

[Cite as *Conservation Load Switch, Inc. v. Amerine*, 2004-Ohio-1472.]

IN THE COURT OF CLAIMS OF OHIO

CONSERVATION LOAD SWITCH, INC. :

Plaintiff : CASE NO. 2002-06031
and : Judge J. Warren Bettis

DECISION

I. ROBERT AMERINE, et al. :

Intervenors :

v. :

OHIO UNIVERSITY :

Defendant :

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{¶1} Plaintiff brought this action against defendant alleging claims of breach of contract and unjust enrichment. Defendant filed a counterclaim for return of the payments that it had made to plaintiff under the contract.¹ The case was tried to the court on the issues of liability and damages.

{¶2} Plaintiff manufactures traffic control load switches that carry electrical current to traffic signal lamps. In July 1995, the National Cooperative Highway Research Program (NCHRP) conducted a feasibility study during which six state and county transportation agencies tested 120 of plaintiff's load switches. In September 1997, based upon the

¹On December 20, 2002, the court granted I. Robert Amerine and F.P. Developers, Inc. leave to intervene to assert a creditor's bill against plaintiff. On May 19, 2003, the court issued an order that bifurcated intervenors' claim from the original action and ordered that intervenors' claim be adjudicated after a judgment had been entered in plaintiff's case against defendant.

results of the NCHRP study, the Federal Highway Administration (FHA) requested that plaintiff participate in a “pooled funds study” to determine whether plaintiff’s load switches extended the service life of traffic lamps. The Ohio Department of Transportation (ODOT) selected Helmet Zwahlen, Ph.D., a faculty member at defendant university, to be the principal investigator for the study.

{¶3} On December 26, 1998, defendant published a “Proposal for the Evaluation of the CTCLS Series Traffic Signal Load Switches in the Field” that was drafted by Dr. Zwahlen and Tom Schnell, Ph.D. The purpose of the evaluation was to establish the average life of a traffic lamp and to determine whether plaintiff’s load switches could approximately double that life. The proposal acknowledged that plaintiff’s load switch had “not yet been evaluated in an extended field test.” (Joint Exhibit A, Exhibit 3.)

{¶4} According to stipulations filed by the parties, a safety device known as a conflict monitor was installed in some traffic signals to detect electrical “noise” that could cause traffic lights to flicker. Conflict monitors manufactured by EDI contained a “blinking noise dimmer” (BND) alarm that could detect line noise and would cause traffic signals to flash red in all directions, rather than fail, when an electrical interference occurred in the power lines. EDI conflict monitors were also equipped with a switch that could disable the BND alarm.

{¶5} Some time prior to March 1, 1999, defendant received a copy of the July 1995 NCHRP study report that included a graph showing “sine wave” depictions of voltage output. (Joint Exhibit A, Exhibit 1.) There is no dispute that the sine wave depictions show that plaintiff’s load switches may cause a malfunction when used with certain traffic light components.

{¶6} On February 4, 1999, defendant sent a letter to plaintiff that described the study and expressed defendant’s intent to purchase load switches for the project. On April 29, 1999, defendant issued a purchase order for 1,728 units of plaintiff’s Model A99 load switch at a total price of \$195,507. The purchase order did not specify any performance

characteristics for the load switches. On approximately the same date as the purchase order was prepared, Dr. Zwahlen drafted a “request for purchase order terms and conditions” that was provided to defendant’s purchasing department; however, the document does not provide any specifications for the load switches and Dr. Zwahlen was uncertain whether the document was sent to plaintiff. Some time in May or June 1999, plaintiff informed defendant that it would require approximately six months to manufacture all of the 1,728 units.

{¶7} Defendant did not inform plaintiff that the criteria for the study did not allow for the BND alarms to be disabled. In October 1999, Dr. Schnell informed plaintiff that BND alarms had been triggered in some of the traffic control signals that were being used in the study. In November 1999, Dr. Schnell recommended that plaintiff adjust the voltage in the load switches in lieu of disabling the BND switches. To accomplish this adjustment, Dr. Zwahlen had the load switches removed from the traffic lights and returned to plaintiff. On December 20, 1999, plaintiff completed voltage adjustments on all 1,728 load switches and then returned them to the participating transportation departments for reinstallation.

