NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0210

AMMIE L. ANDERSON

VERSUS

DUPLESSIS PONTIAC-BUICK-GMC TRUCK, INC.

DATE OF JUDGMENT: SEP 2 3 2008

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
DOCKET NUMBER 2006-359, DIV P, PARISH OF ASCENSION
STATE OF LOUISIANA

THE HONORABLE MARILYN LAMBERT, JUDGE

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* * * * * *

BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Disposition: AFFIRMED.

Kuhn, J.

This appeal arises from a redhibition suit involving a 2003 Nissan Sentra, which was purchased by plaintiff, Ammie L. Anderson, from defendant, Duplessis Pontiac-Buick-GMC Truck, Inc. ("Duplessis") for a purchase price of $9,343.22. After purchasing the car, Anderson immediately began experiencing problems with it, and when Duplessis refused to provide certain repairs at its own expense, Anderson returned the vehicle and filed suit against Duplessis seeking the return of the purchase price. The trial court ordered Duplessis to pay Anderson the full purchase price, together with legal interest from the date of judicial demand, and all court costs. We affirm.

I. PROCEDURAL AND FACTUAL BACKGROUND

On September 21, 2006, Anderson purchased the car, financing it through her credit union, without purchasing an extended warranty. Anderson testified that she did not recall the finance manager explaining the terms of the "as is" sale. She testified that shortly after she left Duplessis, she noticed rain coming inside the window on the front passenger side of the car. A few days later, she returned to the dealership and voiced a complaint to the salesman, who had sold her the car. She stated that he put duct tape in the area of the leak and told her that it would take a "long time" for the weather-stripping part to come in. She explained that she was never notified by the salesman or the dealership that the part had come in.

Anderson also testified that "a couple of days later," the car "killed" on her, and she "couldn't turn the wheel" or "press the brakes." She stated she had to let it roll to a stop. The next day, the car did the same thing. She notified the salesman of her difficulties, who dispatched a tow truck to her residence to tow the car back to

Duplessis. Because Duplessis did not have the service equipment that would allow it to perform computer module diagnostic testing, Duplessis drove the car to a nearby Nissan dealership. The Nissan dealership replaced the camshaft position sensor, and pursuant to an open campaign affecting the 2003 Nissan Sentra, performed an idle air volume relearning procedure, which was needed to reduce the idle speed. Duplessis paid Nissan's invoice total of $74.33. During the period that her car was being serviced, Anderson declined Duplessis' offer of a loaner vehicle, explaining that she used her boyfriend's vehicle. Service records indicate that the car was towed into Duplessis on October 12, 2006, and was ready for pickup on October 17, 2006. According to the odometer readings between the time of sale and the time of these initial repairs, Anderson had driven the car only 394 miles.

When Anderson picked up her car, the service engine light came on later that same day. She tried to contact the salesman, and when she could not reach him, she spoke to Duplessis' service manager, who told her she would have to bring her car back to Nissan and have it fixed at her own expense. He did not offer her the option of bringing it back to Duplessis to have it fixed. Anderson contacted an attorney, and in November 2006, Anderson filed suit seeking return of the purchase price, reasonable attorney's fees, and costs of the suit.

At trial, Anderson testified she did not use the car after November 2006, and that she had returned it to Duplessis in March 2007, indicating she no longer wanted it. At this point, Anderson had only driven the car an additional 379 miles since the October 2006 repairs. She explained that as she drove the car to Duplessis, she had to "stomp the brakes in order to come to a stop" and that she did not feel safe in the car. She stated that she owned another two-door vehicle, but she purchased the

Nissan Sentra so that she could have a four-door vehicle to transport herself and her new baby. Based on the performance she received out of the car, she did not feel that it had served the purpose for which she had bought it. After dropping off her car at Duplessis, she acknowledged that she received a phone call from the service manager indicating that her car had been repaired, but she never picked it up. Duplessis' service records indicate that the car had been sent again to Nissan for "idle air valve learn." Duplessis paid Nissan's $75.00 invoice, and notified Anderson that the car was ready for pick up on March 29, 2007.

