

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 2593

MICHAEL ISABELLE

VERSUS


 **BAYLINER MARINE CORPORATION; BRUNSWICK CORPORATION; CUMMINS MID-SOUTH, L.L.C.; AND BOATER'S LANDING, INC. OF FT. MYERS**

Judgment Rendered: November 3, 2006

Appealed from the
Twenty-second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2002-12568

Honorable Reginald T. Badeaux, III Judge Presiding

Scott W. McQuaig
Keith A. Conley
W. Chad Stelly
Metairie, LA

Counsel for Plaintiff/Appellant,
Michael Isabelle

C.G. Norwood, Jr.
Patrick J. O'Cain
New Orleans, LA

Counsel for Defendants/Appellees,
Brunswick Family Boat Company, Inc.;
Brunswick Corporation; and Boater's
Landing, Inc.

David M. Kerth
Baton Rouge, LA

Counsel for Defendants/Appellees,
Cummins Mid-South, LLC and
Cummins Engine Company

BEFORE: CARTER, C.J., WHIPPLE AND McDONALD, JJ.

McDonald, J. concurs and assigns reasons.

WHIPPLE, J.

In this appeal, plaintiff challenges the trial court's judgment, which rejected his claim of redhibition for a pleasure boat he had purchased and, instead, awarded him damages for negligent repair. Defendants filed answers to the appeal, also challenging the judgment. For the following reasons, we reverse in part, amend in part, render in part and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

In November of 1999, plaintiff, Michael Isabelle, purchased a thirty-nine foot Bayliner 3685 Avanti boat, equipped with two 330 horsepower Cummins diesel engines, from Boater's Landing, Inc., an authorized Bayliner dealer, in Fort Myers, Florida. The vessel was a 1998 model that was manufactured by Brunswick Family Boat Company, Inc. in October 1997, and sold to Boater's Landing in November 1997. Plaintiff purchased the vessel as a "new demo" boat, with a **new boat** warranty, for a total purchase price of \$207,174.62.

While the boat ran appropriately on the trip home to Louisiana, in April 2000, plaintiff began experiencing problems with the boat, consisting mainly of the boat being unable to achieve plane and intermittently overheating. When these problems began, plaintiff contacted Boater's Landing and described what he was experiencing. According to plaintiff, Boater's Landing directed plaintiff to "go to a local area individual who works on the motors," in that the problem described sounded like a power plane problem.

Thereafter, plaintiff was referred to Cummins Mid-South, LLC, a certified Cummins repair facility, in Kenner, Louisiana, and Cummins Mid-South attempted to repair the problems on numerous occasions.

Nonetheless, the problems persisted, and, ultimately, in May and August of 2001, the vessel experienced failure of the port and starboard engines, requiring both engines to be rebuilt. Although these particular Cummins engines should normally run for 2800 to 3000 hours before requiring a major overhaul, the port engine was rebuilt after only 233 hours of use, and the starboard engine had only 269 hours of use when it was rebuilt. Even after the engines were rebuilt, the boat continued to experience the same problems and did not perform properly.

On May 24, 2002, plaintiff filed suit against: Brunswick Family Boat Company, Inc. (formerly known as Bayliner Corporation) and Brunswick Corporation, as the manufacturers of the vessel (collectively referred to as “Brunswick”); Cummins Mid-South and Cummins Engine Company, Inc., as the manufacturers of the engines; and Boater’s Landing, the seller. Plaintiff alleged that the vessel was defective and that, had he known of the defects in the vessel, he would not have purchased it. He further contended that the cause of the defects was attributable solely to the manufacturers and sellers of the vessel. Thus, plaintiff sought rescission of the sale of the vessel for redhibitory defects. Additionally, plaintiff contended that he had suffered damages as a result of the negligence of defendants in failing to repair the defects in the vessel. In addition to rescission of the sale, plaintiff sought to recover as damages all costs he had expended on the vessel.

Prior to trial, plaintiff’s redhibition claims against Cummins Mid-South, which was a distributor and engine service company and not a manufacturer, were dismissed by summary judgment. Thereafter, as set forth in the pretrial statement, plaintiff sought to recover at trial against Brunswick and Boater’s Landing for redhibition and against Cummins Mid-

South and Cummins Engine Company (collectively “Cummins”) for negligent repairs to the vessel.

Following a bench trial, the trial court rendered written reasons for judgment, in which it concluded that the evidence established that “the boat’s inability to plane was due largely to the size of the propellers.” However, the court further concluded that the fact that the boat was incorrectly “propped” for the warmer climate of Lake Pontchartrain did not render the boat redhibitorily defective. The court concluded that the expert testimony did not establish by a preponderance of the evidence that the propeller was the incorrect size at the time of the sale or under certain conditions even at a later date.

The court further found that the engines both had a defective number six piston that was discovered when the engines were rebuilt. However, the court stated that it was “quite possible” that “despite the apparent engine malfunctioning, the propellers were to blame all along.” Moreover, the court found that the alleged defect in the vessel had largely been repaired with a change in the propeller size shortly before trial. Thus, the court concluded that plaintiff had failed to carry his burden of proving that the vessel was redhibitorily defective.

Nonetheless, the court did find that there had been negligence in the efforts made to repair the vessel. Specifically, the court found that the evidence established that incorrect propeller size can cause excessive strain on the engines and overheating. The trial court further noted that despite the experts’ insistence that the engine problems were obviously related to the propellers, none of the mechanics who worked on the vessel suggested that the propellers should be changed.

The court concluded that the expert testimony established that the propellers should have been checked as a source of the vessel's problems and possibly should have been changed as early as the spring of 2000. The court further found as a fact that, had this been done, most of the vessel's performance problems could have been eradicated. Thus, the court concluded that the failure to identify at an earlier date that the propellers were the source of the vessel's performance problems constituted negligence on the part of all service providers.

