

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

FARM BUREAU GENERAL INSURANCE  
COMPANY, a/s/o William Bryan Dandurand  
and Christine Marie Dandurand,

Plaintiff,

Case No. 15-02521-CKB

vs.

HON. CHRISTOPHER P. YATES

BMW OF NORTH AMERICA, LLC,

Defendant.

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OPINION AND ORDER GRANTING IN PART, AND DENYING IN  
PART, DEFENDANT’S MOTION FOR SUMMARY DISPOSITION

For some reason, the specialized business docket is awash in insurance disputes about motor vehicles that burst into flames. This action arises from a fire that occurred on October 26, 2014, that caused \$40,174.90 in damages to a new BMW 328 as well as \$9,000 in damages to real and personal property. After paying all of those losses, Plaintiff Farm Bureau General Insurance Company (“Farm Bureau”) stepped into the shoes of its insureds and filed this case against Defendant BMW of North America, LLC (“BMW”), contending that some flaw in the BMW 328 caused the fire. Farm Bureau has pleaded four claims for breach of implied warranty, breach of express warranty, violation of the Michigan Consumer Protection Act (“MCPA”), see MCL 445.901, *et seq.*, and liability pursuant to the Magnuson-Moss Warranty Act, 15 USC 2301, *et seq.*<sup>1</sup> Farm Bureau plainly has a viable claim of some sort based upon the underlying facts, but the Court nonetheless must struggle to determine which legal theories are proper vehicles for seeking recovery. This opinion does that work.

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<sup>1</sup> The specialized business docket is littered with such garden-variety consumer claims simply because insurance providers can proceed on a subrogation theory against corporate defendants.

## I. Factual Background

Defendant BMW has challenged each count of the complaint by seeking summary disposition under MCR 2.116(C)(8) and (10). “A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint[,]” Maiden v Rozwood, 461 Mich 109, 119 (1999), so the Court must limit itself to the allegations set forth in the complaint when addressing such a request for relief. “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint” and permits the Court to consider “the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties.” Corley v Detroit Board of Education, 470 Mich 274, 278 (2004). Because Defendant BMW has sought relief on both grounds, the Court shall first consider Farm Bureau’s complaint and then turn to the evidence in the record.

William and Christine Dandurand bought a new BMW 328 in August 2014.<sup>2</sup> See Complaint, ¶6. On October 26, 2014, Christine Dandurand drove the BMW to the Triemstras’ house in Jenison and parked in the driveway. See id., ¶8. While the car was parked in the driveway, it caught on fire, destroying the vehicle itself and causing damage to the Triemstras’ property. See id., ¶9. After the fire, the Dandurands submitted a claim to Plaintiff Farm Bureau for insurance coverage for all of the losses. See id., ¶10. Farm Bureau ultimately paid \$40,174.90 to the Dandurands for the loss to the BMW vehicle, see id., ¶11, and an additional \$9,000 to cover the Triemstras’ losses. See id., ¶12. Farm Bureau thereafter stepped into the shoes of its insureds and filed this action against BMW on March 20, 2015. After discovery ran its course, BMW moved for summary disposition on all of the claims in the complaint, citing MCR 2.116(C)(8) and (10) as authority for the relief.

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<sup>2</sup> The complaint alleges a purchase, but Defendant BMW insists that the vehicle was leased.

## II. Legal Analysis

A motion for summary disposition pursuant to MCR 2.116(C)(8) should be “granted if ‘[t]he opposing party has failed to state a claim on which relief can be granted.’” State ex rel Gurganus v CVS Caremark Corp, 496 Mich 45, 62-63 (2014). In reviewing such a motion, the Court “must accept all factual allegations in the complaint as true,” id. at 63, and grant relief only if “the claims alleged are ‘so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.’” Maiden, 461 Mich at 119. In contrast, a motion for summary disposition under MCR 2.116(C)(10) should be granted “if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” West v General Motors Corp, 469 Mich 177, 183 (2003). Such “[a] genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” Id. Applying these familiar standards, the Court shall turn to Defendant BMW’s request for summary disposition on each of Plaintiff Farm Bureau’s four claims.