Robert Witty, Duplessis' service manager, testified that the Nissan Sentra had been obtained by the dealership as a trade-in during 2006. He explained that Duplessis performed a safety inspection on the car, and changed a tire, the battery, and the oil before selling the car to Anderson. He conceded that although Duplessis did not have the service equipment which would allow it to perform computer diagnostic testing before selling its used cars, it did not routinely send its used cars to competitor dealerships for diagnostic checks. He testified, however, that the car would not have been sold if a "check engine light" had been illuminated. He acknowledged that if the Nissan had previously malfunctioned, it would have had a stored code that could have been detected by hooking up the car to a Nissan computer module. He also acknowledged that before selling Duplessis' used cars, he did not check whether they had been subject to any open campaigns regarding defects or recalls. He was also not aware that anyone else at the dealership had done so. He explained that during an open campaign, the manufacturer notifies the dealer that a repair will be done at no cost to the customer and the manufacturer attempts to notify each owner about the problem with the vehicle.

Regarding the problems that Anderson had experienced with her Nissan Sentra, Witty testified that he knew nothing regarding whether any weather stripping had been ordered for the car. Regarding the stalling problem that she experienced, he acknowledged that a campaign bulletin had been sent to the Nissan dealers and there was a good possibility that the problem existed before the vehicle was ever traded in to the Duplessis dealership. He explained that the campaign addressed the reprogramming of an electrical component on the vehicle, described as "relearning the idle air valve."[1] He also admitted that the repairs performed in both October 2006 and March 2007 involved the same problem. Witty acknowledged that it looked like the Nissan dealership "was redoing what they did the first time." Witty conceded that the problems with the vehicle could not have been discovered by a simple inspection of the vehicle and involved highly technical malfunctions. When asked whether he could assure that the idling problem would not develop again, resulting in the car stalling and stopping on Anderson and her child, Witty was unable to do so.

Witty testified, however, that the problem had been fixed and the car "ran perfectly fine" the last time he had driven it. Contrary to his prior testimony, Witty also stated that he believed the problem that caused the car not to run did not exist at the time of the sale to Anderson. He further testified he did not detect any problems with the brakes, and he had not been informed by Anderson that she had experienced any problems with the brakes. Regarding the reported water leak,

[1] The October 12, 2006 Nissan repair order stated, "CHECK AND VERIFY OPEN CAMPAIGN ON 2003 ... SENTRA WITH QR25DE ENGINE CRANK ANGLE SENSOR ECM REPROGRAMMING FOLLOW REPAIR PROCEDURE OUTLINED IN RECALL BULLETIN NTB06-051 ON 2003 ... SENTRA WITH QR25DE ENGINE REPROGRAM ECM AND PERFORM IDLE AIR VOLUME RELEARNING PROCEDURE OP CODE 406061 FRT ...."

Witty explained that after a "real heavy rain for a couple of days," he examined the car and could not find any evidence of a water leak. Witty testified that Anderson was contacted to pick up her car, and when she did not pick it up, the car was eventually placed into storage.

Glen Wilkins, who oversaw the sales operations of the Duplessis dealership, testified that Duplessis did not check for recalls and campaigns on trade-ins that were to be resold, and he did not know there was a campaign bulletin that affected the Nissan Sentra when it was sold to Anderson. He further testified that the finance manager customarily informed the customer that the car was sold "as is," if the extended service contract was not purchased. At trial, he testified that the car was completely repaired. When questioned about the leak and the weather-stripping repair, he indicated he did not know there was a water leak, but stated that the repair would be made.

In reasons for judgment, the trial court found that the warranty waiver language was contradictory and implicitly found that Anderson had not waived the warranty against redhibitory defects. The trial court stated that the problems Anderson had experienced with the car were defects that existed prior to the sale, stating there was no indication that the defects would have occurred from ordinary use in the short passage of time that Anderson owned the car. The trial court found the defects "made the vehicle useless to [Anderson] or so inconvenient that if she had known they existed, she would not have purchased the vehicle." Additionally, the trial court determined that "Anderson gave Duplessis sufficient notice of the defect[s] as well as an opportunity to make repairs, which it was unable to do successfully within a reasonable period of time." By judgment dated April 28,

2008, the trial court rescinded the sale of the car and ordered Duplessis to pay Anderson the full purchase price of $9,343.22, together with legal interest from the date of judicial demand, and all court costs.

