IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned On Briefs February 21, 2008

LISA GAIL LASHLEE v. HARPER'S CHRYSLER

Appeal from the Circuit Court for Dickson County
No. CV-2092 Robert E. Burch, Judge

No. M2007-00443-COA-R3-CV - Filed August 27, 2008

Lisa Gail Lashlee ("Customer") sued Harper's Chrysler ("Dealer"), a car dealership in Dickson, claiming Dealer breached an extended service contract (or "warranty") that Customer had been awarded in an arbitration proceeding concerning a vehicle that she had leased from Dealer. Customer argues that Dealer wrongfully refused to perform work under the warranty. Dealer denies any such wrongful refusal, and also asserts that it is not bound by the warranty, which it says was issued by the manufacturer, DaimlerChrysler ("Manufacturer"). The case was tried to a jury, which returned a verdict for Customer in the amount of $21,492.45 – the $551.45 that she eventually paid to have repairs done, plus an additional $20,941.00, which is approximately the amount of the lease payments that accrued between the date of the alleged breach and the expiration of the lease. Dealer appeals. We affirm the judgment as to liability, but vacate as to damages, finding no material evidence to support the jury's verdict in the amount rendered. We remand for a new trial on the issue of damages only.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Vacated in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Joseph T. Zanger, White House, Tennessee, for the appellant, Harper's Chrysler.

Lisa Gail Lashlee, McEwen, Tennessee, appellee, pro se.[1]

OPINION

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[1] Ms. Lashlee was represented by Brent O. Horst, Nashville, Tennessee, at the trial court level. Mr. Horst withdrew from this case shortly after Ms. Lashlee's notice of appeal was filed, and neither he nor any other attorney for Ms. Lashlee has made an appearance before this court. No brief was filed in this case on behalf of Ms. Lashlee.

I.

In February 1999, Customer leased a Dodge Durango from Dealer. The vehicle came with a three-year manufacturer's warranty. In the months that followed, the vehicle had many mechanical problems, and was frequently returned to Dealer for repairs. Some of the problems were minor, while others were more serious. For instance, Customer complained, at various times, of: broken fog lights; a noisy window; an inoperable window; a malfunctioning seat latch; failing brakes; "spongy" brakes; an unexplained "humming" noise; a strong coolant smell; and various other issues. Some of the problems occurred multiple times. Dealer repaired each problem that it was able to duplicate and, in accordance with the warranty, billed Manufacturer rather than Customer for the cost of the repairs. On a number of occasions, Customer was given a free rental car while her Durango was in for repair. This, too, was billed to Manufacturer rather than to Customer.

Customer eventually came to regard her vehicle as a "lemon," and in May 2000, she applied for Manufacturer's "customer arbitration process." On her application, she stated, "I would like the company to buy back my Durrango [sic] or replace w/ new vehicle purchase." She attached a letter detailing the problems with her Durango and stating that the vehicle had been in for repair "60 days throughout the course of 14 months." She complained that she had specifically chosen the Durango because it has four-wheel drive and is "large enough to accommodate a family of 6," but instead she had been stuck "driving a cheap little 4-5 passenger rental car for a good deal of the time" because the Durango had been in the shop so frequently. She stated that she could "not possibly describe on paper the personal anguish and stress that I have been subjected to" by the vehicle's many mechanical problems and repeated, sometimes lengthy repairs.

An arbitration hearing was held at Dealer's premises on July 5, 2000. Doug Ferguson of the National Center for Dispute Settlement ("NCDS") served as the arbitrator. The hearing was attended by Customer, Customer's husband, and a "Service Manager" for Dealer named Calvin Chassman. At the hearing, according to the arbitrator's report, Customer and her husband each discussed their concerns regarding the vehicle's mechanical condition, while Dealer's representative, Mr. Chassman, "stated that their vehicle has been repaired for any verifiable defects present when serviced." In addition, Manufacturer submitted a written statement indicating that Customer's initial three-year warranty "has been honored and will continue to be honored." After considering these statements and taking the vehicle for a test drive, the arbitrator denied Customer's request for repurchase or replacement. He stated that he had "tak[en] into consideration the applicable . . . warranty law including that . . . commonly referred to as the 'Lemon Law,' " but had determined that "the vehicle has not been subject to an unreasonable number of repair attempts for the same nonconformity." However, the arbitrator ordered Manufacturer to extend the vehicle's warranty:

> DaimlerChrysler shall provide the Customer with a 7 year/70,000 mile "Maximum Care" Service Contract with a $50 deductible, at no charge to the Customer, to address the ongoing concerns because of the lengthy repair history.