In apportioning fault, the trial court concluded that Cummins, Brunswick¹ and Robert Casadaban² (whose company Casadaban Marine had occasionally performed work on the vessel for plaintiff) were each thirty percent at fault for negligent repair. Additionally, the court assessed ten percent fault to plaintiff for his failure to "recognize or suggest that the propellers were the offenders."

With regard to damages, the court concluded that plaintiff had established that he suffered \$35,000.00 for devaluation of the vessel; \$15,000.00 for damage to the reputation of the vessel; \$56,133.00 for mental anguish; and \$5,000.00 for additional "tweaking" for repairs to get the vessel in proper running condition.

From a judgment rendered in accordance with the trial court's reasons, plaintiff appeals, contending that the trial court was manifestly erroneous in: (1) failing to find that plaintiff had carried his burden of proving a vice or defect in the vessel which rendered it either absolutely

¹The trial court actually listed this defendant as "Bayliner" when apportioning fault. However, in the pretrial order, Brunswick stipulated that Brunswick was formerly known as Bayliner Marine Corporation.

²Although Casadaban was not named as a defendant in this suit, the trial court assessed fault against him in accordance with LSA-C.C. art. 2323(A). Dumas v. State, Department of Culture, Recreation & Tourism, 2002-0563 (La. 10/15/02), 828 So. 2d 530, 537.

useless or its use so inconvenient and imperfect that it must be supposed that plaintiff would not have purchased the vessel; (2) failing to award plaintiff damages arising from the redhibitory defects in the vessel, including rescission of the sale and restoration of the purchase price; (3) failing to award plaintiff reimbursement of reasonable expenses occasioned by the sale of the vessel and expenses incurred in the preservation of the vessel; (4) failing to award plaintiff attorney's fees; (5) apportioning fault to Robert Casadaban; and (6) apportioning fault to plaintiff.

Brunswick answered the appeal, contending that the trial court erred in: (1) finding Brunswick liable for negligent repair of plaintiff's vessel; (2) apportioning 30% fault to Brunswick for negligent repair of the vessel; and (3) finding that plaintiff had sustained \$111,133.00 in damages.

Cummins also answered the appeal, contending that the trial court erred in: (1) not allocating a greater percentage of fault to plaintiff based on his improper maintenance of the vessel, which would reduce the fault allocated to Cummins; and (2) awarding plaintiff \$111,133.00 in damages.³

**TRIAL COURT'S REJECTION OF PLAINTIFF'S
REDHIBITION CLAIMS AGAINST BRUNSWICK
AND BOATER'S LANDING
(Plaintiff's Assignment of Error No. 1)**

In this assignment of error, plaintiff contends that the trial court erred in concluding that he failed to carry his burden of proving a vice or defect in the vessel and, thus, that he failed to prove his redhibition claim. In Louisiana, sellers are bound by an implied warranty that the thing sold is free of hidden defects and is reasonably fit for the buyer's intended purpose. Morrison v. Allstar Dodge, Inc., 2000-0398 (La. App. 1st Cir.

³Although Cummins listed as an assignment of error in its answer to appeal the trial court's finding that it was liable for negligent repair, this assignment of error was not listed or addressed in Cummins' appellate brief and, thus, is deemed abandoned. See Uniform Rules -- Courts of Appeal, Rule 2-12.4.

5/11/01), 792 So. 2d 9, 14, writ denied, 2001-2129 (La. 11/2/01), 800 So. 2d 878. Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold which renders the thing either absolutely useless **or its use so inconvenient** that it must be supposed that the buyer would not have purchased it had he known of the vice. LSA-C.C. art. 2520; 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.

A buyer may bring an action against all sellers in the chain of sales back to the primary manufacturer to rescind the sale for breach of an implied warranty. To prevail in a claim for 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 the sale, but was not apparent; and (3) the seller was given an opportunity to repair the defect. Pratt v. Himel Marine, Inc., 2001-1832 (La. App. 1st Cir. 6/21/02), 823 So. 2d 394, 403, writs denied, 2002-2128, 2002-2025 (La. 11/1/02), 828 So. 2d 571, 572.

As stated above, the trial court herein determined that plaintiff failed to prove the existence of a redhibitory defect in the vessel at the time of purchase. The existence of a redhibitory defect is a question of fact, and the trial court's findings should not be disturbed in the absence of manifest error. Pratt, 2001-1832, 823 So. 2d at 403.

In an attempt to establish his claim of redhibition, plaintiff called Robert Casadaban, an expert in marine mechanical repair and yacht repair, to testify at trial. Casadaban's company, Casadaban Marine Services, Inc. (Casadaban Marine), had performed cosmetic warranty work and maintenance on plaintiff's vessel, as well as some troubleshooting. On

February 18, 2000, Casadaban Marine performed cosmetic and minor repair work to repair wear and tear to the vessel that had been stored outdoors at Boater's Landing. Thereafter, on April 4, 2000, plaintiff made a service call to Casadaban Marine because he, his wife and friends were to participate in a scheduled event with the boat that day, but he was unable to get the boat up on plane.⁴ Casadaban testified that the fuel filters were changed that day. However, according to plaintiff, even after the fuel filters were changed, the boat could not achieve plane. Knowing that the problem was not the fuel filters, Casadaban, who was not at the time a certified Cummins mechanic, recommended that plaintiff contact Cummins, given that the engines were under warranty.

Moreover, plaintiff testified that he contacted Boater's Landing when he first began experiencing these problems in the spring of 2000, and Boater's Landing also recommended that he have the engines inspected in that the problem sounded like a power plane problem. Thus, plaintiff contacted Cummins, which attempted repairs to the vessel on July 21, 2000, October 25, 2000, April 5, 2001, June 26, 2001, August 21, 2001, September 25, 2001, and December 19, 2001. The repairs included rebuilding both engines that had failed. Nonetheless, as Casadaban testified at trial, the problems with overheating, low power and the boat's inability to achieve plane persisted.

