

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DANNY C. KRUSE,	:	Civil Action
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
CHEVROLET MOTOR DIVISION OF THE GENERAL MOTORS CORP.,	:	
	:	
Defendant.	:	NO. 96-1474

MEMORANDUM

Reed, J.

July 15, 1997

Plaintiff Danny Kruse ("Kruse" or "Plaintiff") purchased a Chevrolet Monte Carlo from Weed Chevrolet, Inc. dealership. Plaintiff alleges that defects existed and brought this lawsuit to recover damages pursuant to the Pennsylvania Lemon Law, Magnuson-Moss Act, Uniform Commercial Code, and Unfair Trade Practices and Consumer Protection Law.

Pending before this Court is the motion of defendant General Motors Corporation ("GM") for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (Document No. 14), and the various responses and briefs of the parties thereto. For the reasons that follow, the motion will be granted in part and denied in part.

I. FACTUAL BACKGROUND¹

Kruse purchased a new 1995 Chevrolet Monte Carlo, manufactured and warranted by GM, from Weed Chevrolet Inc. on June 6, 1995. The total purchase price of the vehicle was \$19,563. The warranty provided by GM covered the vehicle for three years or 36,000 miles, whichever came first. Plaintiff alleges that he experienced air noise, transmission hum or thumping, and tire whine and vibration beginning on July 19, 1995. On several occasions Kruse complained to the dealer, which attempted unsuccessfully to repair the defects at no cost to Kruse, pursuant to the terms of the warranty.

1. The following facts are based on the evidence of record viewed in the light most favorable to plaintiff, the nonmoving party, as required when considering a motion for summary judgment. See Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997).

After filing this lawsuit, Kruse traded in the Monte Carlo for a Chevrolet Venture Van. Lafferty Chevrolet dealership placed a trade-in value of \$12,700 on the Monte Carlo. The total price of the new Venture Van was \$20,315.

Plaintiff voluntarily dismissed the Lemon Law claim because Pennsylvania law requires a plaintiff to maintain possession of the vehicle in order to pursue a cause of action (Document No. 15). Defendant seeks summary judgment on the remaining claims pursuant to the Magnuson-Moss Act, Uniform Commercial Code, and Unfair Trade Practices and Consumer Protection Law, contending that plaintiff recovered the full market value of the Monte Carlo at the time of the trade-in and, thus, is not entitled to damages.

II. DISCUSSION

A. Breach of Warranty

Plaintiff contends that GM breached the terms of the express warranty as well as the implied warranty of merchantability. To prevail on a claim of breach of warranty, plaintiff must show GM breached an implied or written warranty and that GM was afforded a reasonable opportunity to cure the failure to comply with its warranty obligations. See 15 U.S.C. § 2510(d), (e); Seybold v. Francis P. Dean, Inc., 628 F. Supp. 912, 917 (W.D. Pa. 1986). Plaintiff has proffered sufficient evidence to create a genuine issue of material fact as to whether or not GM breached the implied and express warranties.

B. Damages -- Magnuson-Moss Act and Uniform Commercial Code

Assuming that GM breached either of the two warranties, the trier of fact may award plaintiff a measure of damages equal to 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. See 13 Pa. Cons. Stat. Ann. § 2714(b); Ford v. Chrysler Corp., No. CIV.A.95-4143, 1996 WL 363914, at * 2 (E.D. Pa. June 28, 1996), aff'd, 111 F.3d 126 (3d Cir. 1997) (TABLE); Sinnerard v. Ford Motor Co., No. CIV.A.95-2708, 1996 WL 363932, at * 4 (E.D. Pa. June 20, 1996), aff'd, ____

