SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
KATHERINE R. DUPUIS
JUDGE

UNION COUNTY COURT HOUSE
ELIZABETH, NEW JERSEY
07207-8001

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FROM: Lindsey P. Bobinger, Law Clerk to the Honorable Katherine R. Dupuis

DATE: November 26, 2008 PAGES (incl. cover): 10

SUBJECT: Little v. Kia Motors America, Inc.
UNN-L-000800-01

COMMENTS: Please find attached a letter opinion and order.

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
KATHERINE R. DUPUIS
JUDGE

COURT HOUSE
ELIZABETH, NEW JERSEY
07207-8001

November 24, 2008

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RE: Little v. Kia Motors America, Inc.
UNN-L-000800-01

Dear Counsel:

The court has before it defendant's motion for a judgment notwithstanding the verdict, motion for a new trial, motion for class decertification and motion to stay the judgment. Plaintiff has filed a motion for attorneys' fees and expenses, a motion for prejudgment interest and a motion to enter final judgment.

The court will deny defendant's motion for a stay and defendant's motion for a judgment notwithstanding the verdict. Defendant's motion for class decertification and motion for a new trial are granted in part and require claims proceedings as to damages. The plaintiff's motions are denied without prejudice. The court's decision is as follows:

Defendant's Motions

I. Motion for Judgment Notwithstanding the Verdict and Motion for a New Trial

Defendant's motions allege a litany of trial errors including a lack of a government standard for brake life, the fact that damages were based on class members who did not testify, the improper admission of Kia records into evidence, faulty jury instructions as to notification, an opportunity to cure and merchantability, the court's failure to exclude Mr. King's testimony and the failure of the class to conform to Ms. Little's experience, and Ms. Little's failure to meet the damages standard of her own expert. These matters were extensively argued at trial, no new arguments have been raised and the court shall not repeat its rulings here. In addition, the defendant argues that the jury's verdict was against the weight of the evidence and that there is insufficient proof that each class member suffered $750 in damages.

The standard for determining a motion for judgment notwithstanding the verdict is the same as that governing a motion for involuntary dismissal under R. 4:37-2(b). Accordingly, the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord him the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied. See Dolson v. Anastasia, 55 N.J. 2 (1969); Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559 (2003). In addition, the standard is a mechanical one that does not involve weighing evidence. See Johnson v. Salem Corp., 97 N.J. 78, 92 (1984).

As alternative relief, defendant moves for a new trial. A court may grant a motion for a new trial following a jury verdict pursuant to R. 4:49-1 as follows: "The trial judge shall grant the motion [for a new trial] if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1. See also Crego v. Carp., 295 N.J. Super. 565 (App. Div. 1996) (holding that jury verdicts should be set aside in favor of new trials only with reluctance and then only in cases of clear injustice).

The judge's function on a motion for a new trial is not mechanical. Rather, the court is to consider both tangible and credibility factors, and the feel of the case, to determine if the jury's verdict was clear error or mistake. Kita v. Borough of Lindenwold, 305 N.J. Super. 43, 49 (App. Div. 1997). A new trial will be required if the judge concludes that his erroneous trial rulings resulted in prejudice to a party. Crawn v. Campo, 136 N.J. 494 (1994). The same is true if the judge concludes that his erroneous or confusing instructions to the jury resulted in prejudice to a party. Conklin v. Hannoch Weisman, P.C., 281 N.J. Super. 448 (App. Div. 1995), modified 145 N.J. 395 (1996).

A jury's verdict is "entitled to very considerable respect. It should not be overthrown except upon the basis of a carefully reasoned and factually supported (and articulated) determination, after canvassing the record and weighing the evidence, that the continued viability of the judgment would constitute a manifest denial of justice." Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977).

This court is convinced that the majority of defendant's arguments must fail. Plaintiff had two theories of damages: (1) diminution of value due to a defective braking system, and (2) the costs to the individual owners for repair to the brake system. The jury rejected the first theory, but not the second. An examination of the evidence shows ample support for the jury's verdict in all respects but damages.

Plaintiff produced an expert, Mr. King, who testified that brake repairs would cost $250, and that each class member would suffer $1,250 in damages if they maintained their car for 100,000 miles. The cost of a brake repair was not disputed. Mr. King also testified that the consumer expectation was that the brakes would last a minimum of 20,000 miles. Testimony of Timothy McCurdy, a former Kia employee, was read and indicated that Kia had difficulty with the performance of its braking system. Testimony was elicited that in Kia's own tests there were brake failures at 7,500 miles. Testimony also elicited that Kia continuously attempted to modify the braking system with a field fix but that success was not achieved until a larger rotor assembly was designed in a later model car. At some point a coupon program for repair of brakes was undertaken. Further, Kia's own documents demonstrated their knowledge of the defects in the system. Kia's Director of Consumer Affairs, Michelle Cameron, testified that Kia's consumer affairs representatives were instructed to tell consumers that brakes were a "wear and tear" items and not covered under the express warranty up to 36,000 miles. Ms. Little also testified that she kept her car for 75,000 miles and had repairs on five occasions at Kia dealerships and on two other occasions. Her testimony was that she paid for three of the repairs.