{¶8} On the same date, representatives for plaintiff and defendant executed a document that identified unanticipated costs due to delivery delays and problems associated with plaintiff’s load switches. In the document, plaintiff acknowledged that defendant would withhold a total of \$8,720 from outstanding payments that were due to plaintiff.

{¶9} The load switch adjustments caused additional traffic light malfunctions such as “red failures” and “dual indications.” When Dr. Schnell was notified that the traffic lights continued to malfunction, he asked plaintiff to devise a solution. Shortly thereafter, defendant notified plaintiff that it would not make any further payments for the switches and that it would not afford plaintiff an opportunity to remedy the situation. Prior to this notice, plaintiff had received five payments from defendant that totaled \$66,673.

{¶10} Plaintiff claims that it is due an outstanding balance of \$120,105 for the load switches that it produced and delivered. Plaintiff agreed to forgo payment of \$8,729 in accordance with the December 20, 1999, document.

{¶11} The outcome of this case largely turns on the nature and terms of the parties' contract. "A contract is an agreement, upon sufficient consideration, between two or more persons to do or not to do a particular thing." *Nilavar v. Osborn* (2000), 137 Ohio App.3d 469, 483, quoting *Lawler v. Burt* (1857), 7 Ohio St. 340, 350. In order to prove a breach of contract, a plaintiff must establish the existence and terms of a contract, the plaintiff's performance of the contract, the defendant's breach of the contract and damage or loss to the plaintiff. *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 10, 2002-Ohio-443.

{¶12} The parties stipulated that plaintiff delivered 1,728 units of plaintiff's Model A99 load switch according to the terms of defendant's April 29, 1999, purchase order. Plaintiff's claim for breach of contract is based upon defendant's failure to pay plaintiff the total amount that is specified in the April 29, 1999, purchase order. Defendant maintains that plaintiff knew its switches would interfere with the conflict monitors used in some traffic signals and that the parties' December 20, 1999, agreement required plaintiff to demonstrate "plug-and-play" performance before defendant was obligated to pay the balance of the purchase price.

{¶13} Defendant refused to pay the balance of the purchase price for the switches based upon its assertion that plaintiff breached an implied warranty of fitness for a particular purpose under R.C. 1302.28. The test for finding an implied warranty of fitness for a particular purpose has been described as follows: "First, the seller must be aware at the time of contracting of a particular purpose for which the buyer intends to use the goods. Second, the buyer must rely on the seller's skill or judgment to select or furnish goods suitable for that particular purpose." *Price Brothers Co. v. Philadelphia Gear Corp.*, 649 F.2d 416, 423 (C.A. 6, 1981); R.C. 1302.28 (U.C.C. § 2-315).

{¶14} With regard to plaintiff's knowledge of a particular purpose for which defendant intended to use the switches, the parties agree that the purpose of defendant's study was to evaluate the performance of plaintiff's Model A99 load switches and its effect on the life of the traffic lamp. Defendant's proposal for the evaluation also acknowledged that plaintiff's load switch had "not yet been evaluated in an extended field test." Although defendant's purchase order specified Model A99 load switches, it did not specify any performance characteristics for the switches. Consequently, plaintiff's Model A99 load switches met specifications. Under Ohio law, the party asserting a breach of warranty claim carries the burden of proving that a defect exists in the product sold by the manufacturer, and that the defect existed at the time the product left the manufacturer's control. *McDonald v. Ford Motor Co.* (1975), 42 Ohio St.2d 8.

{¶15} Defendant asserts that it had no knowledge of the "defect" until the switches were installed and operated by the study participants. Defendant claims that plaintiff knew the switches were defective and unsuitable for the project because they were incompatible with the conflict monitors that were used in the study. The parties stipulated that plaintiff's Model A99 load switches were incompatible with some conflict monitors produced by EDI unless the BND was disabled. However, the fact that plaintiff's load switches were incompatible with certain conflict monitors does not establish that the switches were defective and unsuited to the purpose of the study.