Casadaban further testified that after this suit was initiated, his boat facility was utilized for an inspection and sea trial on December 3, 2003. During the trip to Casadaban Marine, Casadaban was unable to get the boat to achieve plane. Once the boat reached his facility, the boat was hauled out

⁴Casadaban explained that when he referred to the boat not being able to get up on plane, he was referring to the inability of the boat to perform above its hull speed or to achieve the speed at which it was designed to travel.

of the water, and the hull, running gear, propellers, trim tabs and intakes were cleaned of barnacles and growth, so that the vessel could be properly evaluated. Thereafter, while the boat was able to achieve plane, it nonetheless was not able to achieve the manufacturer's recommended RPMs, a condition which undisputedly can cause engine performance problems. Casadaban further noted that the sea trial was conducted in the cooler month of December and that the boat always performed more poorly in the warm weather months.

Thereafter, a second sea trial was conducted on July 23, 2004, two weeks prior to trial of this matter, for the purpose of allowing Brunswick to replace the propellers that had been installed on the boat at the time of manufacture with propellers of a different pitch in an attempt to correct the performance problems of the vessel. At that time, the boat was again hauled out of the water, and an inspection demonstrated that the bottom of the boat and the running gear were clean and in good condition. However, when the boat was taken out for a sea trial, it was unable to achieve plane with the original propellers on the boat.

The boat was then hauled out of the water again, and the original propellers were replaced with smaller pitch propellers. When the boat was tested again, it was able to achieve plane. However, according to Casadaban, even with the new propellers on the boat, the engines were operating at an RPM level in excess of the manufacturer's specifications, which was inappropriate.⁵ When questioned about the problem with running the boat in excess of the manufacturer's recommended maximum RPM level, Casadaban stated that one problem was that it would void the

⁵Specifically, Casadaban testified that the Cummins technician on board the vessel showed Casadaban his digital tachometer, which registered 3100 RPMs for the port engine at full throttle, exceeding the recommended 2800 RPMs.

warranty. Also, according to Casadaban, when the boat turns too many RPMs, this action places excessive wear and tear on the engines and other components, and causes them to burn more fuel. In sum, Casadaban was of the opinion that the boat had had an exorbitant amount of repairs for its age and still had not been fixed. Casadaban testified that there are still “serious issues” that need to be addressed with the vessel.

Plaintiff also called as a witness John Martin, an expert in the field of marine surveying, appraisal and evaluation of yachts. Martin was one of the individuals who participated in the July 23, 2004 sea trial. He testified that during the July 23, 2004 sea trial, although the bottom of the vessel was appropriately clean and free from any growth, algae or barnacles at that time, the boat nonetheless did not perform well in the water. According to Martin, when the throttles were accelerated, the engines emitted excessive amounts of black smoke, and the engines’ RPMs were very low, in the 1800 to 1900 RPM range. Also, Martin noted that during that initial run, the vessel was unable to achieve plane.

Martin further testified that after the vessel was again hauled out of the water and the original propellers were replaced with propellers of a different pitch, the boat was able to achieve plane. However, Martin noted that the boat took longer than it should have, in his opinion, to achieve plane and that there was still excessive smoking of the engines. Moreover, Martin stated that he observed one of the technicians taking photoelectric tachometer readings, and those readings indicated that one engine was running at approximately 3100 RPMs and the other at approximately 3500 RPMs.

According to Martin, running the engines in excess of the manufacturer’s rating of 2800 RPMs could cause premature wear of the

engines and possible overheating problems, as well as increased fuel consumption and possible warranty problems. In fact, Martin testified that during the sea trial, when the engines were running in excess of the manufacturer's specifications, a valve cover gasket "blew." When questioned as to whether he believed the vessel had been sufficiently repaired such that plaintiff would have no more difficulties with it, Martin responded, "Not from what I saw on the second sea trial, no." According to Martin, despite the recent efforts in changing the propellers, the vessel is still not running properly or in an acceptable fashion.

Plaintiff and his wife also testified as to the persistent problems they had experienced with the vessel since shortly after its purchase. Specifically, plaintiff testified that they purchased the boat in November and that during the following cooler months, they primarily just idled around the neighborhood. However, when the weather warmed up and they attempted to use the boat for the activities for which they initially purchased it, they began experiencing problems with the boat being unable to achieve plane and overheating. These problems began just four months after the purchase of the vessel. Plaintiff testified that despite numerous repair attempts, they had continued to experience those problems intermittently up to the time of trial. He further stated that while the boat ran better in the winter months, he nonetheless still had problems with the boat in the cooler weather.

Both plaintiff and his wife testified as to numerous events and trips that they were unable to participate in with the boat and the times when they were stranded out in the water due to its malfunctioning. When asked if he believed that the boat had been suitable for its intended purpose, plaintiff responded, "[f]ar from it." When further questioned on cross-examination as to whether he had in fact gotten some use out of the vessel since its

purchase, plaintiff responded, “I qualify that with I haven’t had any quality use of the boat.” He acknowledged that he had used it to idle around the neighborhood, but he stated that he did not purchase this boat to simply idle around the neighborhood. Plaintiff additionally described one occasion when they had guests on the boat, and it was able to achieve plane. However, his gauges were indicating that the engines were overheating, and, while the alarms were not signaling an overheating problem, he stated that he was “sitting there with white knuckles driving the boat at 205 degrees.”

Plaintiff and his wife testified as to their regret and dissatisfaction in the purchase of the boat. Mrs. Isabelle stated that the boat had been a source of “great sorrow” for them and that it had never run properly. Similarly, plaintiff testified that if he had known then what he knows now, he would have never purchased the boat.

In an attempt to rebut plaintiff’s evidence, Brunswick called Jonathan Flesher to testify. Flesher is employed by Brunswick, defendant herein, as the head of the naval architecture testing and certification department. He was accepted by the court as an expert in the field of naval architecture, specifically as it pertained to the hull design of this particular boat. Flesher testified that Brunswick, also known as U.S. Marine, oversees the Bayliner, Maxum, Trophy and Meridian lines and is the manufacturer of this particular boat. The naval architecture testing and certification department is responsible for the design of the hull bottoms, performance testing and certification, and evaluation of prototypes.