Ample evidence existed to show the braking system was defective, that the defect was known to Kia, and that Kia took no or insufficient steps to cure. The court will not disturb the verdict of the jury as to these issues.

The jury determined that Plaintiff had not proven a diminution in value of the Kia automobiles. Such a finding would result in damage throughout the class. The jury instead determined that class members suffered losses of $750 due to the defective braking system.[1] This court is convinced this finding was based upon an erroneous submission by the court of the jury question and accompanying instructions. The damages suffered by each class member are dependent on

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[1] Jury Verdict Sheet –

Question No. 4:

Did the Class sustain damages?

_X_ Yes ____ No

If your answer is "No" to Question 4, cease deliberating.

If your answer is "Yes" to Question 4, go to Question 5.

Question No. 5:

State the amount of damages sustained by each Class Member:

a) For the difference in value, if any, of the Sephia as warranted compared to the Sephia as warranted compared to the Sephia as delivered.

$ 0

Question No. 6:

State the amount of damages sustained by each Class Member:

b) For repair expenses, reasonably incurred as a result of defendant's breach of warranty.

$ 750

numerous variables, such as brake life, frequency of repair, driving habits and length of time the car was owned. These damages cannot be ascertained on a class wide basis, and the court's decision to submit same to the jury was error. A new trial will be granted as to the individual damages suffered by each class member pursuant to R. 4:49-1. To be clear, the only issue in this new trial will be the monetary amount of damages incurred, if any, and not whether the car suffered from a defective braking system, whether there was a breach of warranty, whether there was notice, or whether there was an opportunity to cure, all of which has been proven on a class-wide basis. The new trial will be handled on a claim-form basis. Kyriazi v. Western Electric, 647 F.2d 388, 392 (3d Cir. 1981).

II. Motion for Class Decertification

A party seeking decertification of a class bears the burden of demonstrating that the proposed class does not satisfy the elements of the class action rule. Slaven v. BP America, Inc., 190 F.R.D. 649, 651 (C.D. Cal. 2000). Similarly, the court in Gordon v. Hunt, 117 F.R.D. 58 (S.D.N.Y. 1987), determined that the party seeking decertification "bear[s] a heavy burden to prove the necessity of ... decertification." Id. at 61.

Defendant argues that since the jury rejected the diminution in value theory, the class should be decertified as to the damages suffered by each class member. Defendant again contends that there is insufficient proof that each member has suffered $750 in damages. Defendant relies upon Muise v. GPU, Inc., 371 N.J. Super. 13 (App. Div. 2004). In Muise, a class of utility customers sued the utility company for failure to provide power. The appellate court decertified the previously certified class due to the predominance of individual causation issues. The court also noted that the proposal for proving damages, an ex ante survey taken of other utility customers relating to the value they placed on their utility services rather than actual damages, was not reliable as to the amount of damages. The trial judge determined that the survey lacked materiality to the case presented. The court noted that individualized proof of damages is the norm for class actions. Id. at 55 (citing Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 300 (D.N.J. 1989)). The facts of Muise are individualized and do not strongly relate to the fact pattern before this court. However, the principal that proof of individualized damages may be needed in a class action is sound. The jury rejected the argument that all class members suffered a loss in the value of their automobiles. Thus, it cannot be shown that all members of the class suffered monetary damages on a class-wide model. Individual issues of proof exist, including whether individual owners had to pay for any brake repairs which should have been covered by warranty, whether individual owners had to pay for brake repairs more often that every 20,000 miles, or whether the replacement of the brakes was due to a cause other than the design, i.e. an accident. To rule otherwise would provide a windfall to those owners who did not actually pay for brake repairs more often than every 20,000 miles.