### A. Breach of Implied Warranty.

Under the Michigan version of the Uniform Commercial Code (“UCC”), MCL 440.1101, *et seq*, the BMW 328 motor vehicle at issue here constitutes a “good.” See MCL 440.2105(1); see also Radina v Wieland Sales, Inc, 297 Mich App 369, 375 (2012). Thus, the Court must consult the UCC to determine whether Plaintiff Farm Bureau can assert a claim for breach of implied warranty against BMW. The UCC makes clear that the sale of a “good” carries with it implied warranties of merchantability, see MCL 440.2314, and fitness for a particular purpose. See MCL 440.2315. But these implied warranties are subject to exclusion or modification. See MCL 440.2316.

In Count One of its complaint, Plaintiff Farm Bureau alleges that the BMW 328 “contained manufacturing defects including, but not limited to, a defective electrical system, which caused the fire at issue.” See Complaint, ¶ 17. Thus, Farm Bureau contends that Defendant BMW breached the implied warranty of fitness for a particular purpose. See id., ¶ 21. Curiously, Defendant BMW has devoted most of its argument to asserting that Farm Bureau cannot establish a viable products-liability claim. Our Court of Appeals has clearly explained, however, that “where the foundation of the relationship between the parties is contractual and no personal injury or damage to property other than the subject goods themselves is alleged[,]” the plaintiff’s claim must rest upon the UCC, rather than any tort theory, including products liability. McGhee v GMC Truck & Coach Division, General Motors Corp, 98 Mich App 495, 505-506 (1980). Thus, the Court need not take up the arguments concerning Farm Bureau’s inability to sustain a products-liability claim.<sup>3</sup> Beyond that, BMW argues that Count One presents “a claim for breach of implied warranty *in tort*.” See Defendant BMW of North America, LLC’s Motion for Summary Disposition at 23 (emphasis added). The UCC surely does not create a claim “in tort.” Therefore, the Court must focus on the claim that has been pleaded, as opposed to the claim that BMW imagines it faces in Count One.<sup>4</sup>

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<sup>3</sup> The Court recognizes that Plaintiff Farm Bureau’s effort to recover the \$9,000 that it paid for the damage to the Triemstras’ property does not fall neatly within the logic of the McGhee case. Nevertheless, the bulk of the loss took the form of compensation for fire damage to the BMW itself, so Defendant BMW’s products-liability argument has no bearing on the central component of Farm’s Bureau’s claim.

<sup>4</sup> Defendant BMW enjoys certain benefits from the characterization of the claim as predicated upon the UCC, rather than products-liability law. Most importantly, the damages that Plaintiff Farm Bureau can obtain are much more limited in a UCC action than in a products-liability case. As our Supreme Court determined in defining the scope of the economic-loss doctrine, an implied-warranty claim implicates principles of contract, not tort, so the plaintiff’s damages on an implied-warranty claim are limited to “direct, incidental, and consequential losses, including property damage.” See Neibarger v Universal Cooperatives, Inc, 439 Mich 512, 531-532 (1992).

According to the UCC, which forms the basis for the implied-warranty claim in Count One: “Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.” See MCL 440.2315. “Thus, to establish a valid warranty of fitness for a particular purpose, ‘the seller must know, at the time of sale, the particular purpose for which the goods are required and also that the buyer is relying on the seller to select or furnish suitable goods.’” Leavitt v Monaco Coach Corp, 241 Mich App 288, 293 (2000). Those questions of the seller’s knowledge ordinarily present factual issues that must be resolved at trial. See id. at 294-295.

The evidence establishes that Plaintiff Farm Bureau’s insureds bought the BMW 328 for the purpose of driving the vehicle on public roads. Within three months of the purchase, however, the vehicle caught on fire and was completely destroyed. Such an outcome implicates the protection of an implied warranty of fitness for a particular purpose, assuming that the seller did not disclaim such a warranty. To date, Defendant BMW has neither cited nor argued about a disclaimer, so the Court must presume that BMW failed to disclaim the warranty of fitness for a particular purpose. In light of that presumption, the Court must acknowledge that a genuine issue of material fact exists, which precludes the Court from awarding summary disposition to BMW on the implied-warranty claim in Count One of Farm Bureau’s complaint.<sup>5</sup> See Leavitt, 241 Mich App at 294-295.