Approximately one month later, on August 4, 2000, Customer agreed – reluctantly, according to the testimony at trial – to accept the arbitrator's decision. She signed an acceptance form that stated:

> I understand that I am not bound to the Decision of the Arbitrator(s) in my case unless I accept it. . . . I also understand that if I accept the Arbitrator(s)'s Decision, the DaimlerChrysler Motors Corporation Dealer involved and the DaimlerChrysler Motors Corporation will be legally bound by the Arbitrators(s)'s Decision.

The extended service contract, or "warranty," was made retroactive to the beginning of the lease.

On September 11, 2000, just over a month after Customer accepted the arbitrator's decision, she called Dealer to report several additional problems, the most serious being yet another problem with the brakes. Dealer sent a mechanic to Customer's home, and the mechanic replaced the master cylinder – the second time it had been replaced – free of charge under the new warranty. No problem with the brake rotors or pads was noted at the time.

The brakes malfunctioned again approximately one month later, in October 2000. Customer brought the Durango to the dealership, and was told that the vehicle's brake rotors and pads were so severely worn that it could not be driven safely. She was also told that brake rotors and pads, as "wearable" parts, are not covered by the warranty, and thus their replacement would cost her an estimated $585. Customer testified that a mechanic at Dealer suggested she take the vehicle to a different repair shop, which could replace the rotors and pads less expensively. Customer then took the Durango to another shop, Auto Pro. The mechanic there informed Customer that the brake calipers – a non-wearable part, which was covered by the warranty – were leaking, and that *this leak was responsible for the damage to the pads and rotors*. Customer testified:

> [Auto Pro] contacted me at work the next day . . . and [the mechanic] told me that the calibers [sic] were leaking on the vehicle and that this was a warranty issue. . . . [He said,] If I fix it for you, it's going to be expensive for me to order those parts when this should be covered under your warranty. He told me [the leaking calipers were] the reason the pads were bad and that the whole problem was with the brakes and that the whole system would probably . . . have to be replaced.

The Auto Pro mechanic also stated, according to Customer, that "I can replace the brake pads . . . [b]ut because the calibers [sic] are bad, the brake pads will – they're just going to go right back down."

Customer called Dealer and told an employee what the Auto Pro mechanic had told her, and Dealer agreed to pick the vehicle up from Auto Pro. However, upon further inspection, Dealer again insisted that the brake pads and rotors had to be replaced before any other work could be done, and

that since these "wearable" items were not covered by the warranty, Customer would have to pay for them.[2] On the work order, a handwritten note states that the Durango "WILL REQ[UIRE] THESE ITEMS [*i.e.*, rotors and pads] BEFORE FURTHER DIAG[NOSIS] ON HYDRAULIC PROBLEM." (Capitalization in original.) A second handwritten note, in different handwriting, states, "Will have to pay[;] No problem with calipers." Both of these notes were apparently written by mechanics working for Dealer. The latter note was subsequently initialed by Dealer's owner, Betty Harper.

Customer did not authorize the proposed non-warrantied replacement of the rotors and pads, and instead decided to take the vehicle home.[3] She then took no further action with regard to the brake problem.

Not only was the Durango not repaired by Dealer in October 2000; it was not repaired by *anyone*. Although the vehicle would have been driveable again – at least with regard to the specific brake problem at issue – if the relevant parts had been replaced, Customer "parked" the vehicle at her home for the remaining three-and-a-half years of the lease. She continued to make the monthly lease payments because "I didn't want my credit to go down," but she stopped driving the vehicle altogether, and she bought a new car – a Toyota Camry, which cost approximately "19,000 [dollars] and some change" – to replace it. On direct examination, Customer was asked why she chose this course of action:

> Q: Now, why not just take this Durango to some other [Chrysler] dealer and try to have them fix it [under the warranty], or pay, if you had to? Why not do that?
>
> A: Well, at this point, for me, a lot of it was principle. On a personal level, I felt like I had been totally cheated by this vehicle. The agreement through arbitration was that I was to be able to take the

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[2] In her testimony, Customer stated that Dealer's owner, Betty Harper,"told me that she did not want to repair my vehicle" and that "they were not going to do any work on my vehicle." However, Customer then added that Ms. Harper had "told me that the brake pads needed to be replaced." All other evidence in the record indicates that Dealer did not blanketly refuse to work on the Durango ever again under any circumstances, but simply refused to work on it *unless* Customer first authorized – and agreed to pay for – replacement of the brake rotors and pads. We do not interpret Customer's testimony as directly contradicting this latter reading of the facts, nor do we believe the jury's verdict suggests that it believed Ms. Harper flatly refused to do any further work on the Durango under any circumstances. The evidence in this record firmly supports the finding that Dealer's refusal to do further work on the Durango was conditional. The question is whether the condition – *i.e.*, that the Customer must first pay for the replacement of the pads and rotors – was reasonable, or whether it constituted a breach of the warranty. The jury reached the latter conclusion.