With regard to the engine and propeller selection for the prototype, Flesher explained that the design team uses information from the hull design to calculate speeds and performance. They then develop predictions about a

selected engine and propellers. A test hull is then built, and the engine and propellers are tested under different weight conditions.

For this particular boat model, the prototype was tested with 330 Cummins engines and the propellers specified by Brunswick in Seattle, Washington, and Brunswick determined that the boat performed well with these engines and propellers in that geographical location.

Nonetheless, Flesher acknowledged that at the time of the December 3, 2003 sea trial, the vessel was not meeting rated RPMs, which he opined was possibly an “engine/propeller combination” problem. He believed that a decrease in the pitch of the propellers may correct this problem. Flesher further testified that Brunswick was aware that in different altitudes and weather climates, the propellers would perform differently, and there would be performance loss. In fact, Flesher specifically agreed that the specified propellers were not the right propellers for this boat in warmer temperatures. Additionally, Flesher acknowledged that the engines’ failure to meet rated RPMs due to an incorrect propeller selection could have resulted in all the repair work that Cummins Mid-South attempted on plaintiff’s vessel, including rebuilding the engines. Nonetheless, Brunswick placed no geographical limitations on where this vessel could be sold or used with the specified propellers.

Flesher also acknowledged that Brunswick did not inform or warn plaintiff that his boat may not perform properly in the warmer climate of Louisiana with the specified propellers on the boat.⁶ Yet, Flesher contended

⁶The owner’s manual did provide that “[b]oat speeds are affected by a great many factors,” some, such as temperature and altitude, that the owner could not change. It further provided that the owner should keep the propellers “in good repair and at the correct pitch” and that “[t]he standard propellers may not be the best for your particular boat and load conditions.” **Nonetheless, the owner’s manual did not specifically inform or warn the owner that the propellers may need to be changed to a different size or pitch in a warm weather climate in order to allow the boat to achieve plane.**

that the propellers specified for this particular boat were a “good, general” propeller and that the fact that plaintiff’s boat did not perform properly with the specified propellers in this locale did not mean that there was a mistake made when those propellers were installed on plaintiff’s boat during the manufacturing process.

However, Flesher acknowledged that plaintiff’s boat had never performed the way it was supposed to since plaintiff had purchased it. Additionally, with regard to the performance of plaintiff’s boat after the propellers were re-pitched during the July 2004 sea trial, Flesher acknowledged that the boat was still not performing correctly. However, he contended that the boat was running “fairly well” after the propeller change. According to Flesher, the port engine was not reaching rated RPMs, and the boat’s acceleration was not what he would have “liked to have seen.” Flesher also conceded that the other engine was running above the maximum-rated RPMs.

Nonetheless, Flesher believed that the boat could be “tweaked” with another propeller change and possibly larger trim tabs than those originally specified and installed to further improve the performance of the vessel. He believed that these additional repairs would correct the boat’s performance and would cost approximately \$3,000.00 for the necessary parts.

Iain Pelto, a customer service manager for Cummins MerCruiser Diesel, was also called to testify. Pelto, who has a degree in marine engineering, was accepted as an expert by the court in the field of marine engineering and specifically in diesel marine engine operation and performance. Pelto also participated in both the December 4, 2003 and July 23, 2004 sea trials.

During the December 2003 sea trial, Pelto took measurements of air and water temperature, engine temperature and RPM performance of the engines. While the boat was able to achieve plane during that sea trial, the port engine was unable to reach rated RPMs. Pelto concluded, based on the measurements he took, that the boat was “slightly overpropped” at that time.⁷ Notably, Pelto also acknowledged that if the engines are not able to reach rated RPMs, there can be resulting damage to the engines, including increased wear and tear on the cylinders and engine overheating.

Additionally, based on calculations he performed using certain assumptions as to summertime conditions, Pelto conceded that the boat “would be overpropped by a significant amount” in the warmer months in Louisiana. Following the December 2003 inspection and sea trial, Pelto anticipated that the boat would experience problems in the summer months and conceded that, with the propellers provided by Brunswick, the vessel would not be able to achieve plane in the summer.

Pelto further testified that the improvement of the boat’s performance during the July 2004 sea trial following the propeller change validated his expectations regarding improved performance with a change in propeller pitch.⁸ Nonetheless, Pelto maintained that Brunswick had not installed the wrong propellers on this boat at the time it was manufactured.

In sum, we note that the boat was purchased by plaintiff for use in Louisiana, from an authorized Brunswick/Bayliner dealer. The boat was sold as a “new demo,” with a new boat warranty. Nonetheless, the

⁷Pelto also opined that the performance problems plaintiff was experiencing could be caused in part by insufficient maintenance, noting that there was a significant amount of barnacle growth on the bottom of the vessel prior to the December 2003 sea trial. However, the trial court specifically rejected this assertion.

⁸As did the other defense expert, Pelto also acknowledged that the starboard engine exceeded the manufacturer’s maximum-rated RPMs after the propeller change.

performance problems surfaced within six months of the purchase, as soon as the weather warmed up. Flesher, Brunswick's employee and expert, acknowledged that the vessel had never performed properly, and Pelto, Cummins' expert, testified that with the propellers specified and installed by the manufacturer and present on the vessel at the time of purchase, he would not have expected the boat to be able to achieve plane in the warm weather months in Louisiana. Moreover, Brunswick's expert candidly acknowledged that it did not inform or warn plaintiff that use of the boat in warmer climates may necessitate a change in the originally specified and installed propellers.