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<sup>5</sup> Defendant BMW insists that Plaintiff Farm Bureau must prove a “defect” to prevail on its implied-warranty claim. In products-liability litigation, a “breach of warranty claim tests the fitness of the product and requires that the plaintiff “prove a defect attributable to the manufacturer and causal connection between the defect and the injury or damage of which he complains.”” Kenkel v The Stanley Works, 256 Mich App 548, 556 (2003). But even there, “[i]t is within the province of the jury to infer the existence of a defective condition from circumstantial evidence alone; there is no requirement that the actual defect need be proven.” Caldwell v Fox, 394 Mich 401, 410 (1975).

B. Breach of Express Warranty.

Count Two of the complaint presents a claim for breach of an express warranty, but it makes no mention of the specific warranty upon which it rests. “An express warranty may be created only between a seller and a buyer, and any such express warranty becomes a term of the contract itself.” Heritage Resources, Inc v Caterpillar Financial Services Corp, 284 Mich App 617, 634 (2009). “In order to determine whether any express warranties were made, it is generally necessary to examine the terms of the parties’ contract.” Id. at 636. Plaintiff Farm Bureau did not attach a contract to its complaint, and Count Two only superficially alleges that Defendant BMW “made express warranties and representations to plaintiff’s insured, both orally and in writing and through advertising and conduct.”<sup>6</sup> See Complaint, ¶ 27. Farm Bureau’s brief simply asserts: “The defendant’s BMW came with an unlimited warranty express warranty that covered the BMW at the time of the fire at issue.” See Plaintiff’s Response in Opposition to Defendant’s Motion for Summary Disposition at 11. This sentence provides no support for an express-warranty claim. Without a copy of the contract between Farm Bureau’s insureds and BMW, the Court “cannot discern whether [BMW] made any express warranties to” Farm Bureau’s insureds. See Heritage Resources, 284 Mich App at 636. Thus, the Court must grant summary disposition to BMW on Count Two under MCR 2.116(C)(10), albeit with leave for Farm Bureau to amend Count Two in order to provide the language of an express warranty upon which Farm Bureau can rely.<sup>7</sup>

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<sup>6</sup> In addition, the complaint states that, pursuant to “MCL 440.2314, defendant warranted to plaintiff’s insured that the BMW manufactured and placed into the stream of commerce by defendant was of merchantable quality and fit for the ordinary purpose for which the vacuum is used.” See Complaint, ¶ 30. That allegation flows from implied warranties under the UCC. Thus, the allegation adds nothing to Farm Bureau’s claim for breach of express warranty. Indeed, paragraphs 33 and 34 in Count Two speak only of “breach of implied warranty.” See id., ¶¶ 33-34

<sup>7</sup> Leave to amend is appropriate under MCR 2.116(I)(5), but any amended version of Count Two must include precise language and a written warranty upon which Plaintiff Farm Bureau relies.

C. Violation of Michigan Consumer Protection Act.

Plaintiff Farm Bureau's third claim, which the complaint misidentifies as "Count IV," makes a demand for relief under the Michigan Consumer Protection Act ("MCPA"), MCL 445.901, *et seq*, which "prohibits 'unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce[.]'" Gorman v American Honda Motor Co, Inc, 302 Mich App 113, 128 (2013). The MCPA "defines 'trade or commerce' as 'the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes[.]'" Id. Consequently, Defendant BMW's sale of a motor vehicle to Plaintiff Farm Bureau's insureds involved a category of "trade or commerce" that could fall within the ambit of the MCPA.

The complaint alleges Defendant BMW violated the MCPA in two ways: (1) by representing "that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model," see MCL 445.903(1)(e); and (2) because gross discrepancies existed "between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits." See MCL 445.903(1)(y). Leaving aside BMW's argument about how the MCPA is supplanted in this case by the regulatory authority of the National Highway Traffic Safety Administration,<sup>8</sup> the Court detects a fundamental problem with Plaintiff Farm Bureau's MCPA claim. That is, Farm Bureau has utterly failed to offer evidence of any oral or written representations made by BMW to Farm Bureau's insureds. It appears that a commonplace vehicle transaction occurred without incident, but problems arose when the car burst into flames just a few months after the transaction.