[3] Indeed, it seems there was something of an altercation with Dealer's employees when Customer and her husband arrived to take the Durango away on October 17, 2000. The record provides little information about the incident, and it is not directly relevant to the outcome of this case, but it apparently led to Customer's first lawsuit against Dealer, filed in October 2001, in which she alleged assault, false imprisonment, malicious prosecution, and breach of implied and express warranty. That lawsuit was voluntarily nonsuited in July 2004.

> vehicle to Harper's. And it was not safe to drive. And the nearest dealership, I think is – it's Nashville, I'm sure – or perhaps maybe Clarksville, which is not close at all.

Later, when asked again on cross-examination about this matter, Customer indicated that her decision to "park" the Durango was somehow related to a belief that she would be able to get quick relief from Dealer through the legal system:

> Q: So rather than pay the $800 in October of 2000, you elected to park the car for four years?
>
> A: Well, at the time that I elected to park the car, I didn't know that it was going to take four years to have this hearing that we're having today to take place. I didn't realize that the timeframe would be that lengthy.

As already noted, Customer filed a lawsuit against Dealer approximately one year after the incident in question, but it was ultimately nonsuited. It is not clear from this record what transpired between the filing of that suit and its dismissal in July 2004, nor is it clear what Customer hoped would occur with regard to the "timeframe."

In the meantime, while Customer's earlier lawsuit was pending, her lease expired. Before returning the vehicle, she finally took it in for repair in March 2004, and got the pads, rotors, and calipers replaced. The pads cost $66.56; the rotors cost $93.84; the calipers cost $172.06. With labor, taxes and fees, the total repair bill was $551.45. The work was performed by Auto Pro.

Customer filed this action in June 2005. She sued both Dealer and its owner, Betty Harper, stating two causes of action: "breach of contract / arbitration agreement" and "fraud." The fraud claim was based on the allegation that Dealer "fraudulently entered the arbitration agreement with no intent to fulfill its obligations under the agreement and further that on October 17, 2000 the Defendants knew that the brake calipers were leaking and fraudulently stated that they were not in need of repair." Dealer and Ms. Harper moved for summary judgment in May 2006, alleging that Customer could not establish the elements of fraud, that neither defendant was a party to the arbitration agreement, and that Customer's failure to authorize the non-warrantied replacement of the brake rotors and pads had justified any failure by Dealer to perform further repairs. The trial court in August 2006 granted the motion for summary judgment as to Ms. Harper, but denied it as to Dealer.

A trial was held in September 2006. Dealer moved for a directed verdict at the conclusion of Customer's proof, and again at the conclusion of all the proof. The court denied the motions in both instances, but strongly hinted that it probably would not let a verdict for Customer on the fraud charge stand, calling Customer's evidence on that count "shaky." However, both allegations were submitted to the jury. The jury returned a verdict finding that Dealer was liable for breach of

contract, but not liable for fraud. Damages were assessed at $21,492.45. Immediately after the verdict was announced, the court stated "that the fraud count has insufficient evidence . . . [so] even though the jury obviously has found for the Defendants for the fraud count, I also rule that that count should be dismissed."

With respect to the breach of contract claim – the only claim at issue on appeal – Dealer filed a motion for judgment notwithstanding the jury's verdict, or, in the alternative, for a new trial. Dealer also requested a remittitur, asserting that the jury's $21,492.45 damage award was unsupported by the evidence, and that the proper measure of damages, if any, was the cost of the repairs: $551.45. Dealer argued that the evidence clearly showed Customer could have mitigated her damages by getting the Durango repaired by someone other than Dealer, but failed to do so as a matter of "principle," thus deliberately keeping the vehicle undriveable. The court ruled as follows:

> The motion for judgment non obstante verdicto is denied. The Court finds that it is in agreement with the verdict of the jury.
>
> The motion for remittitur is likewise denied. This was a leased vehicle. Most of the time the vehicle was in the shop or un-useable. It was in the shop . . . 72 days out of the first year. . . . [T]he payments under the lease for a measure of damages was because the Plaintiff, essentially, didn't have a useable vehicle, even though she paid those lease payments.
>
> * * *
>
> As far as mitigation, the car was a lemon. No matter where you took it, it would still be a lemon. And the jury obviously found – and I find – that taking it to another shop would have done no good. You know, the car was just a bad buy.
>
> Motion respectfully denied.

