Van Eman v. Cars Protection Plus
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Matthew Van EMAN, Plaintiff-Appellee,

v.

CARS PROTECTION PLUS, Defendant-Appellant.

Docket No. 267473.

May 22, 2007.

Wayne Circuit Court; LC No. 04-407867-CP.

Gerard V. Mantese and Ian M. Williamson, Mantese and Associates, P.C., Troy MI for plaintiff-appellee.

Jeffrey C. Gerish and David C. Nelson, Plunkett & Cooney, P.C., Bloomfield Hills, MI for defendant-appellant.

Before: CAVANAGH, P.J., and JANSEN and BORRELLO, JJ.

PER CURIAM.

***1** In this case arising under the Michigan consumer protection act (MCPA), MCL 445.901 *et seq.*, defendant CARS Protection Plus appeals as of right a judgment awarding plaintiff Matthew Van Eman damages in the amount of $4,047 and attorney fees in the amount of $43,537.50 and entering a permanent injunction against defendant. We affirm, but remand for entry of an award of appellate attorney fees in favor of plaintiff.

I. FACTS AND PROCEDURAL HISTORY

On September 4, 2003, plaintiff purchased a 1998 Dodge Durango from JD's Car Company, Inc., for $7,599.34. The odometer on the vehicle registered 125,850 miles. On the same date, plaintiff also applied for and paid defendant $500 for a "Power Train Value Limited Warranty" which was good for three months or 4,500 miles. The warranty contains the following provisions:

COMPONENTS NOT COVERED-No other components, other than those listed above, are covered by this limited warranty. This limited warranty will not cover any repair done without prior authorization from CARS Protection Plus, Inc. Component failures which occur prior to the acceptance of this limited warranty are not covered. Other items not covered include diagnostic charges, damage that results from any previous or improper repairs. This limited warranty does not cover the parts and labor that are needed to maintain your vehicle (oil, filters, etc.), the parts of your vehicle that are subject to normal wear and tear (fan belts, radiator, hoses, etc.), damage to your vehicle that results from fire, accident, theft, or conditions of the environment, damage that results from someone altering the vehicle, misusing the vehicle, tampering with the vehicle, making improper adjustments, using improper fuels, improperly maintaining the vehicle, failing to maintain the vehicle, damage to a covered component that results from the failure of a non-covered component, fluid leaks and damage that results from fluid leaks.

* * *

WARRANTY CLAIM PROCEDURE-Your vehicle must be at a repair center in order for a claim to be opened. Once the vehicle is at the repair center call CARS Protection Plus, Inc. at 1-888-335-6838 with the estimate of repairs before any work begins. The limited warranty holder is responsible for all charges, relating to the tear down and diagnosis of the vehicle, also fluids, filters and tax. If it is determined that the covered component has failed and the estimate for the repairs is agreed upon by our adjuster, an authorization number will be issued for the repair....

Before the expiration of three months or 4,500 miles, plaintiff's Durango broke down. Plaintiff had the vehicle towed to North Hill Marathon to be repaired. After defendant made what plaintiff considered to be unreasonable tear down and diagnostic demands, which under the limited warranty were to be paid for by plaintiff, plaintiff concluded that defendant had no intention of honoring the limited warranty and would likely continue to demand additional tear down and

diagnosis until the warranty was rendered valueless. Therefore, plaintiff had the Durango towed to a different facility and repaired, at a cost of $4,047. Thereafter, plaintiff brought suit against defendant. Plaintiff's first amended complaint [FN1] contained claims of violation of the MCPA, breach of contract and fraud.

> FN1. Plaintiff filed the complaint as a class action and attempted to have the case certified as a class action, but the trial court denied plaintiff's motion for class certification.

***2** Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). Plaintiff responded to defendant's motion for summary disposition and filed a counter-motion for summary disposition under MCR 2.116(I)(2). The trial court denied both parties' motions for summary disposition, and the case proceeded to trial. At trial, the trial court determined that the proofs for plaintiff's three claims were likely to be duplicative and, to avoid jury confusion, ruled that the trial should be limited to plaintiff's MCPA claim.