Duplessis has appealed, asserting the trial court erred in concluding that: 1) Anderson had not waived the warranty against redhibitory defects; 2) Duplessis failed to perform the repairs within a reasonable time; 3) Nissan's open campaign to make a "simple adjustment to the idling mechanism" of the used car was a redhibitory defect; 4) Anderson was told to make the "second and final repair" at her own expense because Duplessis made all of the repairs at its own expense; and 5) Duplessis was liable due to its failure to perform additional diagnostic testing on the used car that was available only through a non-affiliated business competitor/manufacturer.

II. ANALYSIS

A. Redhibition

Pursuant to Louisiana Civil Code article 2520 *et seq.*, the seller provides a warranty against redhibitory defects. Article 2520 provides:

> The seller warrants the buyer against redhibitory defects, or vices, in the thing sold.
>
> A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.
>
> A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

Thus, sellers are generally bound by an implied warranty that the thing sold is free of hidden defects and is reasonably fit for the buyer's intended use. La. C.C. art. 2475; ***Young v. Ford Motor Co., Inc.***, 595 So.2d 1123, 1126 (La. 1992).

B. Validity of Waiver of Warranty

The sale agreement, which was signed by Anderson, included the following language pertaining to warranties:

> ALL WARRANTIES IF ANY BY A MANUFACTURER OR SUPPLIER OTHER THAN DEALER ARE THEIRS, NOT DEALER'S AND ONLY SUCH MANUFACTURER OR OTHER SUPPLIER SHALL, BE LIABLE FOR PERFORMANCE UNDER SUCH WARRANTIES. UNLESS DEALER FURNISHES BUYER WITH A SEPARATE WRITTEN WARRANTY OR SERVICE CONTRACT MADE BY DEALER ON ITS OWN BEHALF. DEALER HEREBY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE: (A) ON ALL GOODS AND SERVICES SOLD BY DEALER, OR (B) ON ALL USED VEHICLES WHICH ARE HEREBY SOLD "AS IS – NOT EXPRESSLY WARRANTED OR GUARANTEED."

Anderson also signed a Buyers Guide, which showed two options: "Implied Warranty Only" and "Warranty." The box next to "Implied Warranty Only" contained an "X" in it, and a handwritten notation, stating, "AS IS!!" appeared on the buyer's guide. Under the "Implied Warranty Only" option, the Buyers Guide contained the following language:

> This means that dealer does not make any specific promises to fix things that need repair when you buy the vehicle or after the time of sale. But, state law "implied warranties" may give you some rights to have the dealer take care of serious problems that were not apparent when you bought the vehicle.

The parties may agree to an exclusion or limitation of the warranty against redhibitory defects. The terms of the exclusion or limitation, however, must be clear

and unambiguous and must be brought to the attention of the buyer. La. C.C. art. 2548. A waiver of the warranties against hidden defects must be specific and unequivocal, and any waiver language is strictly construed. ***Williston v. Noland***, 03-2590 (La. App. 1st Cir. 10/29/04), 888 So.2d 950, 952, ***writ denied***, 05-0084 (La. 4/22/05), 899 So.2d 572. In order to be effective, such waiver of warranty must also be contained in the contract. ***Ross v. Premier Imports***, 96-2577 (La. App. 1st Cir. 11/7/97), 704 So.2d 17, 21, ***writ denied***, 97-3035 (La. 2/13/98), 709 So.2d 750.

The mere fact that a sale is confected "as is" does not create a waiver of all warranties. ***Id***. If the act of sale fails to state that the purchaser waives express and implied warranties, including the warranty of fitness for a particular purpose and the warranty against redhibitory vices, it is not sufficiently clear and the seller remains responsible for implied warranties associated with the concept that the thing be fit for the use for which it is intended. La. C.C. art. 2520; ***Willison***, 888 So.2d at 952. The seller bears the burden of proving the warranty has been waived. ***Bo-Pic Foods, Inc. v. Polyflex Film and Converting, Inc.***, 95-0889 (La. App. 1st Cir. 12/15/95), 665 So.2d 787, 791.

