e.g., Briehl v. General Motors Corp., 172 F.3d 623, 628 (8th Cir. 1999) (dismissing plaintiff's breach of implied warranty claim where the plaintiffs suffered no injury); Jarman v. United Indus. Corp., 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (A warranty claim requires that "there is actually a failure in product performance," and "[m]ere suspicion of a lost bargain . . . will not support an award of damages."); In re Air Bag Prods. Liab. Litig., 7 F. Supp. 2d 792, 805 (E.D. La. 1998) ("[T]he absence of a manifested defect precludes a cognizable claim."); Weaver v. Chrysler Corp., 172 F.R.D. 96, 99 (S.D.N.Y. 1997) ("[P]urchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own."); Yost v. General Motors Corp., 651 F. Supp. 656 (D.N.J.1986) (holding that damage is a necessary element of breach of warranty claim); American Suzuki Motor Corp. v. Superior Ct., 44 Cal. Rptr. 2d 526, 529 (Cal. Ct. App. 1995) (holding that, "in the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation").

CONCLUSION

The fact that the Plaintiff has not suffered a manifestation of the alleged defect in her Vehicle does not preclude her UTPCPL claim, but bars her breach of warranty claim. Accordingly, the Motion is granted in part and denied in part.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: May 22, 2002

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

SHIRLEY ZWIERCAN, et al.,	:	June Term, 1999
Plaintiffs	:	
	:	No. 3235
v.	:	
	:	Commerce Case Program
GENERAL MOTORS CORP., et al.,	:	
Defendants	:	Control No. 021062

ORDER

AND NOW, this 22nd day of May, 2002, upon consideration of the Motion for Summary Judgment of Defendant General Motors Corporation, and Plaintiff Shirley Zwiercan's response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Motion is GRANTED IN PART and DENIED IN PART.

2. The Motion as it relates to Count I - Implied Warranty of Merchantability is GRANTED.

3. The Motion as it relates to Count IV - Violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law is DENIED.

BY THE COURT:

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JOHN W. HERRON, J.