At trial, Robert John Weir, the managing mechanic at North Hill Marathon, stated that after plaintiff's vehicle was towed to North Hill Marathon, the mechanics examined the vehicle and discovered that there was a hole in the oil pan and determined that one of the internally lubricated parts in the lower end of the engine had broken and pierced the oil pan, rendering the engine irreparable. Weir asserted that he described the problem with the oil pan to plaintiff and told him that the Durango needed a new motor. As required by plaintiff's limited warranty, North Hill Marathon "called and told them [defendant] there was a hole in the pan and that it was going to need an engine, there was no fixing it." Weir offered defendant two options for engine replacement. According to Weir, defendant "told me that we would have to find out exactly what broke on the vehicle, what came through the pan." Weir asserted that defendant insisted that North Hill Marathon conduct additional tear down and diagnosis, instructing Weir to remove the oil pan to discover exactly which engine parts had broken. Defendant also informed Weir that the expense of the additional tear down would be borne by plaintiff.

When North Hill removed the oil pan and inspected the engine, they discovered that the engine had seized up and that there was a big hole in the oil pan and many broken pistons and rods in the oil pan. According to Weir, the damage was caused by a lack of oil pressure, which could have been caused by the pump not working properly, low oil due to the owner's failure to put oil in the vehicle, or because the channels through which the oil flowed were plugged or obstructed. He stated that the majority of the time problems with oil pressure are caused by a faulty pump and that given that plaintiff had only had the Durango for three months, he doubted that the problem with the oil pressure was due to plaintiff's failure to put oil in the vehicle because "it shouldn't get that low on oil that quickly." After Weir contacted defendant again and explained their findings after removing the oil pan and inspecting the engine, defendant then insisted that the entire engine be disassembled and examined to "find out exactly what caused it to break loose" before it would agree to pay for any repairs. The North Hill mechanics did not believe that additional tear down was necessary and did not have time to undertake such thorough disassembly of the motor. They estimated that the cost to remove the engine, disassemble it, and repair it, could be as much as $1,500. In all, plaintiff spent $478 for North Hill to tear down and diagnose the vehicle.

***3** The deposition of Robert Charles Lindsay, a regional sales manager for defendant, was read into evidence at trial. Lindsay testified that defendant had been doing business in Michigan since 1998 or 1999 and that defendant did business in 16 or 17 states. Lindsay asserted that under plaintiff's limited warranty, plaintiff was required to bear the costs of tear down and diagnosis to determine whether a covered part was damaged. According to Lindsay, before defendant will pay on a warranty, it must know the cause of a defect. Lindsay asserted that plaintiff's engine blew, but that defendant would not pay for the engine's repair or replacement until it had a diagnosis of why the engine blew. Lindsay denied knowing that plaintiff's engine blew or broke down because of a failure of the oil pump, and he asserted that he did not know if defendant was told that the cause of the

engine blowing was the failure of the oil pump. He stated that plaintiff never authorized tear down of the vehicle to the point where defendant knew what was wrong with it. Lindsay confirmed that defendant required a determination of the exact cause of the failure of a covered part before it would pay. According to Lindsay, even if a hole was visible in the oil pan (a covered part), defendant was nonetheless justified in requiring plaintiff to pay for additional tear down and diagnosis to determine what caused the hole. Lindsay asserted: "We require tear down to find out if a noncovered part did cause that covered part to fail[,]" and if a noncovered part caused the engine to fail, "[t]he consumer would not have a claim."

Although Lindsay denied knowing if defendant had been informed that the engine failed because of the failure of the oil pan, Neil Bomgardner, defendant's national sales manager, testified that defendant was initially informed that the oil pump had failed and that the oil pump and pan were covered components under plaintiff's limited warranty.