{¶16} Even if defendant had shown that the switches were defective, it would also have to show that it relied on plaintiff's skill or judgment to select goods suitable for the study. Defendant has not asserted, nor is there evidence to show, that defendant relied on plaintiff's skill or judgment to select the model of switch that was used in the study. Plaintiff was initially approached by the FHA to participate in the study, more than one year before Drs. Zwahlen and Schnell drafted defendant's proposal.

{¶17} Contrary to defendant's assertion that it had no knowledge of any potential problems with the load switches, sometime prior to March 1, 1999, defendant received a

copy of the July 1995 NCHRP study report that included a graph showing “sine wave” depictions of voltage output. (Joint Exhibit A, Exhibit 1.) There is no dispute that the sine wave depictions show that plaintiff’s load switches may cause a malfunction when used with certain traffic light components. Dr. Zwahlen testified that he would have expected an electrical engineer, such as Dr. Schnell, to recognize the significance of the sine wave. In its post-trial brief, defendant acknowledged that “perhaps the University could have uncovered the switches’ ‘defect,’ but did not.”

{¶18} Furthermore, prior to shipping the load switches, plaintiff sent Dr. Schnell a copy of the limited warranty provided by plaintiff, which provides in part: “This Limited Warranty applies if, and only if, the Unit is installed and operated according to the specifications and operating instructions applicable to the Unit as provided by CLS.” (Joint Exhibit A, Exhibit 8.) Plaintiff shipped its load switches with a two-page document that was titled “Installation, Operation, Features & Trouble Shooting Guide For the CTCLS Series Load Switches” that contained the following instructions: “Conflict Monitors, The CTCLS Series A99 has been tested & function with the following Conflict Monitors *** All EDI, (CLS specifies with the newer EDI BND be disabled) ***.” (Joint Exhibit A, Exhibit 7.) The court finds that defendant failed to comply with the operating instructions to disable the BND alarms and therefore the limited warranty was inapplicable.

{¶19} Upon review of the evidence, the court finds that plaintiff provided defendant with sufficient information to determine the compatibility of plaintiff’s load switches with the conflict monitors that were used in the study. The court further finds that defendant was a sophisticated buyer and that it did not establish that it had relied on plaintiff’s expertise as a manufacturer to select and order the switches. The court concludes that plaintiff did not breach any implied warranty of merchantability.

{¶20} Defendant further claims that, pursuant to R.C. 1302.26, plaintiff breached an express warranty by failing to deliver switches with “plug and play” performance in accordance with the December 20, 1999, written agreement. R.C. 1302.26 (U.C.C. §

2-313) sets forth the conditions whereby a seller can create an express warranty and provides, in pertinent part:

{¶21} “(A) Express warranties by the seller are created as follows: “(1)

Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

{¶22} “(2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

{¶23} “***

{¶24} “(B) It is not necessary to the creation of an express warranty that the seller use formal words such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.”

{¶25} On December 20, 1999, Greg Filbrun, plaintiff’s president, signed an agreement which contained the following:

{¶26} “1. CLS, Inc. acknowledges and accepts that Ohio University will withhold a total of \$8,720.00 (non negotiable) from the remaining outstanding payments that we will disperse to you upon demonstration of satisfactory (plug-and-play) performance of a random sample of your CTCLS load switches in the participating states.

{¶27} “***

{¶28} “4. You acknowledge and understand that should the CTCLS load switches cause any more problems and disruptions that are not observed with conventional load switches, we will discontinue evaluation of your product in our study. This is your last chance to have your product evaluated.”

{¶29} Plaintiff asserts that the December 20, 1999, agreement did not modify the original purchase contract because the latter agreement was “not founded on some valid

consideration.” However, R.C. 1302.12 (U.C.C. 2-209) provides that an agreement modifying a contract for the sale of goods needs no consideration to be binding. Nevertheless, defendant cannot avoid payment for the switches based upon a theory of breach of an express warranty to demonstrate “satisfactory (plug-and-play) performance” if such language was not part of the “basis of the bargain” of the sale. “The ‘basis of the bargain’ test [in R.C. 1302.26(A)] centers on the description or affirmation which goes to the heart of the basic assumption between the parties.” *Barksdale v. Van’s Auto Sales, Inc.* (1989), 62 Ohio App.3d 724, 728. To determine whether a statement formed the basis of the bargain, the court must examine “the circumstances surrounding the sale, the reasonableness of the buyer in believing the seller, and the reliance placed on the seller’s statement by the buyer.” *McCormack v. Knight* (June 19, 1989), Clermont App. No. CA88-11-080, citing *Slyman v. Pickwick Farms* (1984), 15 Ohio App.3d 25, 28.