F.3d ____ (3d Cir. 1997) (TABLE); AM/PM Franchise Ass'n v. Atlantic Richfield Co., 584 A.2d 915, 920 (Pa. 1990); Cober v. Corle, 610 A.2d 1036, 1040-41 (Pa. Super. Ct. 1992). In addition, the buyer may recover consequential damages. See 13 Pa. Cons. Stat. Ann. §§ 2714(c), 2715. The evidence of record shows that Kruse paid \$19,563 for the Monte Carlo. However, plaintiff provides no evidence regarding the value of the car had it been as warranted, the crucial factor to determine damages. See K & C, Inc. v. Westinghouse Elec. Corp., 263 A.2d 390, 394 (Pa. 1970) (purchase price not relevant factor); Natalie Bros. Towing Serv. Inc. v. Murray Ford Inc., 41 Pa. D. & C.3d 224, 226 (1994) (same). The difference between the value "as is" and "as warranted" can be measured by the cost of repair. See Pompa v. Hart, 15 Pa. D. & C.4th 119, 124 (1992). Plaintiff did not pay the cost of repair, nor is there evidence of the cost incurred by the dealership in its attempts to repair the alleged defects. Therefore, plaintiff has failed to show that he can produce at trial the evidence necessary to show he suffered damages.

Plaintiff appears to argue that he is entitled to recover the full purchase price of the car. See Suber v. Chrysler Corp., 104 F.3d 578, 588 n.12 (3d Cir. 1997). Yet, implicit in the concept of a refund of the purchase price is the condition that the purchaser return the consumer good at issue. See Williamson v. Chrysler Corp., No. Civ.A.96-5021, 1997 WL 241572, at * 1 & n.3 (E.D. Pa. May 6, 1997) (under Lemon Law plaintiff must surrender car in order to receive refund of purchase price); see also 15 U.S.C. § 2304(b)(2) ("[A] warrantor may require, as a condition to replacement of, or refund for, any consumer product . . . that such consumer product shall be made available to the warrantor free and clear of liens and other encumbrances . . ."). Plaintiff sold the Monte Carlo and is presently unable to return it for a refund. Moreover, plaintiff accepted and used the car for approximately one and one-half years, thereby diminishing the value of the car. Awarding damages equal to the full purchase price does not take into account the natural depreciation of the vehicle from normal usage. Therefore, I find that plaintiff has not presented evidence that he is entitled to a refund of the full purchase price.

At the time of trade-in, the Lafferty dealership appraised the Monte Carlo with a value of

\$12,700. Plaintiff contends that he is entitled to the difference between the original purchase price of the car and the resale value at the time of the trade-in. To support his proposition, Kruse cites to Judd Constr. Co. v. Bob Post, Inc., 516 P.2d 449 (Colo. Ct. App. 1973). In Judd, the court accepted the proposition that the difference between the original purchase price and the trade-in allowance received upon sale of the vehicle could constitute damages. However, this measure of damages is appropriate only when the buyer rightfully rejects or justifiably revokes acceptance of the goods and then resells them. See Judd, 516 P.2d at 451. In the instant case, as in Judd, plaintiff fails to assert, nor does the record show, that he rejected or revoked his acceptance. Therefore, the difference between the purchase price and trade-in value does not constitute the appropriate measure of damages.

Nevertheless, the trade-in value of the Monte Carlo is relevant evidence of the fair market value of the car at the time of the resale. Plaintiff has proffered absolutely no evidence to the contrary. There is no documentary evidence or testimony that the value at the time of trade-in was diminished because the appraiser considered in his calculation the alleged defects, and, as a result, no evidence that Kruse did not receive the fair market value for the car. Kruse bought the Monte Carlo, used it, incurred no costs for repairs, and traded in the car for fair market value. Without evidence to show that the difference in value between the original purchase price and the trade-in value is attributable to some factor other than the normal and usual diminution in value due to usage and the passage of time, a reasonable fact finder would have to engage in speculation or conjecture to determine that Kruse is entitled to anything more than the \$12,700 he received when he resold the car. Compensatory damages are awarded to make a plaintiff whole. Although Kruse may have experienced the hassles and inconveniences of making trips to the dealer to have the car serviced, plaintiff fails to set forth evidence to support such a finding. The evidence of record fails to show that he has suffered actual damages due to the alleged breach of warranty. Therefore, even assuming that GM breached the warranty, I find that Kruse is not entitled to damages pursuant to the Magnuson-Moss Act and the Uniform Commercial

Code.