II. ANALYSIS

Defendant argues that the trial court erred in denying its motion for summary disposition. Although defendant moved for summary disposition of plaintiff's MCPA claim under both MCR 2.116(C)(8) and (10), defendant only challenges the trial court's denial of the motion based on MCR 2.116(C)(10). This Court's review of a trial court's grant or denial of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337, 572 N.W.2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v. Charlevoix Co. Rd. Comm'rs*, 227 Mich.App. 621, 625, 576 N.W.2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626, 576 N.W.2d 712; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.' " *DeBrow v. Century 21 Great Lakes, Inc. (After Remand)*, 463 Mich. 534, 539, 620 N.W.2d 836 (2001), quoting *Harts v. Farmers Ins. Exchange*, 461 Mich. 1, 5, 597 N.W.2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362, 547 N.W.2d 314 (1996). [*Clerc v. Chippewa Co. War Memorial Hosp.*, 267 Mich.App. 597, 601, 705 N.W.2d 703 (2005), lv den and remanded --- Mich. ---- (April 6, 2007).]

***4** The MCPA defines and enumerates "[u]nfair, unconscionable, or deceptive methods, acts, or practices" that are unlawful in the conduct of trade or commerce. MCL 445.903. The evidence submitted by plaintiff in opposition to defendant's motion for summary disposition established an issue of fact regarding whether defendant violated the MCPA by requiring tear down and diagnostics above that which was required by the language of the limited warranty and in violation of the MCPA. The limited warranty provides that plaintiff "is responsible for all charges, relating to the tear down and diagnosis of the vehicle[.]" In plaintiff's affidavit, plaintiff avers that when his Durango broke down, he had it towed to North Hill Marathon and that he "was informed by North Hill Marathon that the engine blew due to the failure of the oil pump." According to plaintiff's affidavit, defendant refused to authorize repairs and instead demanded additional engine tear down. Plaintiff asserted: "it was unfair of CARS to require a tear down of my vehicle when it was already known that the cause of the engine failure was that the oil pump failed...."

Defendant argues that plaintiff's affidavit relies on hearsay inasmuch as plaintiff avers that he "was informed by North Hill Marathon that the engine blew due to the failure of the oil pump." It is true that evidence offered in support of or in opposition to a motion for summary disposition can be considered only to the extent that it is admissible. MCR 2.116(G)(6);

FACE Trading, Inc. v. Dep't of Consumer & Industry Services, 270 Mich.App. 653, 675, 717 N.W.2d 377 (2006). Because hearsay is generally not admissible, MRE 802, evidence opposing a motion for summary disposition may not be considered if it is hearsay, and a plaintiff may not merely promise to provide admissible evidence at trial. *Trentadue v. Buckler Automatic Lawn Sprinkler Co.*, 266 Mich.App. 297, 305, 701 N.W.2d 756 (2005), lv gtd 475 Mich. 906, 717 N.W.2d 329 (2006).

Contrary to defendant's argument, the statement at issue is not hearsay. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Plaintiff's statement that he was informed "by North Hill Marathon that the engine blew due to the failure of the oil pump" was not hearsay by definition because it was not offered to establish as truth that the oil pump caused the engine to blow up. Rather, this statement was offered to show defendant's response to being informed that the failure of plaintiff's engine was caused by a covered part under the limited warranty. " 'An utterance or a writing may be admitted to show the effect on the hearer or reader when this effect is relevant. The policies underlying the hearsay rule do not apply because the utterance is not being offered to prove the truth or falsity of the matter asserted.' " *People v. Fisher*, 449 Mich. 441, 449-450, 537 N.W.2d 577 (1995) (citation omitted). Therefore, defendant's contention that plaintiff's affidavit contained improper hearsay is without merit. The statement was included to show defendant's response, which was to refuse to authorize payment for the repairs and instead require additional tear down and diagnostics, to information that tended to show that the failure of plaintiff's engine was caused by a problem with a part that should have been covered under the limited warranty.

