IP 00-1378-C H/K Great Nrthrn Ins v Buddy Gregg [2]
Judge David F. Hamilton Signed on 4/29/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

GREAT NORTHERN INSURANCE COMPANY, A MEMBR OF THE CHUBB GROUP OF INSURANCE COMPANIES, AS SUBROGEE OF GEORGE MIKELSONS AND MURIEL MIKELSONS - PER AMENDED COMPLAINT AUTHORIZED BY ORDER OF 05/14/01,

Plaintiff,

vs.

BUDDY GREGG MOTOR HOMES, INC. - DEFT & CROSS-CLAIM DEFT (FILED 10/20/00),
MONACO, INC. - DEFT & CROSS-CLAIM DEFT (FILED 10/20/00),
PREVOST CAR, INC. - DEFT & CROSS-CLAIM PLAINTIFF (FILED 10/20/00),

Defendants.

CAUSE NO. IP00-1378-C-H/?

π Thomas J Jarzyniecki Jr
Kightlinger & Gray
660 Market Square Center
151 North Delaware Street
Indianapolis, IN 46204

Reginald B Bishop
Roberts & Bishop
The Roberts-Bishop Building
118 North Delaware Street
Indianapolis, IN 46204

Larry Evans
Hoeppner Wagner & Evans
103 E Lincolnway
P O Box 2357

Valparaiso, IN 46384-2357

John Joseph Tanner
Baker & Daniels
300 North Meridian St #2700
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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GREAT NORTHERN INSURANCE COMPANY, a member of the CHUBB GROUP OF INSURANCE COMPANIES, as Subrogee of GEORGE MIKELSONS and MURIEL MIKELSONS,	)	
Plaintiffs,	)	
v.	)	CAUSE NO. IP 00-1378-C-H/K
BUDDY GREGG MOTOR HOMES, INC., ROYALE COACH BY MONACO, INC., and PREVOST CAR, INC.,	)	
Defendants.	)	

ENTRY ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Great Northern Insurance Company, as subrogee of George and Muriel Mikelsons, brought this diversity action to recover damages caused when a luxury motor coach covered by one of its policies was damaged in a fire. The dealer who sold the motor coach, defendant Buddy Gregg Motor Homes ("Buddy Gregg"), moved for partial summary judgment on three specific issues. In a previous entry, the court granted Buddy Gregg's motion with respect to two of those issues, which plaintiff did not contest. The remaining issue is whether Great Northern can sue Buddy Gregg for negligence outside the Product Liability Act, Ind. Code § 34-20-1-1 *et seq.*, for damage to the motor coach itself.

As explained below, the court grants Buddy Gregg's motion for partial summary judgment. In a nearly identical case, the Supreme Court of Indiana held that the Product Liability Act does not authorize such claims for damage to the allegedly defective product itself. *Progressive Ins. Co. v. General Motors Corp.*, 749 N.E.2d 484 (Ind. 2001) (statute allows claims for personal injury and for damage to other property). The Product Liability Act also bars efforts like Great Northern's to bring such a claim under another legal theory. Ind. Code § 34-20-1-1 (Act governs all actions brought by user or consumer against a manufacturer or seller for physical harm caused by product, regardless of substantive legal theory). Great Northern has attempted to distinguish *Progressive* on the theory that in this case Buddy Gregg not only sold the motor coach but also made a separate sale of services that were performed negligently. That attempted distinction is not persuasive. The undisputed facts show there was one transaction in this case for the sale of a product.

Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate when there are no genuine issues of material fact, leaving the moving party entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party must show there is no genuine issue of material fact. *Celotex*

Corp. v. Catrett, 477 U.S. 317, 323 (1986). A factual issue is material only if resolving the factual issue might change the suit's outcome under the governing law. *Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). A factual issue is genuine only if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Undisputed Facts

The following facts are either undisputed or stated in the light reasonably most favorable to plaintiff Great Northern Insurance Company.

Defendant Buddy Gregg is in the business of selling motor coaches in Knoxville, Tennessee. George and Muriel Mikelsons purchased a used motor coach from Buddy Gregg. Defendant Prevost Car, Inc. manufactured and defendant Royale Coach by Monaco, Inc. customized the motor coach that the Mikelsons purchased. In February 1996, Buddy Gregg sold the motor coach "as is" to its first owner. In September 1997, Buddy Gregg sold the motor coach "as is" to two new owners. In July 1998, George and Muriel Mikelsons purchased the motor coach "as is" from Buddy Gregg for $525,000.

Plaintiff Great Northern Insurance Company issued a policy of insurance to the Mikelsons for the used motor coach. After leaving Buddy Gregg's dealership

on July 15, 1998, the Mikelsons drove the motor coach to Indianapolis, Indiana. On July 18, 1998, the Mikelsons' motor coach was destroyed by a fire. Defendant Prevost Car, Inc. retained the services of a consulting and engineering company to investigate the fire. The company's investigation indicated that the most likely source of the fire was a copper wire in the engine compartment of the motor coach that had not been installed by Prevost.