{¶30} In the December 20, 1999, agreement, plaintiff agreed to accept \$8,720 less than its original contract price and acknowledged that it would receive the balance of the purchase price “upon demonstration of satisfactory plug-and-play performance,” a standard that was not a requirement under the April 29, 1999, purchase order. Plaintiff also acknowledged that defendant would cease to evaluate its switches in the event that defendant observed any problems that were not associated with conventional load switches. Although the agreement stated that defendant might choose to terminate the evaluation of its switches if problems were observed, plaintiff did not admit to any defect in the switches or release defendant from its obligation to pay the purchase price for the switches that had been delivered.

{¶31} Considering the circumstances of this sale, the court finds that it would not have been reasonable for defendant to believe that plaintiff would agree to forgo payment for switches that did not meet defendant’s expectation regarding performance in a study that was conducted to determine performance characteristics. For the reasons stated above, the court finds that defendant did not rely on plaintiff’s statements as a

manufacturer to order the switches; that defendant had adequate notice that the switches were or may have been incompatible with certain conflict monitors; and that defendant failed to prove that the switches were defective.

{¶32} The court also finds that the language of the December 20, 1999, agreement regarding satisfactory plug-and-play performance was not part of the basis of the bargain and did not create an express warranty under the sales contract.

{¶33} For the foregoing reasons, defendant's counterclaim for breach of an express warranty must be denied.

{¶34} Furthermore, even if an express warranty had been created, the December 20, 1999, agreement provides that defendant's remedy for a failure to demonstrate plug-and-play performance was to terminate the evaluation. The agreement did not authorize defendant to withhold more than \$8,720 for itemized delay costs from the payment due for the switches that were delivered.

{¶35} The court finds that plaintiff accepted the terms of defendant's April 29, 1999, purchase order and performed its obligation under the contract when it delivered the 1,728 load switches to defendant. The court further finds that defendant's failure to pay the balance of the purchase price constituted a breach of the sales contract.

{¶36} Plaintiff has also set forth a cause of action for unjust enrichment. However, having determined that plaintiff was entitled to recover proceeds under the terms of a valid, enforceable contract, the equitable remedy of unjust enrichment is not available to plaintiff.

{¶37} Plaintiff also asserts a claim for prejudgment interest. R.C. 2743.18(A)(1) provides that interest shall be allowed with respect to any civil action on which a judgment or determination is rendered against the state for the same period of time and at the same rate as allowed between private parties to a suit. R.C. 1343.03(A) provides the applicable rate of interest as follows: "**** [w]hen money becomes due and payable upon any *** contract or other transaction, the creditor is entitled to interest at the rate of ten per cent per annum, and no more, unless a written contract provides a different rate of interest in

relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.”

{¶38} Under R.C. 1374.03(A), prejudgment interest attached to plaintiff’s damage award in this case when the money owing plaintiff became “due and payable.” The court finds that the purchase price became due and payable when plaintiff shipped the adjusted load switches back to the transportation agencies on December 20, 1999.

{¶39} Therefore, plaintiff is entitled to recover \$120,105, which represents the balance of the amount due under the sales contract less \$8,720, plus prejudgment interest and the \$25 filing fee. Prejudgment interest on \$120,105 calculated at the rate of ten percent per annum from December 20, 1999, to the date of this judgment equals \$50,773.15. Accordingly, judgment shall be rendered in favor of plaintiff in the total amount of \$170,903.15.

{¶40} This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is hereby rendered in favor of plaintiff in the amount of \$170,903.15, which includes the filing fee paid by plaintiff and prejudgment interest at ten percent per annum from December 20, 1999, to the date of the journalization of this entry. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. WARREN BETTIS
Judge

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