Dealer timely appealed.

II.

Dealer attacks the judgment on several grounds. First and foremost, Dealer argues strenuously that it cannot be held liable on the warranty because it was not a party to the contract, nor to the arbitration that produced it. The warranty, Dealer says, was a contract between Manufacturer and Customer, not between Dealer and Customer – and Dealer was a mere bystander at the arbitration hearing. Thus, according to Dealer, Customer's only recourse would be a lawsuit

against Manufacturer. Dealer raised this argument at various points during the litigation, including at summary judgment, to which the court replied:

> The acknowledgment of procedures clearly identifies the parties as Ms. Lisa Lashlee as customer and Harper's Chrysler Plymouth, Dodge, Jeep Dealer and/or Chrysler Motors Corporation Dealer. Furthermore, the personalized service contract makes clear that plan service will be provided or assisted by the dealer who sold the plan. This certainly indicates that Harper's was bound by the terms of the agreement.

(Citations omitted.)

We, too, reject Dealer's argument because, having thoroughly reviewed the record, we find that there is ample evidence from which the jury could have concluded that Dealer was indeed a party to the contract. "Parol evidence is ordinarily admissible to establish the identities of the parties to a contract," ***International House of Talent, Inc. v. Alabama***, 712 S.W.2d 78, 86 (Tenn. 1986), and we find that, on these facts, the combination of written documents and parol evidence in the record created, at the very least, an issue of fact regarding whether Dealer was a party to the arbitration and the resulting warranty, which the jury justifiably resolved in Customer's favor.

The analysis necessarily begins with the text of the warranty document contained in the record. Although the warranty describes itself as a contract between Customer and Manufacturer, it also states:

> OBTAINING PLAN SERVICE: Plan service *will be provided or assisted by the Dealer who sold you the Plan*, at his place of business, using new or authorized remanufactured parts. In the event you cannot return to the selling Dealer for service, you may request service from any Chrysler, Plymouth, Dodge or Jeep Dealer within the 50 states, District of Columbia or Canada.

(Emphasis added.) Dealer appears to argue that the language allowing Customer to get service from any dealer "[i]n the event you cannot return" to the "selling Dealer" somehow proves that Dealer is not obligated to perform service under the warranty. This reading contradicts the plain meaning of the language, which is that Customer has the *option* to go elsewhere if she "cannot return" to the selling dealer – not that the *dealer* has the option to *force* Customer to go elsewhere, artificially creating a situation in which she "cannot return." The "will be provided" language clearly contemplates an obligation on the part of the "selling Dealer."

Dealer also suggests that this clause does not apply to it at all, because there *was* no "selling Dealer" in this case, since the warranty was not sold but rather awarded in an arbitration hearing. However, we think the jury could certainly have concluded – not just from this and other written

documents referenced herein, but also from the location of the arbitration hearing on Dealer's premises, the presence of a Dealer employee at the hearing, the alleged role of Dealer's employees in encouraging Customer to seek arbitration in the first place,[4] the testimony that the arbitrator had to get permission from both Customer and Dealer to hold the hearing, and various other items of evidence – that, under the totality of the circumstances, Dealer was clearly intended by the parties to be the "selling Dealer" in this case.

In addition, although the printed first page of the arbitrator's decision labels the case as "the matter of Dispute Settlement between Ms. Lisa Lashlee . . . and DaimlerChrysler Motors Corporation" – a point emphasized by Dealer – the signature page, or "acknowledgment of procedures," labels the case quite differently. The pre-printed text on this document, an NCDS form by which all parties at the hearing acknowledged the arbitrator's authority, begins with the phrase "IN THE MATTER OF," and then contains the word "Customer" with three lines above it, followed by "and," followed by the phrase "DaimlerChrysler Motors Corporation *and/or Dealer*" with another three lines above it. (Emphasis added.) On the lines above "Customer," Ms. Lashlee's name and address are handwritten. More significantly, on the lines above "DaimlerChrysler Motors Corporation and/or Dealer," the name and address of Dealer are handwritten. It seems, therefore, that Dealer is explicitly being described as the "DaimlerChrysler Motors Corporation and/or Dealer" – an interchangeable designation that does not comport with Dealer's current position that the two entities, Manufacturer and Dealer, are totally separate for warranty and arbitration purposes. In any event, when the printed and handwritten text is read together, the document labels the case thusly: "IN THE MATTER OF Ms. Lisa Lashlee . . . and Harpers Chrysler Ply[mouth], Dodge, Jeep." Significantly, the handwritten text on the fill-in-the-blank lines was presumably written by the parties at the arbitration hearing, and thus this text would seem to be a more direct indication of the parties' intent than printed form language or the language of the arbitrator's decision.