C. Damages -- Unfair Trade Practices and Consumer Protection Law

Count IV of the complaint sets forth a cause of action pursuant to the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Cons. Stat. Ann. § 201-2. Defendant contends that Count IV must be dismissed given the dismissal of the Lemon Law claim. Although a violation of the Lemon Law also gives rise to a claim pursuant to the UTPCPL, the UTPCPL covers a broad spectrum of activity and protects consumers from conduct in addition to Lemon Law violations. See Rose v. A & L Motor Sales, 699 F. Supp. 75, 77 (W.D. Pa. 1988) (claim under UTPCPL is independent claim). In his complaint, plaintiff asserts a cause of action pursuant to the UTPCPL for failure of GM to comply with the terms of a written guarantee or warranty given to the buyer at, prior to, or after a contract for the purchase of goods or services is made. See Complaint ¶ 49; 73 Pa. Cons. Stat. Ann. § 73-201-2(4)(xiv); see also Rudder v. American Honda Motor Co., Inc., No. CIV.A.94-6769, 1995 WL 216955, at * 3 (E.D. Pa. Apr. 12, 1995). A breach of warranty appears to be a per se violation of the UTPCPL. See Smith v. Chrysler Motors Corp., No. CIV.A.89-2898, 1990 WL 65700, at * 4 (E.D. Pa. May 15, 1990). Plaintiff has proffered sufficient evidence of record to survive a summary judgment motion as to the UTPCPL claim based upon breach of warranty.

The UTPCPL limits recovery to actual damages or \$100, whichever is greater. See 73 Pa. Cons. Stat. Ann. § 201-9.2(a). In addition, the court may, in its discretion, award up to three times the actual damages sustained, but not less than \$100, and may provide such additional relief as it deems necessary or proper. See 73 Pa. Cons. Stat. Ann. § 201-9.2(a). Having found that Kruse has produced no evidence that he suffered actual damages from the alleged breach of either the express or implied warranties, plaintiff is not entitled to recover actual damages or treble damages. Accordingly, recovery for plaintiff is limited to \$100 plus such additional relief as the court may deem necessary or proper.

III. CONCLUSION

In sum, a genuine issue of material fact remains as to whether or not GM breached the express and implied warranties. Assuming GM breached either of the warranties, plaintiff has failed, in defending against the defendant's motion for summary judgment, to meet his burden of showing in this record the existence of admissible evidence that he suffered actual damages or that he is entitled to recover compensatory damages pursuant to the Magnuson-Moss Act and Uniform Commercial Code. Based upon the pleadings and the issues raised by plaintiff, it is clear that the alleged breach of warranties underlies the claim pursuant to the UTPCPL. Having found that plaintiff has failed to show that he suffered actual damages as a result of any breach, the statute provides that plaintiff may recover \$100 and such additional relief that the court deems necessary or proper.

An appropriate order follows.

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CHEVROLET MOTOR DIVISION OF THE GENERAL MOTORS CORP.,	:	
	:	
Defendant.	:	NO. 96-1474

ORDER

AND NOW, this 15th day of July, 1997, upon consideration of the motion of defendant Chevrolet Motor Division of the General Motors Corporation ("GM") for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (Document No. 14) and the various responses and briefs of the parties thereto, together with the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, having found that there remains a genuine issue of material fact with regard to whether or not GM breached the express and implied warranties provided to plaintiff Danny Kruse ("Kruse") and having further found that no reasonable fact finder could find that Kruse suffered actual damages as a result of any alleged breach, **IT IS HEREBY ORDERED** that the motion for summary judgment is **GRANTED IN PART AND DENIED IN PART**. Summary judgment is hereby entered in favor of GM and against Kruse with regard to the claims pursuant to the Magnuson-Moss Act and the Uniform Commercial Code. Plaintiff may proceed with his claim pursuant to the Unfair Trade Practices Consumer Protection Law based upon the failure

of GM to comply with the terms of the warranties, but the recovery for plaintiff is limited to \$100 plus such additional sums that the court may deem necessary or proper.

LOWELL A. REED, JR., J.