***5** Courts are liberal in finding that a genuine issue of material fact exists. *Citizens Ins. Co. of America v. Auto Club Ins. Ass'n*, 179 Mich.App 461, 464, 446 Mich. 482 (1989). We find that based on the language in the limited warranty and plaintiff's affidavit, plaintiff established an issue of fact regarding whether defendant required tear down and diagnostics beyond that which was required in the language of the limited warranty and in violation of the MCPA. Therefore, the trial court properly denied defendant's motion for summary disposition.

Defendant next argues that the trial court erred in denying its motion for directed verdict. This Court reviews de novo a trial court's decision with respect to a motion for directed verdict. *Wickens v. Oakwood Healthcare System*, 242 Mich.App. 385, 388, 619 N.W.2d 7 (2000), rev'd in part and vacated in part on other grounds 465 Mich. 53, 631 N.W.2d 686 (2001). This Court must view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party and must grant every reasonable inference to the nonmoving party and resolve any conflict in the evidence in favor of the nonmoving party to determine whether a question of fact existed. *Id.* at 388-389, 619 N.W.2d 7. A directed verdict is appropriate only when no factual questions exist on which reasonable minds could differ. *Id.* at 389, 619 N.W.2d 7. This Court may not substitute its judgment for that of the jury. *Id.*

Defendant argues that the trial court erred in denying its motion for directed verdict for two reasons. First, plaintiff admitted that he did not, as required by the limited warranty, secure defendant's authorization before having the vehicle repaired. Second, defendant was never informed that the damage to plaintiff's vehicle was either caused or likely caused by the failure of a covered component.

Plaintiff's theory at trial was that defendant violated the following three provisions of the MCPA:
(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

* * *

(n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.

* * *

(s) Failing to reveal a material fact, the omission of

which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

* * *

(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner. [MCL 445.903.]

The trial court denied defendant's motion for directed verdict, stating that there was "plenty of evidence that it was obvious that a covered component had failed, and that this requirement of tear down was completely unnecessary, excessive...." Viewing the evidence introduced at trial in a light most favorable to plaintiff, as the nonmoving party, the evidence establishes an issue of fact regarding whether defendant was aware that there was a hole in the oil pan (a covered part) and whether defendant required unreasonably excessive tear down and diagnostics before it would authorize payment for damage that should have been covered under the limited warranty. Regarding whether defendant was aware that the damage to the engine was caused by a hole in the oil pan, Weir, the manager at North Hill Marathon, where plaintiff's vehicle was initially towed after it broke down, asserted that North Hill Marathon "called and told them [defendant] there was a hole in the pan and that it was going to need an engine, there was no fixing it." Bomgardner, defendant's national sales manager, also admitted that defendant was initially informed that the oil pump in plaintiff's vehicle had failed. Defendant contends that it was entitled to a directed verdict because Weir stated that plaintiff's failure to put oil in the vehicle could have caused the problem with the oil pan. This argument ignores the fact that the evidence must be viewed in a light most favorable to plaintiff, however, and Weir testified that although it was possible that the problem was caused by the lack of oil, the majority of the time problems with oil pressure are caused by a faulty pump and it was doubtful that the problem with the oil pressure was due to plaintiff's failure to put oil in the car because plaintiff had only had the vehicle for three months and "it shouldn't get that low on oil that quickly." Furthermore, Bomgardner testified that there was "no sludge in the oil pan which means that the oil was good."

***6** The testimony of Weir and Lindsay, defendant's corporate representative in the litigation, and Bomgardner, establish an issue of fact regarding whether defendant required unreasonably excessive tear down and diagnosis before authorizing payment under the limited warranty. According to Weir, after it was communicated to defendant that the engine failed because of a hole in the oil pan, defendant "told me that we would have to find out exactly what broke on the vehicle, what came through the pan." Lindsay admitted that defendant required a determination of the exact cause of the failure of a covered part before it would pay. According to Lindsay, even if a hole was visible in the oil pan (a covered part), defendant was nonetheless justified in requiring plaintiff to pay for additional tear down and diagnosis to determine what caused the hole. Lindsay asserted: "We require tear down to find out if a noncovered part did cause that covered part to fail[,]" and if a noncovered part caused the engine to fail, "[t]he consumer would not have a claim." Weir, Bomgardner and Lindsay's testimony established an issue of fact regarding the existence of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction, MCL 445.903(1)(n), constituted the failure to reveal a material fact (the unreasonable extent to which defendant would require tear down and diagnosis), which tended to mislead or deceive plaintiff and other consumers of the limited warranty and which could not reasonably be known by the consumer, MCL 445.903(1)(s), and established an issue of fact regarding whether defendant failed to reveal the extent to which it required tear down and diagnosis that are material to the transaction in light of representations of fact made in a positive manner, MCL 445.903(1)(cc).

Defendant argues that it is undisputed that defendant was never given any information to suggest that the most likely cause of the damage was the failure of a covered component. This assertion is simply not supported by the record. Viewing the evidence in a light most favorable to plaintiff, Weir's testimony that North Hill Marathon "called and told them [defendant] there was a hole in the pan and that it was going to need an engine" and Bomgardner's testi-

mony that defendant was initially informed that the oil pump had failed and that the oil pump and pan were covered components under plaintiff's limited warranty is sufficient to establish an issue of fact regarding whether defendant had been informed that the cause of plaintiff's engine failure was a hole in the oil pan.

Defendant's argument that plaintiff admitted that he did not, as required by the limited warranty, secure defendant's authorization before having the vehicle repaired, is irrelevant to whether the trial court erred in denying his motion for directed verdict. Defendant's conduct, not plaintiff's conduct, was relevant for purposes of determining whether defendant violated the MCPA.

***7** Viewing the evidence in a light most favorable to plaintiff, there were issues of fact regarding whether defendant had been informed that the cause of plaintiff's engine failure was because of a hole in the oil pan, a covered component, and whether defendant acted in such a manner as to require unreasonable tear down and diagnosis which, in effect, rendered the limited warranty purchased by plaintiff worthless and violated the MCPA. Therefore, the trial court properly denied defendant's motion for directed verdict.

Defendant next argues that the trial court erred in entering a permanent injunction. A grant of injunctive relief is reviewed for an abuse of discretion. *Michigan Coalition of State Employee Unions v. Civil Service Comm.*, 465 Mich. 212, 217, 634 N.W.2d 692 (2001). While the granting of injunctive relief is within the sound discretion of the trial court, the decision must not be arbitrary and must be based on the facts of the particular case. *Higgins Lake Prop. Owners Ass'n v. Gerrish Twp.*, 255 Mich.App. 83, 105-106, 662 N.W.2d 387 (2003).

As part of its judgment, the trial court entered the following permanent injunction against defendant:
C.A.R.S. Protection Plus, Inc. is prohibited from imposing tear down and diagnostic testing costs on its warranty holders for the mere purpose of determining the precise reason why the covered part was damaged or failed where it is evident that a covered part has been damaged or failed and there is no legitimate reason to suspect that the failure of the covered part was caused by negligent maintenance by the warranty holder.

The MCPA authorizes an action to enjoin in accordance with the principles of equity a person who is engaging in or is about to engage in a method, act, or practice which is unlawful under the MCPA. MCL 445.911(1)(b); *Head v. Phillips Camper Sales & Rental, Inc.*, 234 Mich.App. 94, 110, 593 N.W.2d 595 (1999). Injunctive relief is an extraordinary remedy that is normally granted only when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury. *Higgins Lake, supra* at 106, 662 N.W.2d 387. "Although the plaintiff need not demonstrate the absence of an adequate remedy at law to obtain injunctive relief under the MPCA, other 'principles of equity' still apply. MCL 445.911(1)(b)." *Head, supra* at 111, 593 N.W.2d 595. Thus, a real and imminent danger of irreparable injury must exist to support a grant of injunctive relief. *Id.*

Our decision in *Head* is instructive regarding the propriety of injunctive relief in a MCPA case. In *Head*, the plaintiff purchased a pop-up camper from the defendant. *Id.* at 98, 593 N.W.2d 595. After the defendant was unable to fix problems with the camper, the plaintiff ultimately requested a refund from the defendant, which the defendant refused. *Id.* at 99-100, 593 N.W.2d 595. The plaintiff filed suit against the defendant, and her complaint included a claim for violations of the MCPA. *Id.* at 100, 593 N.W.2d 595. The plaintiff also sought a permanent injunction to enjoin the defendant from selling vehicles without possessing documents enabling it to convey marketable title. *Id.* The trial court declined plaintiff's request for injunctive relief, finding that plaintiff failed to demonstrate irreparable harm. *Id.* at 110, 593 N.W.2d 595. We affirmed, stating:
***8** In this case, the trial court correctly observed that plaintiff failed to demonstrate either a pattern of violating the MCPA or any likelihood that defendant ... will engage in unlawful conduct in the future. Accordingly, the trial court properly declined to issue an injunction because no danger of irreparable injury existed. [*Id.* at 111, 593 N.W.2d 595.]

Unlike the plaintiff in *Head*, plaintiff in the instant case did introduce evidence demonstrating a pattern of violating the MCPA. Specifically, in support of one of plaintiff's motions for class certification, plaintiff attached a press release of the Attorney General of Pennsylvania in which the AG announced that it had filed a lawsuit against defendant in Pennsylvania based on defendant's conduct of "failing to honor its warranties, failing to disclose key terms and conditions of its warranties and misrepresenting other warranty coverage items." According to the press release, the lawsuit followed an investigation into complaints from nearly 30 consumers in numerous counties. Furthermore, the testimony of Lindsay indicated that defendant did business in 16 or 17 states and that defendant applied the limited warranties uniformly nationwide. In light of the press release and Lindsay's testimony, we find that plaintiff did demonstrate that defendant engaged in a pattern of violating the MCPA and that justice required the injunction. The trial court did not abuse its discretion in entering a permanent injunction.

Defendant next argues that the trial court erred in instructing the jury that it could find defendant liable if it found that defendant breached the limited warranty, that the trial court improperly influenced the presentation of the case to the jury by instructing counsel for plaintiff regarding how to argue the case, and that the trial court made numerous comments that improperly indicated bias, prejudice or partiality in favor of plaintiff.

Claims of instructional error are reviewed de novo on appeal. *Jackson v. Nelson*, 252 Mich.App. 643, 647, 654 N.W.2d 604 (2002). Even if somewhat imperfect, jury instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Id.* Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *id.* Jury instructions are reviewed in their entirety to determine whether they accurately and fairly presented the applicable law and the parties' theories. *Meyer v. Center Line*, 242 Mich.App. 560, 566, 619 N.W.2d 182 (2000). Because defendant did not object to the challenged instruction at trial, this Court's review is for plain error. *Shinholster v. Annapolis Hosp.*, 255 Mich.App. 339, 350, 660 N.W.2d 361 (2003), aff'd and remanded 471 Mich. 540, 685 N.W.2d 275 (2004). To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) the plain error affected substantial rights. *People v. Carines*, 460 Mich. 750, 763, 597 N.W.2d 130 (1999). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.*

***9** Regarding defendant's jury instruction issue, defendant argues that the following instruction was improper: "Question two asks, did CARS Protection Plus cause damage to Matthew Van Eman. Obviously that means by breach of the warranty or by violation of the consumer protection act obviously. And your answer would be yes or no." Jury instructions must be read as a whole, and even if there are some imperfections, there is no basis for reversal if the instruction adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *People v. Martin*, 271 Mich.App. 280, 337-338, 721 N.W.2d 815 (2006). In addition to the challenged instruction, the trial court specifically instructed the jury that "[t]his is a claim under the Michigan consumer protection act" and that "plaintiff has the burden of proving the defendant violated one or more of the applicable sections of the Michigan consumer protection act." The trial court also explained the three ways in which the jury could find that defendant violated the MCPA and that if it concluded that defendant did not violate the MCPA in one of the three ways, that "would end your deliberations. And the foreman would sign it at that point and you would write a note that you've reached a verdict." Contrary to defendant's argument on appeal, the instructions were not improper when viewed in their entirety. Viewing the instructions as a whole, they adequately conveyed to the jury the applicable law, the nature of plaintiff's claim, plaintiff's burden of proof, and the elements plaintiff was required to prove in order to recover under the MCPA. Defendant has not established plain error regarding the trial court's instructions.