As a result of the vessel being "overpropped," plaintiff undeniably experienced persistent problems with lack of power, inability to achieve plane and overheating, and less than two years after the date of purchase, both engines experienced premature failure and had to be rebuilt. Yet, even after the engines were rebuilt, the problems persisted, and plaintiff was deprived of any quality use of his vessel. In fact, it was not until two weeks prior to trial that the cause of the significant problems experienced may have been pinpointed, and it was still not repaired appropriately as of the time of trial. While the defense experts argued that the vessel was performing better than it had since the time of purchase with the propeller change, all the experts acknowledged that the vessel was still not operating properly as of the time of trial, almost five years after plaintiff's purchase.

A redhibitory "defect" as contemplated in LSA-C.C. art. 2520 is some **defect in** the manufacture or **design** of a thing sold or a physical imperfection or deformity **or a lacking of the necessary components** or level of quality that renders it either absolutely useless or its use so inconvenient that it must be presumed that the buyer would not have

purchased it had he known of the defect. Rey v. Cuccia, 298 So. 2d 840, 842-843 (La. 1974); Belle Pass Terminal, Inc. v. Jolin, Inc., 92-1544 (La. App. 1st Cir. 3/11/94), 634 So. 2d 466, 494, writ denied, 94-0906 (La. 6/17/94), 638 So. 2d 1094. In evaluating the evidence herein, the trial court stated that it found all the expert witnesses to be “equally credible” and accepted their testimony with the exception of the defense experts’ attempts to assign blame for the boat’s malfunctioning on lack of maintenance by plaintiff. Yet, after considering the expert testimony, the trial court nonetheless concluded that plaintiff had failed to prove the existence of a redhibitory defect because the evidence did not establish that “the propeller was the incorrect size at the time of sale” or “under certain conditions even at a later date.”

While the testimony did establish that the boat would probably have functioned correctly with the propellers on it at the time of sale **if the boat had been used in a cooler geographic region**, the record clearly establishes that the intended purpose for which plaintiff purchased the boat was for use in the warmer climate and waters of Louisiana. As stated above, Brunswick, knowing that the boat may under-perform in warmer climates with the specified propellers, failed to inform purchasers of this fact or to limit the geographical market to which it sold this boat.

Additionally, while plaintiff may have been able to use the boat to idle around the neighborhood in the cooler months (i.e., to use the boat “under certain conditions”), this again did not fulfill its intended use. While plaintiff did not experience lack of power problems with the boat in the first five months after he purchased and used it in the cool weather months in Louisiana, as recognized by the experts, he experienced increased difficulty as the temperatures increased. Clearly, plaintiff purchased the boat with the

intent of being able to enjoy its use year round in the climate of his home state, which he was never able to do in the almost five years that elapsed from the time of purchase until the time of trial.

Accordingly, we must conclude that the trial court committed manifest error in concluding that under these facts, plaintiff failed to prove the existence of a redhibitory defect in the boat which rendered its use so inconvenient that it must be presumed that plaintiff would not have purchased it had he known of the defect. Because the record also clearly establishes the remaining elements of plaintiff's redhibition claim, we further conclude that the trial court erred in failing to conclude that under these facts, plaintiff was entitled to rescission of the sale on the basis of redhibition.

**NEGLIGENT REPAIR BY BRUNSWICK AND CASADABAN
(Plaintiff's Assignment of Error No. 5; Brunswick's
Assignments of Error Nos. 1 & 2)**

In addition to the redhibition claims against the parties discussed above, plaintiff asserted a negligent repair claim against Cummins. The trial court, however, rejected the redhibition claim against Brunswick and Boater's Landing, and instead found that Brunswick, Cummins and Robert Casadaban were each liable for negligent repair. While Brunswick has challenged on appeal the finding that it was 30% at fault for negligent repair, we pretermitted discussion of that theory of recovery against Brunswick, having found that Brunswick is liable to plaintiff for redhibition. While Cummins assigned as error in its answer to appeal the finding that it was negligent in its repair of the vessel, it did not brief this issue. Accordingly, we deem the assignment of error abandoned. Thus, we now review plaintiff's contention that the trial court erred in finding that Casadaban was at fault for negligent repair of the vessel.

Liability for breach of the duty to perform repair works in a non-negligent, prudent and skillful manner arises ex delicto, and not under the redhibition articles of our civil code. See LSA-C.C. art. 2316; K & M Enterprises of Slaughter, Inc. v. Richland Equipment Co., Inc., 96-2292 (La. App. 1st Cir. 9/19/97), 700 So. 2d 921, 924; Richard v. Tri-J Industrial Construction, Inc., 478 So. 2d 215, 217 (La. App. 3rd Cir. 1985). In the instant case, the trial court found as a fact that plaintiff first contacted Boater's Landing when he initially experienced planing problems and that Boater's Landing referred plaintiff to Casadaban, who was a certified Cummins mechanic. The court further found that Casadaban and Cummins "spent almost an equal amount of time 'scratching their heads' about the [boat]" and that the failure to identify at an earlier date that the propellers were the source of the boat's performance problems constituted negligence on the part of Casadaban.

However, based on our review of the record, we must conclude that these findings are not supported by the evidence. At the outset, we note that Casadaban testified that at the relevant times, he was not a certified Cummins mechanic. He explained that while he had been a certified Cummins mechanic when he worked for Cummins in 1982, Cummins did not offer him updated training classes thereafter.

Additionally, with regard to the repair services provided to plaintiff by Casadaban Marine, the record demonstrates that after the initial cosmetic repairs performed shortly after plaintiff purchased the boat, Casadaban, on two occasions, performed only routine maintenance-type work in an effort to improve performance of the vessel. Specifically, on April 4, 2000, when plaintiff first began to experience problems, Casadaban changed the fuel filters. Thereafter, in August of 2000, Casadaban flushed the water pump

and heat exchangers to determine whether there was something minor like debris blocking them, which would not have been a warranty issue.⁹ Having then determined that the problem was not simply a maintenance issue, Casadaban recommended that plaintiff pursue the problem under the boat's warranty.