Furthermore, this same document contains three signatures: one by Lisa Lashlee (Customer), one by Charles Lashlee (Customer's husband), and one illegible signature in between two lines of printed text that state "DaimlerChrysler Motors Corporation By" and "Dealer By." It is unclear which entity the signatory purported to represent, but it *is* clear from the record that the signatory must have been Calvin Chassman, the Dealer "Service Manager" who was the only person other than Customer, Customer's husband and the arbitrator in attendance at the hearing. Thus, whether he intended to sign his name as a representative of the "Corporation" or as a representative of the "Dealer," the crucial fact is that *he signed his name*, strongly suggesting that Dealer – through its agent at the hearing – represented that it was a party to the arbitration and agreed, along with Customer, to the description of the case reflected on the top of the signature page, as "THE MATTER OF [Customer] and [Dealer]."

[4] We recognize that Dealer disputes this factual point, but there was some material evidence in the record to support Customer's position, and that is enough to support a jury finding.

Perhaps even more crucial is the document that Customer signed on August 4, 2000, accepting the arbitrator's decision. As noted earlier, this document – another NCDS form – explicitly states, in printed text, as follows:

> I . . . understand that if I accept the Arbitrator(s)'s Decision, *the DaimlerChrysler Motors Corporation Dealer involved* and the DaimlerChrysler Corporation *will be legally bound* by the Arbitrators(s)'s Decision.

(Emphasis added.) This is the very document in which Customer formally accepted the offer of a warranty, and on its face, it states that Dealer is bound. Furthermore, Customer testified at trial, "I was under the impression that the dealer had to perform the warranty work that was granted to me. Because that's what I was told by the arbitrator."

We hasten to add that there is some evidence that could potentially counsel a different conclusion. But the issue in this case is whether there is material evidence to support the jury's verdict. We hold there is such evidence in the record before us.

III.

Several other issues raised by Dealer necessitate only brief discussion. For instance, Dealer argues that the trial court's statement that "the car was a lemon" suggests it assessed the jury's verdict through the prism of the Tennessee Lemon Law, Tenn. Code Ann. 55-24-201 (2004), rather than according to breach of contract principles. Dealer claims that this constitutes a violation of the court's duty to "independently weigh[] the evidence and pass[] upon the issues" in its role as the "thirteenth juror." ***Holden v. Rannick***, 682 S.W.2d 903, 906 (Tenn. 1984). Dealer notes that, under the Lemon Law, Customer's cause of action would be against Manufacturer rather than Dealer, and that in any case, Customer did not state a claim under this law. Thus, according to Dealer, the decision should be reversed and a new trial ordered, since "no verdict is valid until approved by the trial judge." ***Washington v. 822 Corp.***, 43 S.W.3d 491, 494 (Tenn. Ct. App. 2000). We disagree. The court's reference to the Durango being a "lemon" was related only to the issue of mitigation *vis a vis* the remittitur motion, and certainly does not demonstrate that the court was judging the verdict against the wrong law. The court was simply considering evidence of the vehicle's condition as being relevant to the reasonableness of Customer's alleged failure to mitigate damages. We will address the mitigation issue in more detail later, but for present purposes, it is sufficient to point out that the trial court *did* "weigh[] the evidence and pass[] upon the issues," as indicated by its statement that "[t]he Court finds that it is in agreement with the verdict of the jury." As this court stated recently:

> The discretion permitted a trial judge in granting or denying a new trial is so wide that our courts have held that he or she does not have to give a reason for his ruling. If the trial judge does give reasons, the appellate court will only look to them for the purpose of determining

> whether the trial court passed upon the issue and was satisfied or dissatisfied with the verdict. If the trial judge does not give a reason for her action, the appellate courts will presume she did weigh the evidence and exercised her function as thirteenth juror.

Blackburn v. CSX Transp., Inc., No. M2006-01352-COA-R10-CV, 2008 WL 2278497 at *7 (Tenn. Ct. App. M.S., filed May 30, 2008) (citations omitted). This issue is without merit.

Dealer also argues that failure of the fraud count necessarily dooms the breach of warranty count and mandates a verdict for the defendants. Dealer argues in its brief:

> The jury, and the Court, ultimately found that the Defendants did not fraudulently state that the brake calipers were not in need of repair on October 17th, 2000. If there was no fraud in that statement, then what Ms. Lashlee is left with is a vehicle on which the brake pads and rotors needed replacing. These were not covered by the warranty. Unless the Defendants fraudulently told Ms. Lashlee the calipers were not leaking in an effort to avoid their obligation under the warranty, the allegation that Harper's Chrysler breached that warranty cannot stand.