In the present case, the sales agreement does not expressly indicate that Anderson waived the warranty against redhibitory vices. The waiver language does not contain the words "redhibition" or "redhibitory" or explain the nature of a redhibitory defect. Nor does it otherwise reference the rights provided pursuant to La. C.C. arts. 2520 through 2548. Thus, because the waiver of warranty is to be

strictly construed, we find no error in the trial court's conclusion that the warranty against redhibitory defects was not waived by Anderson.[2]

C. Rescission Based upon Redhibition

The warranty created against redhibitory defects applies to the sale of used equipment, but it is not as extensive as in the sale of new equipment. What is required, however, is that the equipment must operate reasonably well for a reasonable period of time. ***Burch v. Durham Pontiac Cadillac, Inc.***, 564 So.2d 380, 383 (La. App. 1st Cir.), ***writ denied***, 569 So.2d 968 (La. 1990). A buyer of an automobile who asserts a redhibition claim need not show the particular cause of the defects making the vehicle unfit for the intended purposes, but rather must simply prove the actual existence of such defects. ***Young***, 595 So.2d at 1126. Multiple defects can collectively form the basis of a redhibitory action even though many of the defects are minor or have been repaired. ***Id.***

Whether a redhibitory defect exists is a question of fact for the trier of fact, and it should not be disturbed in the absence of manifest error. ***Vincent v. Hyundai Corp.***, 633 So.2d 240, 243 (La. App. 1st Cir. 1993), ***writ denied***, 93-3118 (2/11/94), 634 So.2d 832. A court of appeal may not set aside a fact-finder's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." ***Rosell v. ESCO***, 549 So.2d 840, 844 (La.1989). Before an appellate court may reverse a fact-finder's determinations, it must find from the record that a reasonable factual basis does not exist for the findings and that the record establishes that the findings are clearly

[2] Since we find the language of the sale agreement inadequate to effect a waiver, we do not address whether the language of the buyers guide further caused any ambiguity or confusion to Anderson by its reference to an "implied warranty."

wrong or manifestly erroneous. ***Stobart v. State, Through Department of Transportation and Development***, 617 So.2d 880, 882 (La. 1993).

To sustain a suit in redhibition, a purchaser must prove that: 1) the thing sold is absolutely useless for its intended purpose or its use is so inconvenient that had he known of the defect, he would never have purchased it; 2) the defect existed at the time of sale but was not apparent; and 3) the seller was given an opportunity to repair the defect. ***Burch***, 564 So.2d at 382. Louisiana Civil Code article 2522 provides, in pertinent part, "The buyer must give the seller notice of the existence of a redhibitory defect in the thing sold. That notice must be sufficiently timely as to allow the seller the opportunity to make the required repairs."

In the instant case, the car did not operate reasonably well for any period of time. On the day of the sale, Anderson immediately experienced a problem when water leaked through the passenger door. This defect clearly existed when the car was sold, and no meaningful or timely repair of this defect was attempted by Duplessis. Although the car's engine problems did not surface until about three weeks later, the evidence regarding the Nissan campaign and Witty's acknowledgment that there was a good possibility that the problem existed before the car was traded to Duplessis supports the trial court's conclusion that the problem existed at the time of the sale.

Anderson purchased the car to provide safe, reliable transportation for herself and her child. The car stalled more than once while she was driving it, and even after Duplessis had attempted repair of the car, the "check engine" light was illuminated. As a result, Anderson drove the car a minimal amount, and the record establishes that it did not serve its intended purpose of providing safe transportation

for Anderson and her child. Even after Duplessis represented that the car had been repaired, it continued to present problems for Anderson. Thus, we find no manifest error in the trial court's finding that the car was useless or so inconvenient that had Anderson known of its defects, she would never have purchased it. Although Duplessis attempted to resolve the engine problems in October, the trial court obviously believed Anderson's testimony that when the repairs proved unsuccessful and Anderson sought additional repair work, Duplessis refused to perform the repair work. It was not until after Anderson had filed suit and had returned the vehicle to Duplessis that it attempted further repairs. Thus, we further find no error in the trial court's findings that Duplessis' repair attempts were not successful and were not made within a reasonable period of time. If only a simple adjustment were needed to remedy the problems that caused the car's engine to stall, Duplessis failed to make this simple adjustment in a timely fashion.[3] Accordingly, we find no error in the trial court's judgment ordering rescission of the sale. ***Burch***, 564 So.2d at 383.

III. CONCLUSION

For these reasons, the trial court's judgment is affirmed. Appeal costs are assessed against Duplessis.

AFFIRMED.

[3] Duplessis also challenges the trial court's statement that it assumed certain risks associated with selling used vehicles, because it did not perform diagnostic checks available through competitor manufacturers and did not check applicable recall and campaign information. These findings were dictum; the trial court properly applied the law pertaining to redhibition.