Other than those two occasions, the other services provided by Casadaban Marine included disconnecting and removing one of the engines for Cummins to rebuild it and reinstalling that engine after the rebuild. Considering this evidence and the record as a whole, we are constrained to conclude that the trial court manifestly erred when it found that Casadaban negligently repaired the vessel. The record is clear that Casadaban Marine limited its involvement in the repair efforts of the vessel given that the engines were still under warranty. Moreover, there is nothing to indicate that the minor maintenance work or the removal and reinstallation of the engine were performed in a negligent manner. Accordingly, we reverse the finding that Casadaban was negligent in its repair efforts.

**NEGLIGENCE OF PLAINTIFF
(Plaintiff's Assignment of Error No. 6;
Cummins' Assignment of Error No. 1)**

In this assignment of error, plaintiff contends that the trial court erred in finding him negligent for "failing to recognize or suggest that the propellers were the offenders." Cummins, in its answer to the appeal, asserts that the trial court should have apportioned more fault to plaintiff for his improper maintenance of the vessel.

In finding that plaintiff was negligent for failing to recognize or

⁹Casadaban also recalled one other occasion where he was called out to plaintiff's house when the boat was unable to achieve plane. However, because he was unable to remedy the problem that day at plaintiff's home, Casadaban did not charge plaintiff for the visit.

suggest that the propellers were the underlying problem with the boat, the trial court relied on the Brunswick owner's manual, which provided, in pertinent part, as follows:

Boat speeds are affected by a great many factors. Some, such as temperature and altitude, you cannot change, but some factors you can:

* * *

2. Propellers: Keep them in good repair and at the correct pitch. The standard propellers may not be the best for your particular boat and load conditions. If the engine RPM at full throttle is not correct (see your engine operation manual) ask your selling retailer/dealer about trying different propellers.

A slightly bent or nicked propeller will adversely affect the performance of your boat.

It is undisputed that in the instant case, plaintiff contacted Boater's Landing and explained the problems he was experiencing with the vessel, and Boater's Landing recommended that he have the engines checked. In accord with these directions, plaintiff contacted Cummins Mid-South, a certified Cummins repair facility, and again explained the problems he was experiencing with the boat's failure to achieve plane, lack of performance and overheating. Thus, upon experiencing problems with the performance of his vessel, plaintiff contacted the seller and authorized service facility and related the problems to them. He then properly relied on their expertise to diagnose and repair the problem.

While plaintiff did not specifically suggest to defendants exactly how they should repair the boat, we disagree with the trial court's conclusion that plaintiff had such a duty. Defendants, not plaintiff, were the entities with the skills and knowledge to diagnose the problem and repair plaintiff's boat.¹⁰

¹⁰Flesher, Brunswick's expert, acknowledged that, according to the Cruiser owner's manual supplied by Bayliner, Boater's Landing, the dealer, was best qualified to help plaintiff select a propeller. Additionally, Flesher acknowledged that Brunswick, as the boat manufacturer, and Cummins, as an engine service company, were in a more educated and experienced position than the purchaser to know that environmental conditions may necessitate a change in propellers.

Accordingly, we are constrained to conclude that the trial court erred in finding plaintiff negligent in failing to recognize or suggest that the originally specified and installed propellers were the offenders and needed to be replaced.

Regarding Cummins' argument that the trial court erred in failing to assess more fault to plaintiff for improper maintenance of the vessel, we note that the trial court specifically rejected defendants' claim that improper maintenance was a cause of the boat's performance problems. The evidence presented at trial established that when the boat was hauled out of the water in December 2003, the hull and running gear had significant barnacle growth, a factor that can impede boat performance. However, plaintiff explained (and the trial court apparently noted) that once he filed suit in May of 2002, Cummins declined to perform any further work on his vessel. At that point, because of his frustration, plaintiff quit attempting to use the boat and also quit cleaning the boat's hull. However, the record reflects that during the period when he was attempting to use the boat and prior to filing suit, plaintiff, who was an avid diver, "overcleaned" the bottom of the boat.

Moreover, when the boat was hauled out of the water for the July 2004 sea trial, the hull and running gear were clean, having been cleaned the day before by plaintiff, and the boat was nonetheless unable to achieve plane with the original propellers. Accordingly, we find no manifest error in the trial court's conclusion that lack of maintenance was not a cause of the boat's performance problems, and we find no merit to Cummins' contention that plaintiff should be assigned fault on that basis.

Thus, we reverse the portion of the judgment assessing fault to plaintiff.

DAMAGES
(Plaintiff's Assignments of Error Nos. 2, 3 & 4;
Cummins' Assignment of Error No. 2;
Brunswick's Assignment of Error No. 3)

In these assignments of error, plaintiff contends that the trial court erred in failing to order rescission of the sale, return of the purchase price, reimbursement of expenses occasioned by the sale and in the preservation of the vessel, and attorney's fees, on the basis of his redhibition claim. Cummins and Brunswick, on the other hand, contend that the trial court abused its discretion in finding that plaintiff sustained \$111,133.00 in damages for negligent repair, specifically with regard to the amounts awarded for "poor reputation" of the vessel and mental anguish damages.

With regard to plaintiff's assertions, because we have concluded that the trial court erred in denying his redhibition claim, we agree that he is entitled to rescission of the sale, return of the purchase price and reimbursement of reasonable expenses occasioned by the sale and in the preservation of the vessel, less a credit for the use made of the vessel if it was of some value to plaintiff. See LSA-C.C. art. 2531. Brunswick, as manufacturer, and Boater's Landing, as the seller, are solidarily liable for those damages. See LSA-C.C. art. 2545, 1993 Revision Comments (c) & (d); LSA-C.C. art. 1797, 1984 Revision Comment (b); Womack and Adcock v. 3M Business Products Sales, Inc., 316 So. 2d 795, 797 (La. App. 1st Cir. 1975); LeGros v. ARC Services, Inc., 2003-0918 (La. App. 3rd Cir. 2/25/04), 867 So. 2d 63, 65, writ denied, 98-2934 (La. 1/15/99), 736 So. 2d 212. Accordingly, judgment will be rendered in favor of plaintiff and against Brunswick and Boater's Landing, ordering rescission of the sale, and awarding plaintiff return of the purchase price and reimbursement of

expenses occasioned by the sale, and incurred in the preservation of the vessel.¹¹