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<sup>8</sup> At least one court has expressly rejected that argument presented by Defendant BMW itself. See State Farm Mutual Auto Ins Co v BMW of North America, LLC, No 08-12402, slip op at 12 (ED Mich Aug 7, 2009) (unpublished decision available at 2009 WL 2447612). A review of that decision demonstrates that BMW apparently has already made and lost many of the arguments it is making here.

Plaintiff Farm Bureau appears to have a viable claim for breach of implied warranty of fitness for a particular purpose, but Farm Bureau seems determined to lard that viable claim with farfetched theories aimed primarily at recovering attorney fees and other benefits in addition to its actual losses. Nothing in the record thus far supports a claim for violation of the MCPA. Accordingly, the Court must award summary disposition under MCR 2.116(C)(10) to Defendant BMW on the MCPA claim set forth in the complaint. With some trepidation, the Court shall allow Farm Bureau leave to amend its MCPA claim pursuant to MCR 2.116(I)(5). But the Court must put Farm Bureau on notice that a viable MCPA claim must include specific allegations and supporting evidence of oral or written representations by BMW that rise to the level of the standards set forth in MCL 445.903(1).

D. Violation of Magnuson-Moss Warranty Act.

The fourth count of the complaint, which inexplicably is identified as “Count V,” alleges that Defendant BMW committed a violation of the Magnuson-Moss Warranty Act, 15 USC 2301, *et seq.* Congress enacted the Magnuson-Moss Act “to ‘improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.’” The Grosse Pointe Law Firm, PC v Jaguar Land Rover North America, LLC, No 326312, slip op at 1 (Mich App Sept 22, 2016) (Beckering, J, concurring) (**published** opinion). Although the Act does not require a consumer product to be warranted, *id.*, citing 15 USC 2302(b)(2), where a warranty is provided, it is subject to the Act’s regulatory scheme. *Id.*, citing 15 USC 2302(a). The Act provides “for a private right of action for consumers in state or federal court when suppliers, warrantors, or service contractors violate its provisions.” *Id.* at 2, citing 15 USC 2310(d)(1). Therefore, Plaintiff Farm Bureau (in its insureds’ stead) may invoke the Act to support a claim if the facts bear out such a theory. See, e.g., King v Taylor Chrysler-Plymouth, Inc., 184 Mich App 204 (1990).

The Magnuson-Moss Warranty Act “provides remedies to consumers for breaches of express and implied warranties and permits consumers to file suit for damages.” Computer Network, Inc v AM General Corp, 265 Mich App 309, 319 (2005). “A consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under 15 USC 2301 *et seq.*, including failing to comply with written or implied warranties, may bring suit for damages and other remedies.” *Id.* at 320, citing 15 USC 2310(d)(1). Absent a disclaimer of implied warranties, Plaintiff Farm Bureau may at least proceed with a claim under the Magnuson-Moss Warranty Act on the theory that Defendant BMW violated the implied warranty of fitness for a particular purpose. Additionally, if Farm Bureau can establish that BMW made and then violated an express warranty, Farm Bureau can seek damages under 15 USC 2310(d) “under both written and implied warranties.” See Computer Network, 265 Mich App at 320-321. Thus, the Court must deny summary disposition to BMW on Farm Bureau’s claim under the Magnuson-Moss Warranty Act.

### III. Conclusion

For the reasons set forth in this opinion, Defendant BMW’s request for summary disposition under MCR 2.116(C)(8) and (10) is denied with respect to Plaintiff Farm Bureau’s claims for breach of implied warranty and violation of the Magnuson-Moss Warranty Act. In contrast, the Court shall grant summary disposition to BMW under MCR 2.116(C)(10) on Farm Bureau’s claims for breach of express warranty and violation of the MCPA, but the Court shall afford Farm Bureau two weeks’ leave to amend those two claims. See MCR 2.116(I)(5).

IT IS SO ORDERED.

Dated: October 4, 2016

  
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HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge