No. 124285

IN THE
SUPREME COURT OF THE STATE OF ILLINOIS

Kimberly Accettura, Adam Wozniak,	) Appeal from the Circuit Court
	) of Kane County
Plaintiffs,	)
	)
v.	) Trial Court No. 14 CH 1467
	) Appellate Court No. 2-17-0972
Vacationland, Inc.,	) The Honorable David Akemann,
	) Presiding
Defendant.	)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Oral Argument Requested

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I. Introduction

This is a case of an RV that leaked—and leaked again. When the warrantor breached its implied warranty by telling Plaintiffs that it was unable to repair, and would not give an estimate of time to repair, Plaintiffs revoked acceptance under Section 2-608 of Article Two of the Commercial Code. 810 ILCS 5/2-608.

Section 2-608 has two subsections, which describe two scenarios when a buyer may revoke acceptance of goods:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

As evident from the text, subsection 2-608(1)(a) (which presupposes disclosure of non-conformities before acceptance and a promise of "seasonable" cure) references "cure," while subsection 2-608(1)(b) (which contemplates either difficulty of discovery, or even assurances by a seller—more akin to fraud, and hence less solicitous to sellers) does not.

Even though the Code says it should be applied to promote its underlying principles of simplicity and clarity, this case made its way all the way to the Supreme Court.

What's wrong with this picture?

What's wrong is that the lower courts failed to apply the principles of simplicity and clarity. 810 ILCS 5/1-103(a)(1). One subsection of Section 2-608 refers to the right

to cure; another does not. This is clear and simple. Defendant, however, proposes a convoluted interpretation, which takes a page to express. It is neither clear nor simple.

Another problem with Defendant's interpretation is that it violates the principle of plain reading of the statutory text. This Court has ruled that Illinois courts are to interpret statutes in accordance with their plain language:

> The primary rule of statutory construction is to ascertain and give effect to the intention of the legislature, and that inquiry appropriately begins with the language of the statute. *People v. Hare*, 119 Ill.2d 441, 447, 116 Ill.Dec. 664, 519 N.E.2d 879 (1988). There is no rule of construction which allows the court to declare that the legislature did not mean what the plain language of the statute imports.

People v. Woodard, 175 Ill.2d 435, 443, 677 N.E.2d 935, 939, 222 Ill.Dec. 401, 405 (1997). The plain language of the statute refers to cure in one subsection, but not in another (setting up a different test). The omission of a provision in one part of a statute that is included in another part is presumed to be intentional. Thompson v. Thompson, 261 Mich.App. 353, 362 n.2 (Mich.App. 2004) (citing to Michigan Supreme Court case of Farrington v. Total Petroleum, Inc., 442 Mich. 201, 210 (1993)); accord Seekings v. Jimmy GMAC of Tuscon, Inc., 130 Ariz. 596, 602, 638 P.2d 210, 216 (Az. S.Ct. 1981) ("the drafters of the U.C.C. *** pored over the code for years," and so when they meant something to be included, they expressly included it.).

Yet another problem with Defendant's interpretation is that it failed to promote uniformity of commercial law, another value espoused by the Code (and this Court). 810 ILCS 5/1-103(a)(3).

Given these principles, this Court should adopt a clear, simple, majority position, which comports with the plain reading of the statute.

II. Summary of the Argument

Defendant, however, prefers a convoluted reading of the statutory text.

Plaintiffs disagree with Defendant on a number of points.

First, Plaintiffs disagree with Defendant's statement of the issue: "whether a buyer who has already elected the remedy of repair may revoke acceptance under Subsection 2-608(1)(b) of the Illinois Commercial Code *** during the pendency of such repairs." Defendant's Response at 12.

In fact, the issue here is simply whether, as a matter of law, "cure" (however defined) may be read into sub-section (1)(b) of Section 2-608 of the Code, even though it is not referenced there.

Defendant's statement of the issue is particularly nonsensical in its reference to "election of remedies." First, to elect anything one must be given a choice. The record is silent as to the choices (other than "unseasonable" repair) that were given to Plaintiffs. Rather, their choices were, "wait until we ruin your summer vacation and maybe fix your RV, we don't know when," versus "wait until our agent ruins your summer vacation and maybe fixes your RV, it doesn't know when." Not really much of a choice.

Moreover, the doctrine of election of remedies has nothing to do with this case. One can not elect a remedy for a breach until there is a breach. Also, this Court stated that the doctrine of election of remedies "has no application to an election between suits based upon different statutes." Harris v. Manor Healthcare Corp., 111 Ill.2d 350, 366 (1986). Defendant here confuses and conflates two statutes—implied warranty (2-314 of Article Two) and revocation of acceptance (2-608 of Article Two). Plaintiffs were

entitled to have their RV repaired under the implied warranty, but their revocation of acceptance was based on a different statute.

And generally, the doctrine of election of remedies is conceptually inapplicable outside of a litigation, and most often, outside of the post-trial context.[1]

In this case, there was no mythical, and unsupported by any consideration, separate agreement "to cure." Plaintiffs were merely getting the repairs that Defendant was contractually obligated to make under its implied warranty, and, when both Defendant and its agent would not tell them how much longer the repairs would take, Plaintiffs said "enough" and revoked acceptance under the UCC. Put another way, when Defendant and its agent would not tell Plaintiffs when the RV would be repaired, Defendant's implied warranty "failed its essential purpose," and Plaintiffs availed themselves of another remedy "as provided in this Act." 810 ILCS 5/2-719(2).

On August 2.

For a summer product.

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[1] Evergreen West Business Center v. Emmert, 323 P.3d 250, 260 (Or.S.Ct. 2014) ("The doctrine of election between inconsistent remedies does not require an election before the entry of judgment."); May v. Watt, 822 F.2d 896 (9th Cir. 1987) (party is not required to make an election between breach of contract remedies and rescission prior to a jury verdict); North American Graphite Corp. v. Allan, 184 F.2d 387 (D.C.Cir. 1950) (no election between theories of recovery based on breach of contract and quantum meruit is required prior to a jury verdict); Altom v. Hawes, 63 Ill.App.3d 659, 663 (5th Dist. 1978) ("The bringing of a suit for one remedy *** does not preclude the plaintiff from seeking the other remedy instead, if he has a reasonable ground for so doing ***."); Majcher v. Laurel Motors, 680 N.E.2d 416, 421 (2d Dist. 1997) ("The ***prosecution*** of one remedial right to judgment or decree constitutes an election barring subsequent ***prosecution*** of inconsistent remedial rights.") [emphasis added]; Kel-Keef Enterprises v. Quality Components Corp., 738 N.E.2d 524, 533 (2d Dist. 2000) (bringing a law suit does not constitute election of remedies; prevailing party "required to elect which remedy it wished to pursue ***before final judgment***.") [emphasis added].

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Next, Defendant misrepresents the factual record. The record is uncontradicted that Plaintiffs revoked acceptance of a summer product only when Defendant, and Defendant's agent for purposes of warranty repairs, refused to tell them when the RV would be repaired.

Next, Defendant argues that the term "cure" encompasses the term "repair." Of course it does. It just is not ***equal*** to it. As Plaintiffs demonstrated in their opening brief, the term "cure" encompasses many lesser concepts—replacement, repair, and sometimes simply a money allowance.

Next, Defendant argues that the majority position, described as such by numerous courts, is not really a majority position. Defendant, however, fails to cite a single case that recognizes ***its*** position as the majority position.

Finally, Defendant references principles of statutory construction, and Plaintiffs welcome this reference. The plain language principle supports Plaintiffs' (and the majority's) interpretation.

III. Argument

A. Plaintiffs Did Not Forfeit Any Issues

The very beginning of Section A of Plaintiffs' Brief states: "The sole issue in this case is whether subsection (1)(b) of Section 2-608 includes a seller's right to 'cure' a defective condition," i.e., ***the*** issue in this appeal. Brief at 11. On the next page, Plaintiffs state: "As a preliminary matter in this 'right to cure case,' it is important to discuss the legal meaning of the term 'cure.'" Brief at 12.

This, Defendant claims, is a "waived issue." Plaintiffs submit, however, that this is not an "issue," but rather a preliminary definitional discussion of what "cure" is in the appeal that is all about "cure." Defendant's hyper-technical argument should be rejected.

B. Of Course "Cure" Encompasses "Repair," It Is Just Not Equal to It

As an alternative argument, Defendant erects a straw man as if Plaintiffs argue that "cure" does not mean "repair."

Plaintiffs never argued that. Of course "cure" sometimes means "repair." Sometimes, however, it means "replacement." And sometimes it means "monetary adjustment." That is why the broad term under discussion is "cure," and not less broad terms such as "repair," or "replacement," or "monetary adjustment."

Beginning with this section, and continuing throughout its Response, Defendant argues that Plaintiffs somehow entered into a contract to allow Defendant to cure by repairing the leaky RV. In doing so, Defendant substantially misrepresents the factual record, and confuses the relevant statutes.

Taking the statutes first, as Plaintiffs explained in their opening brief, Defendant gave Plaintiff an implied warranty of merchantability. Brief at 8, n.1. (This fact becomes

important later, when Defendant, a dealer-warrantor, having confessed to being unable to repair the RV (and therefore breaching its implied warranty) sends the RV to a non-party to this law suit, the RV manufacturer, which makes the manufacturer the dealer's agent for purposes of repairs.)

There was no "contract" to cure. By allowing Defendant to repair the RV, Plaintiffs merely expected Defendant to comply with its pre-existing contractual duty to repair the RV under its warranty. It is only when Defendant stated that it was unable to do so, and refused to give an estimate of time to repair, that Plaintiffs revoked.[2]

As far as the record is concerned, it is uncontradicted that the RV leaked after the sale, Defendant "repaired" it (repair failed), and, on or about July 14, 2015, Plaintiffs brought the RV to Defendant with the leakage problem again. C-310, A-37, para. 2.[3] Defendant told one of the Plaintiffs that it could not repair the problem. Id. Defendant promised to send the RV to its agent, the manufacturer, for repairs. C-310, A-37, para. 3.

When one of the Plaintiffs asked for an estimate of time for the repairs, Defendant could not give one. C-310, A-37, para. 4. One of the Plaintiffs called the manufacturer, again asking for the timeline. The manufacturer referred Plaintiff to Defendant (presumably because it was ***Defendant***'s implied warranty). C-310, A-37, para. 5.

[2] It is important to observe that subsection 2-608(1)(a) requires that defects be cured "seasonably." 810 ILCS 5/2-608(1)(a). Obviously, where the warrantor cannot even give an estimate for the time to repair, this does not qualify as "seasonably." Moreover, subsection 2-608(1)(a) does not apply here even conceptually: it applies in a situation where the buyer accepts goods that the buyer knows do not conform, because the seller promised to seasonably cure. Here, the non-conformity was not discovered by anyone before acceptance, so 2-608(1)(a) does not apply. Subsection 2-608(1)(b) does.

[3] The "A-" designation refers to the Appendix to Plaintiffs' opening Brief.

During the conversation with the manufacturer, one of the Plaintiffs asked for a cure ("replacement"), and was again referred to Defendant. C-310, A-37, para. 5. Plaintiff then asked Defendant for a cure ("replacement"), and Defendant refused. Id. This conversation took place sometime between July 14 and August 2 of 2015. Id.

It is only when neither Defendant nor its agent for purposes of warranty repairs would give Plaintiffs an estimate for a repair time, did Plaintiffs revoke their acceptance of the RV, on August 2, 2015. C-310, A-37, para. 7. As Plaintiffs pointed out, "[b]y that time the summer was gone, and so was our reason for having an RV." Id.

Thus, this cases falls squarely within the framework articulated in Belfour v. Schaumberg Auto, i.e., "courts will resort to revocation of acceptance only after attempts at adjustment have failed." Belfour, 306 Ill.App.3d 234, 242 (2d Dist. 1999). Here all attempts at adjustment failed—Defendant-warrantor said it could not repair the RV (a per se breach of warranty), sent it to its agent (presumably with a more competent repair shop), and neither of them would give an estimate of time for repair. The proper cure in this case would have been a replacement RV, given that RVs are mostly summer products, and the summer was ending.

Plaintiffs never argued (as represented on p. 17 of Defendant's Response) that the "only" cure for nonconforming products is a replacement. On the contrary, in their opening brief Plaintiffs extensively discussed circumstances when a repair is appropriate, or even a mere monetary adjustment. Plaintiffs maintain, however, that in their case, given its factual circumstances, the proper cure was replacement.

C. There Was No "Contract" to Cure

This is yet another section in which Defendant argues that there was some "contract" to cure between the parties. Indeed, Defendant uses such contractual terms as "Seller offered" and "Buyers accepted," Response at 17, and "honoring the agreement," and "their bargain with Seller," Response at 18. Curiously absent term—"consideration."

But, as explained above, there was no such contract. There was, instead, a pre-existing contractual obligation on the part of Defendant, to repair the RV under its implied warranty of merchantability. There was nothing for it to "offer," and nothing for Plaintiffs to "accept." Defendant was contractually obligated to repair. And also, all this has nothing to do with this appeal, because Defendant was contractually obligated to repair under its implied warranty, but this appeal concerns solely (with the exception referenced below, in Section C(3)) the issue of whether the requirement of "cure" can be read into subsection (1)(b) of Section 2-608 of the Commercial Code, even though "cure" is not referenced there.

When Defendant breached its warranty by confessing its inability to repair, and when both Defendant and its agent stated that they could not give an estimate of time for repairs, Plaintiffs asked for "cure" (replacement). The agent referred them to Defendant. Defendant said "no." At this point, Plaintiffs were fully justified in revoking. (Plaintiffs also note that the assumption that a two-week period is somehow unreasonable as a matter of law is not supported by any case law. Is it unreasonable to expect cars to be repaired within ***one*** week? This Court can take judicial notice that most auto repairs are accomplished within a ***day***. Also, the two-week period is not the correct period for calculating how much time Plaintiffs gave Defendant to "cure." This RV leaked—and

leaked again. The RV leaked at Plaintiffs' first trip in June of 2015, continued leaking in July, and Defendant still failed to repair it. Plaintiffs revoked on August 2. Therefore, the record demonstrates the time period of nearly two months, not two weeks.)

(1) Indeed There Is a Split of Authority; Plaintiff's Position is Majority, and Defendant's Position is Minority

Defendant boldly asserts that Plaintiffs' position "has become the minority view." Response at 18. However, Defendant does not cite a single case that says that Plaintiffs' position is a minority view, or that Defendant's position is a majority view. Plaintiffs do not believe such authority exists.

After citing to some minority position cases, Defendant acknowledges that there is a "split" in the case law. Indeed! Plaintiffs' position is a majority, and Defendant's position is a minority. Hence, a "split."

(2) Plain Reading of Statutory Text Establishes Legislative Intent

Plaintiffs wholeheartedly agree that, sometimes, principles of statutory construction aid courts in determining the legislative intent. However, if the meaning of a statutory provision is clear, the courts go no further. People v. Woodard, 175 Ill.2d at 443, 677 N.E.2d at 939, 222 Ill.Dec. at 405 ("Where an enactment is clear and unambiguous, the court is not free to depart from the plain language and meaning of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express ***.").

Plaintiffs stand on their discussion of the UCC Committee Comments presented in their opening brief. No comment cited by Defendant gives support that the plain meaning of Section 2-608 should be disregarded. Yet again, Defendant advances a

convoluted interpretation, which is neither clear nor simple, in violation of the UCC's guiding principles, as expressed in Article One. 810 ILCS 5/1-103(a)(1).

Defendant also references "prevention of surprise" and Section 508 as additional bases for its argument. Plaintiffs could not have agreed more. Indeed, what can be more surprising than a refusal by a warrantor to even ***estimate*** the time for repairs? And, as pointed out in Plaintiffs' opening brief (Brief, at 28), Section 508 imposes certain requirements upon a curing seller (such as a "money allowance," or "notice"), and the record is silent as far as Defendant's compliance with Section 508 requirements. In fact, the record is exactly the opposite: instead of a "notice," Defendant told Plaintiffs "we do not know when we will cure by repair." That is not compliance with Section 508.

(3) Defendant Opened the Door for This Court to Correct Another Error of Appellate Court

In their PLA, Plaintiffs brought just one legal issue to this Court's attention—the construction of Section 2-608 of the Commercial Code. It was a strategic decision on Plaintiffs' part, given the principles of clarity, simplicity, and uniformity attendant to the UCC.

That is not to say there were no other infirmities in the opinion below. One of them was the appellate and trial courts' use of the New Vehicle Buyer Protection Act (Illinois "Lemon Law," 815 ILCS 380/1 et seq.) by analogy, to transplant the number of repairs element (four) to other statutes, such as the UCC and Magnuson-Moss Warranty Act.

Plaintiffs' PLA and opening brief said nothing about this issue, but Defendant opened the door. Response at 28-30. Given that turn of events, Plaintiffs invite this Court to correct this error.

The Lemon Law was not even mentioned in Plaintiffs' complaint. However, both courts below found, as a matter of law, that Plaintiffs did not give Defendant a reasonable opportunity to repair, pointing to the number of repair attempts referenced in the Lemon Law (four). Plaintiffs are not aware of any cases (and believe there are none) that graft the standards of the Lemon Law (out of service for 30 days, or four repair attempts) upon the Magnuson-Moss warranty reasonableness analysis, or on revocation tests, as set out in Section 2-608.

This, too, was an issue of the first impression. Prior to the appellate opinion in the instant case there was not a single case that substitutes a proper reasonableness analysis under the Magnuson-Moss Warranty Act[4] for a mechanical application of the Lemon Law standard—four repair attempts. Such substitution would run counter of many decades of Illinois law, including the case law of this Court.[5] It would establish a "one size fits all" standard, which would be simply wrong. Because, while two transmission repairs in a car might be unreasonable, a half a dozen repairs of an antenna might be quite reasonable.

It is true that statutes in pari materia could be interpreted in light of each other. But Illinois Lemon Law, on one hand, and Magnuson-Moss Warranty Act or the UCC,

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[4] Pearson v. DaimlerChrysler Corp., 349 Ill.App.3d 688, 696, 813 N.E.2d 230, 237 (1st Dist. 2004).

[5] Sadat v. American Motors Corp., 104 Ill.2d 105, 111 (1984) (the standard for full warranties under MMWA is "reasonable number of attempts," not "four.")

on the other hand, are not in pari materia. For example, they have different subject matters (Lemon Law only covers new cars, as evident from its title; MMWA applies to used cars as well; the UCC applies to goods of all kinds, including commercial goods; in fact the UCC is primarily a business statute, while the Lemon Law is a consumer protection statute); different remedies (Lemon Law deals with repurchases; MMWA allows for both damages and equitable relief; the UCC is an all-encompassing law governing sales transactions); they have different fora (Lemon Law requires arbitration and is exclusive; MMWA and the UCC permit aggrieved plaintiffs to go to court); have different provisions with respect to attorney fees of prevailing parties (MMWA allows; Lemon Law and the UCC do not).

The body of the appellate law provides an apt illustration of how different these statutes are. In Lysek v. Elmhurst Dodge, Inc., 325 Ill.App.3d 536, 758 N.E.2d 862, 259 Ill.Dec. 454 (2d Dist. 2001), the Second District considered the issue of whether service contracts are subject to the Magnuson-Moss Act. Ultimately, the appellate court decided that they are. This illustrates the broad reach of the Magnuson-Moss Act. In contrast, there can be no dispute that the Lemon Law, by its own terms, does not encompass service contracts. This distinction demonstrates how the two statutes are not in pari materia. United States Steel Corp. v. Pollution Control Board, 74 Ill.App.3d 34, 42, 380 N.E.2d 909, 915 (1st Dist. 1978) (statutes must relate to the same "subject" to be considered in pari materia). It is important to note that this Court recognized that the three statutes discussed here are not the same, and refused to graft provisions of one into another. Mydlach v. DaimlerChrysler Corp., 226 Ill.2d 307, 332-33, 875 N.E.2d 1047, 1064-65, 314 Ill.Dec. 760, 777-78 (2007) (no grafting of Lemon Law provisions into the

UCC revocation section and Magnuson-Moss provisions). This Court should confirm its observation here. Obviously, a statute about cars (Lemon Law) does not have the same subject matter as the entire UCC. One is about warranties, another is about the entirety of commercial transactions.

By grafting the standards of the Lemon Law upon Magnuson-Moss Warranty Act and the UCC, the Second District affected a paradigm shift in the area of consumer protection in Illinois. Plaintiffs respectfully submit that such paradigm shifts are the province of the Legislature, not the courts.

(4) Precedent May Be Distinguishable on Facts, But Not on Statutory Meaning

In the final section of its Response, Defendant points to the supposed factual differences between the cited cases and the instant appeal. But the crux of this appeal is a legal construction of a statutory provision. Whether or not the requirement of a cure is read into subsection 2-608(1)(b) does not depend on the facts of any given case; it is, rather, the issue of statutory interpretation. Plaintiffs urge this Court to adopt an interpretation that is clear, simple, uniform, and in conformity with the plain reading of the statute. 810 ILCS 5/1-103(a)(1) and (3).

IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court reverse the Appellate Court on Count III of Plaintiffs' Complaint and remand this case to the trial court for trial on the merits.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the appendix, is 15 pages.

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/s/ Dmitry N. Feofanov
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