This is simply not true. A fraudulent statement is not a necessary element of a breach of contract claim. Customer simply needed to prove that Dealer unjustifiably failed to perform under the contract; whether that failure was *fraudulent* is a separate question. Dealer asserts that, absent fraud, "what Ms. Lashlee is left with is a vehicle on which the brake pads and rotors needed replacing," and that "[t]hese were not covered by the warranty." However, this assertion assumes factual conclusions in Dealer's favor. The jury was entitled to – and did – reach different conclusions based on the evidence. Specifically, there was evidence from which the jury could have concluded that the brake pads and rotors needed replacing *because of problems with the calipers*, which *were* covered by the warranty. Having reached this conclusion, the jury was then entitled to find that Dealer breached the contract when it refused to replace *both* the calipers *and* the non-warrantied parts *that the calipers damaged*.[5] That, we find, is the essence of the jury's verdict, and it does not depend upon a finding of fraud.[6]

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[5] Dealer asserts that Customer "failed to establish any circumstance under which wearable parts would be covered under the warranty." However, the jury could certainly conclude reasonably that, if damage to wearable parts was directly caused by warrantied, non-wearable parts, the warranty extends to repairs of such damage.

[6] Moreover, *even if* the factual underpinnings of Customer's case *did* require that Dealer have acted in a manner that might be loosely described as "fraudulent," such a factual finding is not necessarily ruled out by a legal finding that Customer did not prove the elements of the *tort* of fraud. Factually, it is possible to act dishonestly, even "fraudulently," without *committing fraud* in a legal sense.

Dealer attempts to rebut this conclusion by arguing that Customer failed to prove, by a preponderance of the evidence, that leaking calipers caused the problems with the brake pads and rotors. Dealer points out that two mechanics testified on that issue: an Auto Pro mechanic, who supported Customer's position that the calipers were leaking (and that such a leak could cause wear on the pads and rotors), and a mechanic in Dealer's employ, "specially trained and qualified in the repair of Chrysler products," who supported Dealer's position that the calipers were *not* leaking (and that such a leak would not cause the observed damage to the pads and rotors). Dealer now argues that "because of the superior qualifications to work on Chrysler products by the witness for [Dealer,] the testimony on this point was equally balanced, and perhaps even in favor of [Dealer]," and "[t]he jury was instructed that if testimony on an issue appears to be equally balanced, the party having the burden of proving that issue must fail." Dealer further asserts:

> The Plaintiff had the burden and offered testimony by one mechanic. There was no physical evidence – or any other evidence – offered that would have proven this issue by a preponderance of the evidence in favor of the Plaintiff. The testimony of two mechanics reaching exactly opposite conclusions cannot carry the burden of this issue for the Plaintiff, particularly when the witness offered by the Defendant testified to superior qualification to work on vehicles such as the one at the heart of this case.

Dealer appears to misapprehend our standard of review on this issue. Its statements regarding "balance" and "preponderance" are more properly suited for an argument before a trial court sitting as a thirteenth juror, not an appellate court reviewing a case for which a verdict has already been announced by the jury and approved by the trial judge. As this court explained recently,

> if a motion for a new trial is filed, then the trial court is under a duty to independently weigh the evidence and determine whether the evidence "preponderates" in favor of or against the verdict. . . . This standard should not be confused with our standard of review on appeal if the trial court has approved the verdict. In such a case, on appeal we are to affirm the verdict if the record contains "any material evidence to support the jury's verdict."

Blackburn, 2008 WL 2278497 at *6, *6 n.3. As can be seen, the relevant standard at this stage is the Tenn. R. App. P. 13(d) standard: "any material evidence." And there is certainly material evidence to support Customer's position. The Auto Pro mechanic's testimony, as well as Customer's own testimony about her dealings with both repair shops, created a jury issue regarding the calipers' possible impact on the wearable brake parts, and the jury resolved that issue in Customer's favor. In doing so, the jury was not limited to merely considering the "qualifications" of the witnesses who differed on the issue; it was also free to consider the witnesses' motivations and possible biases, their credibility as judged by the jury's observations of their behavior in court,

the impact of other evidence in the record on the believability of their testimony, and various other factors. We find no error on this point.

IV.