Despite plaintiff's counsel apparent change of heart at the time of the trial, their earlier submissions and arguments recognized that although common issues might predominate, the fact of damages may be different for each individual.[2] Plaintiff now contends that class-wide

[2] Oral Argument by Class Counsel, Michael Donovan, Transcript October 3, 2003, of Kia's Motion for Reconsideration of the Class Certification Motion, p. 11:4-18; p. 11:24; p.12:4:

damages can be proven, citing Long v. Trans World Airlines, Inc., 761 F. Supp. 1320 (N.D. Ill. 1991). In that case, three thousand flight attendants brought suit against Trans World Airlines ("TWA"), their former employer. The class alleged that they were terminated for striking against TWA, and that TWA then failed to issue preferential hiring rights letters to them for more than a year, in violation of the Airline Deregulation Act. Plaintiffs claimed that they suffered damages as a result of lost employment opportunities. The court approved the use of a sampling of plaintiffs, which would allow a class-wide determination of damages based on a sampling from a representative group of the class. In that case, however, the court noted that "the class members were all subjected to exactly the same conduct, and the individuals issues concerning damages do not predominate." Here, in contrast, this court has determined that individual issues do predominate. See In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F.Supp. 450 (D.N.J. 1997).

R. 4:32-2 provides that a court can alter or amend an order certifying a class prior to the entry of final judgment. In Samuel v. Univ. of Pittsburgh, 538 F.2d 991 (3d Cir. Pa. 1976), the court reversed a District Court decision to decertify a class, noting that "an informed discretion was not exercised." Id. at 996. However, the court also noted that "there may be circumstances where the Court could properly decertify." Id. at 996, n.4. Such circumstances may include "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." See Wilder v. Bernstein, 645 F. Supp. 1292, 1301 (S.D.N.Y. 1986).

For the reasons stated above, this court concludes that class certification of the damage issue is improper where, as here, the jury rejected the diminution in value theory. The class will be decertified as to the quantum of damages each individual owner suffered. See, Muise v. GPU, Inc. 371 N.J. Super. 13, 69 (App. Div. 2004) (citing Jaroslawicz v. Engelhard Corp., 724 F. Supp. 294, 300 (D.N.J. 1989)).

As stated earlier, the effect of the decertification of the damages aspect of this case leaves the owners to prove whether they suffered damages.

III. Motion to Stay the Judgment

This court denies this motion as premature based upon the court's reasoning discussed above.

> So, I think that the trial that will occur here will basically result in either a judgment in Kia's favor that there is a design defect, that it has affected all of the cars and that to the extent there are individual damages, we can have claim forms to submit on this.
>
> ...
>
> The difference in damages among people is going to depend upon the uniqueness to which they, unique experience they had with their car and that's going to happen in every case.
>
> Everybody has different damages. So what happens in this action is that to the extent that people took their cars in three times for repairs or four times for repairs, we'll determine if we win after that what their individual damages are on a claims procedure.

Plaintiff's Motions

I. Attorneys' Fees and Expenses

This court recognizes that based upon its ruling as to claims procedures, plaintiff's application for attorneys' fees and expenses is premature. However, the court does believe it can properly decide the issue as to whether attorneys' fees are based on statute or a common fund theory.

Plaintiff has filed a motion for an award of attorneys' fees and expenses pursuant to the fee-shifting provisions of the Magnuson Moss Warranty Improvement Act ("MMWA"), 15 U.S.C. § 2310(d)(2), and pursuant to common fund/common benefit fee-shifting principles. The distinction between statutory fee-shifting cases and fund-in-court cases is necessary because the policies behind the two categories and the calculations for an award of attorneys' fees under the two categories differ substantially. Third Circuit Task Force Report on Court-Awarded Attorneys' Fees, 108 F.R.D. 237, 250-51 (3d Cir. 1985) [hereinafter Task Force Report]. "In sharp contrast to the fund-in-court cases are the substantial number of statutory causes of action ... that include provisions for attorneys' fees – typically characterized as being 'reasonable' in amount – to be awarded to the prevailing party." Id. at 250. The United States Supreme Court has likewise distinguished between statutory fee-shifting claims and common fund claims. See Blum v. Stevenson, 465 U.S. 886, 900 (1984) (stating that "[u]nlike the calculation of attorney's fees under the 'common fund doctrine,' ... a reasonable fee under [the statute] reflects the amount of attorney time reasonably expended on the litigation"). Similar to the statute at issue in Blum, in this case, the MMWA provides for an award of reasonable counsel fees:

> If a consumer finally prevails ... he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action[.]
>
> [15 U.S.C. § 2310(d)(2).]

Where, as here, there is a specific statute relied upon by the plaintiff, the court's calculations of an award of attorneys' fees and expenses will be calculated and awarded as dictated by the MMWA, rather than as a common fund case.

In addition, the defendant contends that the summarized time sheets provided by plaintiff are insufficiently detailed. Plaintiff argues that the summarized sheets provided satisfy the standard for a party seeking attorneys' fees, citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 24 (2004) and Rode v. Dellarciprete, 892 F.2d 1177, 1190 (3d Cir. 1990).