The events leading up to the fire are the basis of this lawsuit. The Mikelsons' motor coach purchase involved several steps. On July 12, 1998, the Mikelsons placed an initial deposit of $10,000 on the motor coach and executed a sales contract with Buddy Gregg. On July 15, 1998, the Mikelsons paid the remaining balance and took delivery of the motor coach. When they arrived at the Buddy Gregg dealership, the motor coach would not start. A Buddy Gregg employee recharged its battery. Buddy Gregg did not require any payment from the Mikelsons, beyond the price of the motor coach, for recharging the battery. Buddy Gregg also did not execute a retail order or "RO" to document recharging the battery. Rowe Dep. 22-23. An "RO" is a work order sheet that Buddy Gregg customarily used to document performance of its obligations under a service contract. Rowe Dep. at 79-81.[1]

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[1]George Mikelsons' affidavit stated that the engine "would not start because of dead batteries" and that he "waited for several hours while Buddy Gregg technicians addressed the problem." G. Mikelsons Aff. ¶¶ 6, 7. Buddy Gregg's employee testified that the house battery on the Mikelsons' motor coach was (continued...)

Jeff Rowe, a Buddy Gregg employee, testified that Buddy Gregg prepared every motor coach for delivery to its purchaser. This preparation included inspecting the motor coach's interior, exterior, engine compartment, and batteries for any basic problems. Rowe Dep. at 18-19, 23, 36-37. Rowe testified that it was common for a motor coach's "house" batteries to become totally discharged during the final inspection. Rowe Dep. at 19. Rowe testified that a motor coach has two sets of batteries: house batteries, which provide electricity to the coach's cabin, and engine batteries. Rowe Dep. at 20-22. Rowe also testified that most motor coach buyers stay on Buddy Gregg's premises for at least one day to learn how to operate their motor coaches and to ensure that they have been built according to their specifications. Rowe Dep. at 18-20.

During the final preparation of the motor coach before delivery to the Mikelsons, the engine compartment should be inspected by a Buddy Gregg employee. Rowe Dep. at 36-37. For purposes of Buddy Gregg's motion for summary judgment, the court assumes that a reasonable jury could find that Buddy Gregg's failure to detect the extra wire in the engine compartment was negligent and that the negligence was a proximate cause of the fire.

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[1](...continued)
recharged. Rowe Dep. at 18-19. The difference is not material because the evidence indicates, at a minimum, that a Buddy Gregg employee should have at least checked the engine batteries during the final inspection of the motor coach.

The fire caused extensive damage to the motor coach itself and to another vehicle and some other personal property. Pursuant to the insurance policy for the motor coach, Great Northern paid the Mikelsons $456,533.55 to cover their damages. As the Mikelsons' subrogee, Great Northern then brought this action against the defendants to recover for the damages caused by the fire. Additional facts are noted below, keeping in mind that the court must construe the record in the light reasonably most favorable to Great Northern.

Discussion

Great Northern asserts claims for negligence, for breach of warranty, and for placing an unreasonably dangerous product into the stream of commerce under the Product Liability Act, Ind. Code § 34-20-1-1 *et seq*. Defendant Buddy Gregg moved for partial summary judgment with respect to three issues: (1) that plaintiff cannot recover damages for loss of the Mikelsons' motor coach itself under the Indiana Product Liability Act, (2) that plaintiff also cannot recover for the loss of the motor coach itself by a separate negligence claim against Buddy Gregg outside the Product Liability Act, and (3) that plaintiff cannot recover from Buddy Gregg for the breach of any implied or express warranties to the Mikelsons because the motor coach was sold "as is."

The court has already granted summary judgment on the first and third issues, which Great Northern did not contest. See *Progressive Ins. Co. v. General*

Motors Corp., 749 N.E.2d 484, 488 (Ind. 2001) (no recovery under the Product Liability Act for "economic loss," *i.e.*, damage to the defective product itself); Ind. Code § 26-1-2-316(3)(a) (a seller who sells a product "as is" disclaims all implied warranties).

The second issue arises from Great Northern's attempt to assert a separate claim for negligence by Buddy Gregg in the final preparation of the motor coach before delivery. The court finds that Buddy Gregg is also entitled to summary judgment on the second issue, so that Great Northern may not recover from Buddy Gregg the claimed damages ($426,144.75) for damage to the motor coach itself. The Product Liability Act itself precludes other claims for damages to the product itself, and allowing a separate negligence claim for the damage would effectively nullify the critical "as is" term of the parties' contract for the sale of the motor coach. (The court's rulings thus far do not affect, however, Great Northern's claims under the Product Liability Act for $3,638.80 for damage to Mr. Mikelsons' personal property and for $570.32 for damage to another Mikelsons vehicle damaged by the fire.)

The Product Liability Act provides that it "governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; regardless of the substantive legal theory or theories upon which the action is brought." Ind. Code § 34-20-1-1. Great

Northern's claim against Buddy Gregg for negligence fits all three criteria. As a subrogee, Great Northern has stepped into the shoes of a consumer. Great Northern has also sued Buddy Gregg as a seller, and it has sued for "physical harm caused by a product."

For such claims, *Progressive* holds there is no recovery available under the Product Liability Act for damage to the allegedly defective product itself. The *Progressive* case presented five consolidated appeals in which insured vehicles had been damaged when they caught fire. The owners' insurers as subrogees sued the vehicle manufacturers under the Product Liability Act, which authorizes liability "for physical harm caused by [the defective] product to the user or consumer or to the user's or consumer's property" under specified conditions. Ind. Code § 34-20-2-1.

The Supreme Court of Indiana also observed in *Progressive* that the Act prohibits plaintiffs from bringing separate negligence claims against sellers to recover economic loss: "If a buyer were allowed to recover economic loss under a negligence theory, he could, in effect, circumvent the seller's limitation or exclusion of warranties permitted under the Uniform Commercial Code." 749 N.E.2d at 488, quoting *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1091 (Ind. 1993). The court in *Progressive* explained that the legislature's policy decision to reject the tort claim for damage to the product itself was

“grounded in the distinction between tort and contract law.” 749 N.E.2d at 489. The separate negligence claim asserted by Great Northern would, if recognized, effectively nullify that policy choice by the legislature.

In *Progressive* the Supreme Court of Indiana affirmed a decision by the Indiana Court of Appeals. The Court of Appeals had relied on *Martin Rispens* to explain the Product Liability Act’s prohibition in terms of the “core separation of tort law and contract law,” stating:

> While a manufacturer should be held liable if its product causes physical harm to a person or other property, it should not be held accountable if its product does not perform to the consumer’s economic expectations unless the manufacturer guarantees the product’s performance.

Progressive Ins. Co. v. General Motors, 730 N.E.2d 218, 220 (Ind. App. 2000), citing *Martin Rispens*, 621 N.E.2d at 1090. The Court of Appeals added that, if contract law does not provide a remedy “due to the statute of limitations, failure to comply with warranty restrictions, or other problems, then consumers may deal with the risk of loss by purchasing insurance to cover damage to their vehicles.” *Progressive*, 730 N.E.2d at 221.

The Indiana Court of Appeals also noted that some purchasers would effectively be denied any remedy by the operation of the Product Liability Act. It is a “practical reality” that users who do not purchase directly from the

manufacturer, and who thus may not be able to avail themselves of the manufacturer's warranty, "often do not or cannot bargain for a warranty or gain legal recourse against the non-manufacturer." *Progressive*, 730 N.E.2d at 222. Rather than bargain with Buddy Gregg for a warranty, the Mikelsons opted to secure insurance from Great Northern to cover their motor coach, but Great Northern's own rights as a subrogee are no greater than those the Mikelsons had.

To avoid the bar of the Product Liability Act, Great Northern contends that Buddy Gregg breached a duty to the Mikelsons by negligently performing *services* for them after they purchased the motor coach. Specifically, Great Northern alleges that during the pre-delivery inspection of the motor coach, Buddy Gregg should have discovered the non-standard wire allegedly responsible for the fire. Pl. Br. at 4.[2]

Great Northern argues that the sale of the motor coach was complete on July 12, 1998, when Buddy Gregg and the Mikelsons executed the contract for

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[2]Great Northern also argues that Buddy Gregg should have discovered the wire upon recharging the motor coach's house battery. Pl. Br. at 6-7. The court agrees with Buddy Gregg that there is no evidence to support a causal connection between recharging the house battery and any failure to discover the wire. See Rowe Dep. at 5 (wire that was the most likely source of the fire was located in the engine compartment); *id.* at 22 (house batteries are located in a compartment located 20 feet from the engine compartment). The dispute is not material to the court's resolution of the motion for partial summary judgment, since the court assumes that Buddy Gregg was negligent in failing to detect the non-standard wire in the engine compartment.

sale and the Mikelsons made a $10,000 down payment. Pl. Br. at 5. Therefore, according to Great Northern, the final inspection before delivery on July 15, 1998 occurred after the sale and was an independent transaction outside the scope of the Product Liability Act.

The core provision of the Product Liability Act applies to "a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property," provided:

> (1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition;
>
> (2) the seller is engaged in the business of selling the product; and
>
> (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.

Ind. Code § 34-20-2-1. The parties agree that Buddy Gregg acted as a "seller engaged in the business of selling" the motor coach.

Claims arising from service transactions are excluded from the Product Liability Act through the applicable definition of "product." The Indiana Code defines "product" for purposes of the Product Liability Act as follows:

(a) "Product", for purposes of IC 34-20, means any item or good that is personalty at the time it is conveyed by the seller to another party.

(b) The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.

Ind. Code § 34-6-2-114.

Treating the purchase of the motor coach as one transaction, that transaction obviously fell within the scope of the Product Liability Act. It was not a transaction that involved "wholly or predominantly the sale of a service rather than a product." The Mikelsons paid $525,000 for the motor coach. Even if some small fraction of the purchase price were allocated to the final preparation services, including the final inspection – and the parties never made such an allocation – a jury could not reasonably find that the transaction was "predominantly" for the sale of a service. See generally *Dow Chemical Co. v. Ebling*, 723 N.E.2d 881, 904-05 (Ind. App. 2000), *aff'd in relevant part*, 753 N.E.2d 633, 635-36 (Ind. 2001) (identifying factors for applying "predominant thrust" test, and holding that professional applicator of pesticide provided service rather than product), citing *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 612 N.E.2d 550, 554-55 (Ind. 1993) (adopting test for determining whether transaction is for sale of goods under UCC). The "predominant thrust" test asks whether the transaction's "predominant factor, [its] thrust, [its] purpose, reasonably stated,

is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved." *Insul-Mark*, 612 N.E.2d at 554.

Great Northern's final effort to avoid the bar of the Product Liability Act therefore depends on whether a jury could reasonably conclude that there were two separate transactions, one for the motor coach and the second for the final inspection services. The evidence would not support such a conclusion, even when viewed in the light reasonably most favorable to Great Northern.

There is no evidence of any separate payment for or agreement regarding inspection or delivery services. The sales contract, titled "Retail Order," describes the motor coach to be purchased. It also states the motor coach's price and the Mikelsons' down payment, and states that the coach was sold "as is." The sales contract does not indicate that Buddy Gregg was obligated to render any services to the Mikelsons. There is no evidence that the parties bargained specifically for any of the final preparation services, or even that any specific amount of the payment was allocated to those services. Buddy Gregg also did not document the inspection as it would the performance of a service contract. When Buddy Gregg agrees to service a vehicle, the evidence shows, it customarily completes a work order sheet called an "RO" to track its progress. Buddy Gregg did not complete an "RO" with respect to the Mikelsons' motor coach. This fact also indicates there

was only one transaction and that the inspection was a service merely incidental to the sale of the motor coach.

Great Northern contends that the sale of the motor coach was complete on July 12, 1998 because George Mikelsons executed the sales contract and made a deposit of $10,000 on the motor coach on that date. G. Mikelsons Aff. ¶ 4. However, the Mikelsons paid the remaining $515,000 due on July 15, 1998, the same day that Buddy Gregg performed its final inspection and the Mikelsons took delivery of the motor coach. Pl. Add. Mat. Fact Nos. 13 & 14; G. Mikelsons Aff. ¶ 5. This evidence would not support a reasonable finding that there were two separate transactions, one for a product and one for final delivery services.

Great Northern also emphasizes that the sale of a motor coach requires substantial services because motor coaches are such complicated products. Pl. Br. at 5, citing Rowe Dep. at 20 (motor coach purchasers stay on site for an extended period to learn to operate the motor coach's systems). Great Northern contends that those services give rise to a separate duty to the purchaser of a motor coach. However, Great Northern's acknowledgment that *the sale* involves substantial services undermines its argument that those services were the subject of a separate transaction. The parties treated those services as an integral part of one overall transaction for the sale of a motor coach.

Great Northern's argument that the sale and inspection were two separate transactions is unsupported by the record. When considered together, a reasonable juror could only conclude that the entire transaction was for the sale of a motor coach. Great Northern is barred from bringing its negligence claim against Buddy Gregg for damage to the motor coach itself.

Conclusion

The court grants defendant Buddy Gregg Motor Homes, Inc.'s remaining motion for partial summary judgment and holds that Great Northern cannot bring a negligence claim against Buddy Gregg outside the Product Liability Act for damage to the product itself.

So ordered.

Date: April 29, 2002_________

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DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Thomas J. Jarzyniecki, Jr.
Kightlinger & Gray
151 North Delaware Street
Suite 600
Indianapolis, IN 46204

Larry G. Evans
Hoeppner Wagner & Evans, LLP
103 E. Lincolnway
P.O. Box 2357
Valparaiso, IN 46384

Reginald B. Bishop
Roberts & Bishop
118 North Delaware Street
Indianapolis, IN 46204

John Joseph Tanner
Baker & Daniels
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204