Dealer's final issue is that the evidence does not support the amount of damages awarded by the jury. On this point, we agree with Dealer. We are of course cognizant that "the amount of compensation is primarily for the jury, and next to the jury, the most competent person to pass on the matter is the trial judge." ***Foster v. Amcon Intern., Inc.***, 621 S.W.2d 142, 147 (Tenn. 1981). "If . . . the jury verdict is approved by the trial court in its role as 'thirteenth juror,' . . . the appellate court must affirm if there is any material evidence to support the verdict." ***Coffey v. Fayette Tubular Products***, 929 S.W.2d 326, 331 n.2 (Tenn. 1996). "We must, therefore, review the evidence . . . to determine whether material evidence supports a finding that the jury award is within the range of reasonableness and not excessive." ***Dunn v. Davis***, No. W2006-00251-COA-R3-CV, 2007 WL 674652, at *9 (Tenn. Ct. App. W.S., filed March 6, 2007). In this case, however, we hold that there is no material evidence to support a jury award in the amount granted in this case.

The jury found, and the trial court agreed, that Dealer's breach of the warranty damaged Customer in the amount of $21,492.45. The only way to support such an award is to use Customer's lease payments from October 2000 through the expiration of the lease as the measure of damages, on precisely the theory stated by the trial court in its memorandum opinion denying Dealer's motion for remittitur: "because the Plaintiff, essentially, didn't have a useable vehicle, even though she paid those lease payments." Yet the evidence is undisputed that, if Customer had paid the same $551.45 for brake repairs in 2000 that she ultimately paid in 2004, she *would* have had a useable vehicle during the final 3 1/2 years of the lease. That she chose instead to "park" the Durango, as a matter of "principle," does not entitle her to blame Dealer for the damages she suffered as a result of this independent choice. The vehicle's lack of useability throughout the final 3 1/2 years of the lease is a consequence of her own inaction. To the extent that her continued lease payments can be described as damages arising initially from Dealer's breach, they are damages that she easily could have – and reasonably should have – mitigated. "It is a well established rule in Tennessee that the party injured by the wrongful act of another has a legal duty to exercise reasonable and ordinary care under these circumstances to prevent and diminish the damages." ***Carolyn B. Beasley Cotton Co. v. Ralph***, 59 S.W.3d 110, 115 (Tenn. Ct. App. 2000) (quoting ***North Carolina Mut. Life Ins. Co. v. Evans***, 1990 WL 212854, at *3 (Tenn. Ct. App. W.S., filed December 31, 1990)).

The claim that any such mitigation would have been futile – *i.e.*, that Customer *still* would not have had a "useable vehicle," even if she *had* made the necessary brake repairs – is based purely on speculation. Such a theory presumes that the Durango's general history of assorted mechanical problems would have continued – in other words, that it really is a "lemon," as the trial court opined. This may be true, but if so, the instant litigation was not the proper forum to prove it, and the evidence herein does not in fact establish it. *This* litigation was about a *specific* problem with the Durango: namely, the brake problem that Dealer failed to repair under the warranty. Customer did not sue for breach of the lease, or for violation of a "lemon law," or for any other cause of action that

might have allowed her to vindicate her broader complaint that "with all the problems I had with the vehicle[,] I didn't feel that it was fair for me to pay out of pocket." She sued only on the narrow grounds of fraud and breach of the extended warranty. The fraud claim was dismissed – correctly, in our view – and, as for the warranty claim, Customer concedes that Dealer repaired, at no charge to her, all the previous problems that it was able to duplicate. Accordingly, the evidence demonstrates no breach of warranty prior to October 2000.[7] The only breach Customer can prove on this record is the one she received the verdict for – failure to repair the brake problems in October 2000 that were allegedly caused by leaking calipers – and she simply cannot prove $21,492.45 in damages from that specific breach.

On the other hand, we recognize that Dealer's breach rendered Customer's vehicle *temporarily* unuseable, and we further recognize that finding time to repair the brakes elsewhere would have been logistically inconvenient for Customer, and this inconvenience could reasonably have caused some degree of delay. We therefore think there is material evidence to support a finding that it would be within the range of reasonableness to award Customer, in addition to the $551.45 cost of repair, one month's lease payment on the Durango. According to the record, Customer paid $465 per month on the lease. This results in a maximum reasonable damages total, *based upon the evidence now before us*, of $1,016.45. Including the one lease payment would be justifiable because, in the words of the trial court, "the Plaintiff, essentially, didn't have a useable vehicle, even though she paid [that] lease payment[.]" However, because of the duty to mitigate, it is unreasonable to award Customer damages based on lease payments beyond that one-month window, absent proof that the failure to mitigate was reasonable, for example because the vehicle would have been unuseable even *after* repair, thus rendering any attempt at mitigation futile. Such proof is wholly lacking in this record.