Plaintiff, however, does not accurately present the holdings of these cases as they do not fully support the propositions as presented by plaintiff. Furst involved a consumer fraud case where the court was faced with defendants' challenge to the trial court's award of reasonable attorneys' fees. The court vacated the award of attorneys' fees and remanded the case for further

proceedings because the trial court did not adequately analyze or explain its award of attorneys' fees, and instead merely relied upon the blanket assertions of plaintiff's counsel.

> An attorney's application should be sufficiently detailed to allow a trial court to determine the nature of the work performed and by whom, as well as the reasonableness of the hourly rates and the hours expended.
>
> ...
>
> The prevailing attorney and the attorney challenging the fee application should keep in mind that a plenary hearing is not a substitute for the failure to file detailed certifications. Sufficient information should be contained in the certifications to permit the court to resolve the issues without a testimonial hearing.
>
> [Furst, supra, 182 N.J. at 25-26 (emphasis in original).]

Plaintiff similarly mischaracterizes the holding of Rode. In that case the court found that "the evidence submitted is specific enough for the district court to decide if the work is proper and compensable." Rode, supra, 892 F.2d at 1189. Plaintiff fails to mention, however, that in support of their fee petition, appellants in Rode provided:

> [A] computer generated time sheet for each attorney, paralegal and law clerk who worked on the case. In each instance, the time sheet was in chronological order. Each entry provided the general nature of the activity and the subject matter of the activity where possible ... the date the activity took place and the amount of time worked on the activity. In some instances, appellants aggregated the work in a day on various activities. Lastly, appellants, from October 1985 to February, 1987, submitted time reports to the district court. These reports were very specific.
>
> [Id. at 1191.]

The court ultimately held that all of these submissions provided the court with sufficient information to determine what hours were worked by who in its analysis of the reasonableness of the claimed attorneys' fees.

Plaintiff in the present case did not even aggregate by day, which was characterized in Rode as allowable but "not the best method." Ibid. Instead, plaintiff here has aggregated the work of attorneys over seven years. For example, Alan M. Feldman, Esq., of Feldman, Shepherd, Wolhgelerntre, Tanner, Weinstock & Dodig, provides only that 725.1 hours were expended at a rate of $625 per hour for a total of $453,187.50. See Appendix of Exhibits in Support of Plaintiff's Fee Application, Exhibit C.

Accordingly, pursuant to the holdings in Furst and Rode, supra, this court requires that plaintiff submit time records that are sufficiently detailed to allow this court to determine whether the proffered hours were reasonably expended towards the litigation of this case.

The next issue to be decided by this court is whether plaintiff can withhold detailed time records under an attorney-client privilege. Although plaintiff argues that the attorney-client privilege requires that the party's detailed time records remain confidential, no case law or other supporting reference is provided for this proposition. The mere fact that some attorney-client information is contained in the records does not negate the need to produce detailed time sheets. The court is convinced that counsel can devise a system, either by way of "blacking out" individual information that is privileged or by use of a privilege log, to protect the interests of its clients. R. 4:10-2.

In sum, the plaintiff's motion for attorneys' fees is denied without prejudice for failure to submit sufficiently detailed records and as premature based upon the court's reasoning as to damages.

II. Prejudgment Interest

This court denies without prejudice this motion as premature based upon the court's reasoning discussed above.

III. Motion to Enter Judgment

This court denies without prejudice this motion as premature based upon the court's reasoning discussed above.

Very truly yours,

Katherine R. Dupuis, J.S.C.

PREPARED BY THE COURT

KATHERINE R. DUPUIS J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, UNION COUNTY
DOCKET NO.: UNN-L-000800-01

REGINA LITTLE, on behalf of herself and all others similarly situated,

PLAINTIFFS,

v.

KIA MOTORS AMERICA, INC.

DEFENDANT.

CIVIL ACTION
ORDER

This matter having been open to the court on October 15, 2008, by Nicole M. Acchione, Esq., attorney for plaintiffs, and Neal Walters, Esq., attorney for defendant;

IT IS ON THIS 24th DAY OF NOVEMBER, 2008, ORDERED

1. Defendant's motion for a judgment notwithstanding the verdict is DENIED.
2. Defendant's motion for a stay is DENIED.
3. Defendant's motion for a new trial is GRANTED IN PART and DENIED IN PART.
4. Defendant's motion for class decertification is GRANTED.
5. Plaintiffs' motion for attorneys' fees and expenses is DENIED without prejudice.
6. Plaintiffs' motion for prejudgment interest is DENIED without prejudice.
7. Plaintiffs' motion to enter final judgment is DENIED without prejudice.

KATHERINE R. DUPUIS, J.S.C.