Defendant next argues that the trial court improperly

cut off defense counsel's cross-examination of plaintiff and made numerous statements and comments which indicated the trial court's bias and favoritism towards plaintiff. Although the trial court has broad discretion to control trial proceedings, that discretion may not impugn judicial impartiality. *People v. Conley*, 270 Mich.App. 301, 307-308, 715 N.W.2d 377 (2006). In determining whether judicial remarks or conduct were improper, a court should consider whether the remarks of conduct were of such a nature as to have unduly influenced the jury. *Id.* at 308, 715 N.W.2d 377. We have carefully reviewed the allegedly improper comments and conduct of the trial court and conclude that the trial court's remarks and conduct were not improper, did not impugn judicial impartiality, and did not unduly influence the jury. *Id.* at 307-308, 715 N.W.2d 377.

Defendant finally argues that the trial court awarded plaintiff unreasonably excessive attorney fees. This Court reviews for an abuse of discretion the trial court's decision whether to award attorney fees and the determination of the reasonableness of such fees. *Windemere Commons I Ass'n v. O'Brien*, 269 Mich.App. 681, 682, 713 N.W.2d 814 (2006). The abuse of discretion standard recognizes " 'that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.' " *Maldonado v. Ford Motor Co.*, 476 Mich. 372, 388, 719 N.W.2d 809 (2006), quoting *People v. Babcock*, 469 Mich. 247, 269, 666 N.W.2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v. Custer*, 476 Mich. 545, 557, 719 N.W.2d 842 (2006). When the trial court selects one of the principled outcomes, the trial court has not abused its discretion and it is proper for this Court to defer to the trial court's judgment. *Maldonado, supra* at 388, 719 N.W.2d 809.

***10** The trial court held an evidentiary hearing on the issue of attorney fees. At the hearing, counsel for plaintiff testified and submitted a document itemizing the number of hours spent on the case and summarizing the action taken on behalf of plaintiff. This list indicated that counsel for plaintiff spent 277.75 hours on the case and listed the total attorney costs as $64,956.25. Defendant presented an expert witness on the issue of attorney fees. The expert testified regarding various charges that he asserted were unreasonable and should not have been charged. The trial court did not award the full amount of attorney fees requested by plaintiff. Instead, the trial court awarded plaintiff $43,537.50 in attorney fees based on an hourly rate of $225 and 193.5 hours.

The MCPA provides for the recovery of attorney fees. Under MCL 445.911(2), a person who suffers a loss as a result of a violation of the MCPA may generally recover the greater of actual damages or $250, along with reasonable attorney fees. MCL 445.911(2). The purpose of the attorney fee provision of the MCPA " 'is to afford an indigent client the opportunity to seek protection and obtain a judgment where otherwise precluded because of monetary constraints.' " *LaVene v. Winnebago Industries*, 266 Mich.App. 470, 477, 702 N.W.2d 652 (2005); quoting *Smolen v. Dahlmann Apartments, Ltd.*, 186 Mich.App. 292, 297, 463 N.W.2d 261 (1990). In determining a reasonable amount of attorney fees to award under the ELCRA, the court must consider: (1) the skill, time and labor involved, (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer, (3) the fee customarily charged in that locality for similar services, (4) the amount in question and the results achieved, (5) the expenses incurred, (6) the time limitations imposed by the client or the circumstances, (7) the nature and length of the professional relationship with the client, (8) the professional standing and experience of the attorney, and (9) whether the fee is fixed or contingent. *Grow v. WA Thomas Co.*, 236 Mich.App. 696, 714-715, 601 N.W.2d 426 (1999). In making an award of attorney fees, the trial court need not detail its findings on each specific factor considered. *Wood v. DAIIE*, 413 Mich. 573, 588, 321 N.W.2d 653 (1982).

The record does not support plaintiff's suggestion that some of the attorney fees were incurred as a result of plaintiff's attempts to have the case certified as a class action. At the evidentiary hearing on the issue of attorney fees, counsel for plaintiff specifically stated that he went through and removed any fees associated with plaintiff's attempts to have the case certified

as a class action.

Defendant also argues that the trial court's award of attorney fees was based on an hourly rate that was higher than that requested by plaintiff. The trial court awarded fees based on a $225 hourly rate. The work on plaintiff's case was done by two attorneys from the same firm. The attorney who did most of the work was a young, new attorney, and the second attorney was a more experienced attorney. In the document detailing the attorney fees, the young attorney's billing rate was listed at $200 per hour and the more experienced attorney's billing rate was $325 per hour. Therefore, while it is true that the hourly rate awarded in this case is higher than one attorney who worked on the case, it is also significantly lower than the other attorney who worked on the case. The $225 rate is a reasonable compromise because it is closer to the rate of the young attorney, who did more work on the case than the more experienced attorney. Furthermore, defendant presented an expert witness who testified that in his opinion, reasonable attorney fees for an attorney preparing and trying a case under the MCPA would be between $175 and $225 per hour. Therefore, the trial court's award of attorney fees at a rate of $225 per hour is within the rate that defendant's own expert testified would be reasonable for this case.

***11** Furthermore, the fact that the attorney fee award was substantially higher than plaintiff's damages does not render the award unreasonable. Consumer protection cases present "special circumstances" that the trial court must consider in awarding attorney fees. *Jordan v. Transnational Motors, Inc.*, 212 Mich.App. 94, 99, 537 N.W.2d 471 (1995). This Court has recognized that in consumer protection cases, "the monetary value of the case is typically low" and that "if attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients" and "the remedial purposes of the statutes in question will be thwarted." *Id.* at 98, 537 N.W.2d 471. Counsel for plaintiff testified that he billed conservatively in this case. Based on the document submitted by counsel for plaintiff detailing the number of hours spent on the case, the attorney fee award did not result in a windfall to plaintiff's counsel. The fact that the trial court reduced the amount of attorney fees sought by plaintiff shows that the trial court evaluated the reasonableness of the attorney fee award and considered defendant's expert's testimony that some of the charges were unreasonable. Furthermore, the amount of the award is justified based on counsel's experience, the fee customarily charged to represent plaintiffs in consumer protection cases, the skill, time and labor involved, the fact that counsel had to prepare for trial, and the results achieved.

The trial court did not abuse its discretion in its award of attorney fees. Even if another trial court would have found a lesser amount of attorney fees to be reasonable, the decision to grant or deny an award of attorney fees is within the sound discretion of the trial court, and the abuse of discretion standard recognizes that there are circumstances where there is more than one reasonable and principled outcome. *Maldonado, supra* at 388, 719 N.W.2d 809. The trial court's decision to award attorney fees does not fall outside the principled range of outcomes. *Woodard, supra* at 557, 719 N.W.2d 842. Therefore, the trial court did not abuse its discretion and it is proper for this court to defer to the trial court's judgment. *Maldonado, supra* at 388, 719 N.W.2d 809.

At oral argument, plaintiff argued that he is entitled to recover approximately $15,000 in appellate attorney fees. This Court has held that appellate attorney fees are allowable under the MCPA. *Solution Source, Inc. v. LPR Assoc. Ltd. Partnership*, 252 Mich.App. 368, 374, 652 N.W.2d 474 (2002). Accordingly, we remand for a determination of an award of plaintiff's actual and reasonable attorney fees.

III. CONCLUSION

Affirmed, but remanded for proceedings consistent with this opinion.

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