"Appellate courts may suggest a remittitur where the trial court has not." ***Dunn***, 2007 WL 674652, at *9 (citing ***Coffey v. Fayette Tabular Prods***., 929 S.W.2d 326, 331 (Tenn. 1996)). However, no court, either trial or appellate, may suggest a remittitur that departs so significantly from the jury's verdict as to destroy that verdict. ***Foster v. Amcon Intern., Inc.***, 621 S.W.2d 142, 148 (Tenn. 1981). Most "destruction of the verdict" cases involve situations where the trial court has suggested remittitur or additur, and the appellate court is asked to consider whether that suggestion destroys the verdict. In this case, of course, the trial court *rejected* Dealer's request for remittitur, so there is no prior suggestion of remittitur for us to accept or reject. However, because we have found that $1,016.45 is the upper boundary of the range of reasonableness supported by any material evidence in this record, we must now consider whether remittitur to that amount would be an appropriate remedy. If so, we can suggest it. If not – if we find that such a suggestion of remittitur would destroy the verdict – then our only option is to remand the case for a new trial.

[7] It was therefore inappropriate for the trial court, in denying Dealer's motion for remittitur, to rely upon evidence that the Durango was "in the shop . . . 72 days out of the first year" of the lease. That was not the issue in this case.

The Supreme Court in ***Foster*** noted that "[t]he majority of additurs and remittiturs found in the reported cases are less than one times the jury's verdict," ***Id.*** at 148 n.9, and that the largest reported increases and decreases were in the range of 3 to 4 times the jury's verdict – for example, a remittitur from $47,500.00 to $15,000.00 in ***Wilson v. Cook Mfg. Co.***, 405 S.W.2d 584 (Tenn. Ct. App. 1966). The Court stated that the cited cases "are used only for illustration; by their use we do not intend to establish a numerical standard for reviewing additurs and remittiturs." ***Foster***, 621 S.W.2d at 148 n.9. Nevertheless, the illustration was instructive in ***Foster*** – in which the Court overturned an additur that increased the verdict thirty-fold – and it is equally instructive in this case. A remittitur herein, reducing the jury's award from $21,492.45 to $1,016.45, would make the total amount of damages more than 21 times smaller than the jury's verdict, stripping away more than 95 percent of the original award. Such a reduction is far more drastic than anything that has been approved before in this state. Indeed, this court in ***Guess v. Maury*** rejected a remittitur from $1,033,000 to $235,000 because "we are of the opinion that a remittitur of seventy-five percent destroyed the jury's verdict." 726 S.W.2d 906, 913 (Tenn. Ct. App. 1986). More recently, in ***Myers v. Myers***, No. E2004-02135-COA-R3-CV, 2005 WL 1521952, at *5 (Tenn. Ct. App. E.S., filed June 27, 2005), we rejected a remittitur from $500,000 to $150,000, a 70 percent reduction. Again, we stated, "[i]n our judgment this reduction was so large as to destroy the jury's verdict." ***Id.***

The approximately twenty-one-fold reduction in damages discussed herein would dwarf the approximately three- and four-fold reductions that were rejected in ***Guess*** and ***Myers***. In pointing this out, we do not, of course, announce a precise "numerical standard" in violation of ***Foster***. However, it is abundantly clear that a remittitur eliminating more than 95 percent of the award, reducing the judgment more than twenty-one-fold, would destroy the jury's verdict in this case. We therefore cannot resolve this issue by suggesting a remittitur, and must instead order a new trial.

Both parties had a full and fair hearing on the question of liability, and as already stated, we find no error in the court's judgment on the issues related to that question. We therefore affirm the trial court's judgment as to liability. We remand this case to the trial court for a new trial on the issue of damages only. *See* ***Lane v. John Deere Co.***, 767 S.W.2d 138, 142-43 (Tenn. 1989) (affirming jury verdict as to liability, but finding proof of damages inadequate and remanding for a new trial on the damages issue only); ***Coyle v. Prieto***, 822 S.W.2d 596, 602 (Tenn. Ct. App. 1991) (same). We, of course, express no opinion about the proper outcome of such a trial. Our analysis of the facts herein relates only to the evidence that was presented at trial, as reflected in this record, and does not indicate or imply any conclusions about what the evidence in a new trial may or may not show.

V.

The judgment of the trial court is affirmed as to liability and vacated as to damages, and the case is remanded for a new trial on the issue of damages only. Costs on appeal are taxed fifty percent to the appellant, Lisa Gail Lashlee, and fifty percent to the appellee, Harper's Chrysler.

CHARLES D. SUSANO, JR., JUDGE