According to the evidence, the purchase price of the boat was \$207,174.58, and plaintiff is entitled to a return of this sum. Additionally, plaintiff incurred \$11,105.00 in insurance premiums to insure the vessel from the time of purchase through the time of trial. He also paid \$1,210.80 for waxing, detailing and cleaning the vessel and \$394.76 for replacement of throttle cables in an effort to maintain and preserve the vessel. We likewise conclude that those sums were reasonable expenses incurred for which plaintiff is entitled to reimbursement.¹² See Poche v. Bayliner Marine Corporation, 93-721 (La. App. 5th Cir. 2/9/94), 632 So. 2d 1170, 1174.

With regard to finance charges that plaintiff incurred as a result of the purchase, we likewise find that this is a reasonable expense occasioned by the sale for which plaintiff is entitled to reimbursement. See Land and Marine Services, Inc. v. Diablo Data Systems, Inc. of Louisiana, 471 So. 2d 792, 802 (La. App. 5th Cir.), writ denied, 477 So. 2d 102 (La. 1985). Plaintiff made a cash down payment of \$30,132.45 and financed the balance of the purchase price, with a monthly note of \$1,485.36. While there is some evidence in the record as to finance charges incurred, we are unable to ascertain from the record before us the exact amount of finance charges that have now been incurred by plaintiff up to the date of rescission, i.e., the date

¹¹Because we have determined that any use plaintiff had of the vessel was non-quality use or extremely inconvenient given the multitude of problems he constantly experienced with the vessel, we conclude that Brunswick and Boater's Landing did not prove their entitlement to a credit for use made of the vessel.

¹²With regard to the various other expenses submitted by plaintiff for additional equipment and improvements to the boat, we decline to award those sums pursuant to LSA-C.C. art. 2531.

of this opinion.¹³ Accordingly, we will remand this matter for a limited determination by the trial court of the amount of finance charges incurred by plaintiff from the date of purchase of the boat to the date of this opinion, an amount for which plaintiff is entitled to reimbursement by Brunswick and Boater's Landing.

Plaintiff is likewise entitled to recover attorney's fees from Brunswick under the redhibition articles. Because a manufacturer is conclusively presumed to have knowledge of defects in the objects it manufactures, it is deemed to be in bad faith in selling a defective product and, thus, is liable to the buyer for all damages recoverable under LSA-C.C. art. 2545, including reasonable attorney's fees.¹⁴ Pratt, 2001-1832, 823 So. 2d at 404.

Factors to consider in determining a reasonable attorney's fee include the ultimate result obtained; the responsibility incurred; the importance of the litigation; the amount of money involved; the extent and character of the work performed; the legal knowledge, attainment and skill of the attorneys; the number of appearances made; the intricacies of the facts involved; the diligence and skill of counsel; and the court's own knowledge. Theriot v. Bourg, 96-0466 (La. App. 1st Cir. 2/14/97), 691 So. 2d 213, 226-226, writ denied, 97-1151 (La. 6/30/97), 696 So. 2d 1008. In the instant case, there were numerous pleadings and pre-trial motions filed. The factual issues presented required the development of expert opinion evidence by plaintiff's counsel to support the claim, which involved a large sum of money.

¹³While plaintiff notes in his appellate brief that the "total payout of principal and interest in connection with the purchase contract of the vessel is \$387,648.85," clearly plaintiff has not incurred all the finance charges associated with the total payout of the twenty-year mortgage. Moreover, the finance and security agreement specifically provides for no pre-payment penalty. Thus, plaintiff is only entitled to recoup those finance charges actually incurred as "reasonable expenses occasioned by the sale." LSA-C.C. art. 2531.

¹⁴There is no evidence, however, that Boater's Landing was a bad faith seller. Thus, it is not liable with Brunswick for the payment of attorney's fees. LSA-C.C. arts. 2531 & 2545; Pratt, 2001-1832, 823 So. 2d at 407-408.

Additionally, counsel for plaintiff presented extensive documentary and testimonial evidence in support of plaintiff's claims at the two-day trial of this matter, and the diligent efforts of plaintiff's counsel are amply demonstrated by the record. Considering the above criteria, we conclude that an attorney's fee award of \$25,000.00 is reasonable for the work performed at the trial court level and on appeal. See e.g. Poche, 93-721, 632 So. 2d at 1175, 1176, and Dupree-Simpson Farms v. Helena Chemical Company, 28,739 (La. App. 2nd Cir. 10/30/96), 682 So. 2d 838, 843.

Because we have concluded that the trial court erred in dismissing plaintiff's redhibition claim, and we render judgment herein awarding plaintiff rescission of the sale and damages pursuant to that claim, we must likewise vacate the trial court's awards of damages to plaintiff of \$35,000.00 for devaluation of the vessel; \$15,000.00 for damage to the reputation of the vessel; and \$5,000.00 for "tweaking" of the vessel. Accordingly, Brunswick's and Cummins' argument that the award for damage to the reputation of the vessel was an abuse of discretion is now moot.

Thus, we now turn to these defendants' argument that the trial court abused its discretion in awarding plaintiff \$56,133.00 for mental anguish damages. In rendering the award for mental anguish, the trial court noted that plaintiff got no enjoyment from his purchase after the first five months following the purchase, that he had to look at the boat on a daily basis as it sat in his back yard "in its crippled condition," that plaintiff was forced to cancel "untold boating plans," and that because of safety concerns due to the boat's performance problems, plaintiff and his wife were not able to participate in family outings with their child on the boat. The court then calculated plaintiff's mental anguish damages as 70% of the boat mortgage payments made by plaintiff.

However, even given the years of frustration and lack of enjoyment of the boat that plaintiff experienced, we must conclude that an award of \$56,133.00 for mental anguish is abusively high. We further conclude that the highest award to which plaintiff could be entitled for mental anguish is \$20,000.00. See Poche, 93-1170, 632 So. 2d at 1175 (\$10,000.00 mental anguish award for each plaintiff was held not to be abusively high where plaintiffs spent four years and a considerable amount of money trying to get sport fishing boat to operate properly). Thus, the mental anguish award will be amended accordingly.

With regard to liability for payment of the mental anguish award to plaintiff, Cummins is clearly liable to plaintiff for mental anguish damages under plaintiff's negligent repair claim.¹⁵ Additionally, we conclude that Brunswick is also liable to plaintiff for these damages under redhibition. Where the principal object of a contract is intellectual enjoyment or a non-pecuniary interest, damages for mental anguish from non-fulfillment of that intellectual object are recoverable. LSA-C.C. arts. 1998, 2545; Young v. Ford Motor Company, Inc., 595 So. 2d 1123, 1133 (La. 1992). We conclude that the purchase of a pleasure boat such as the one in the instant matter clearly satisfies these requirements. See Poche, 93-1170, 632 So. 2d at

¹⁵As additional damages for negligent repair, Cummins would also have been liable to plaintiff for the cost of repairs to the vessel. See Richard, 478 So. 2d at 217. However, the work performed by Cummins was performed under warranty and, thus, not charged to plaintiff. Moreover, plaintiff would not be entitled to any additional cost to fully repair the vessel given that the sale has been rescinded.

With regard to any possible liability that Cummins may have had to Brunswick or Boater's Landing, we note that Brunswick and Boater's Landing filed an incidental action against Cummins Engine Company, seeking indemnification or contribution if it were determined that the vessel was redhibitorily defective in whole or in part because of defects in the engines manufactured by Cummins Engine Company and serviced or repaired by Cummins Mid-South. However, the judgment of the trial court was silent as to this demand. Brunswick and Boater's Landing have not challenged the implicit rejection of that claim in their answer to appeal, and, thus, this issue is not before us in this appeal.

1175; see also Robert v. Bayou Bernard Marine, 514 So. 2d 540, 549 (La. App. 3rd Cir.), writs denied, 515 So. 2d 1107, 1108 (La. 1987).

Pursuant to LSA-C.C. art. 2323, the percentage of fault of all persons contributing to the injury or loss shall be determined, regardless of the basis of liability. Dumas, 2002-0563, 828 So. 2d at 537. Considering these principles and the record before us, we apportion fault for plaintiff's mental anguish damages 50% to Brunswick and 50% to Cummins. See LSA-C.C. art. 2324(B).

CONCLUSION

For the above and foregoing reasons, the portion of the trial court's January 4, 2005 judgment assessing fault against Michael Isabelle and Casadaban is reversed. We vacate the award of \$111,133.00. Judgment is rendered to reflect judgment in favor of Michael Isabelle to recognize that plaintiff is entitled to the following awards under the theories of redhibition and negligent repair as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that that November 19, 1999 sale of the Bayliner 3685 Avanti boat by Boater's Landing to Michael Isabelle is rescinded;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of Michael Isabelle and against Brunswick Family Boat Company, Inc., Brunswick Corporation and Boater's Landing, Inc., in solido, in the amount of \$219,885.14, representing the return of the purchase price of the boat and reasonable expenses incurred in the preservation of the boat;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of Michael Isabelle and against Brunswick Family Boat Company, Inc. and Brunswick Corporation in the amount of

\$25,000.00 in attorney's fees, with interest on this award to run from the date of this opinion until paid. See Sharbono v. Steve Lang & Son Loggers, 97-0110 (La. 7/1/97), 696 So. 2d 1382, 1388-1389;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of Michael Isabelle in the amount of \$20,000.00 for mental anguish, with Brunswick Family Boat Company, Inc. and Brunswick Corporation liable for 50% of those damages and Cummins Mid-South and Cummins Engine Company, Inc. liable for the remaining 50% of those damages.

Furthermore, this matter is remanded for a determination by the trial court of the amount of finance charges paid by Michael Isabelle from the date of purchase of the boat until the date of this opinion and for rendition of judgment in favor of Michael Isabelle and against Brunswick Family Boat Company, Inc., Brunswick Corporation and Boater's Landing, Inc., in solido, for that amount, as reasonable expenses occasioned by the sale; and for further proceedings consistent with the relief ordered herein.

Costs of this appeal are assessed 50% to Brunswick Family Boat Company, Inc., Brunswick Corporation and Boater's Landing, Inc., and 50% to Cummins Engine Company, Inc. and Cummins Mid-South.

REVERSED IN PART; VACATED IN PART; RENDERED IN PART; AND REMANDED WITH INSTRUCTIONS.

STATE OF LOUISIANA

COURT OF APPEAL


FIRST CIRCUIT

NUMBER 2005 CA 2593

MICHAEL ISABELLE

VERSUS

BAYLINER MARINE CORPORATION; BRUNSWICK CORPORATION;
CUMMINS MID-SOUTH, L.L.C.; AND BOATER'S LANDING, INC. OF
FT. MYERS

 McDONALD, J., Agreeing in part and concurring in part:

I agree with my colleagues that this sale should be rescinded and the purchase price refunded to the Isabelles. And while not legally incorrect, I believe it would be better to remand the matter to the trial court to determine how much has been paid by the plaintiffs and how much should be returned to them. This would include the payments that have been made to date, including interest since the sale was financed, as well as return of the deposit. I also agree with the return of reasonable expenses as determined by the majority. The finance papers introduced at trial indicate that the purchase was financed by the seller. (Plaintiff Exhibit 3) Plaintiff's Exhibit 21 indicates that plaintiff has been making payments to Bank of the West in Concord, California, with the boat listed as collateral. It is unclear whether the note has been bought by Bank of the West or they are no more than a collecting agency for the seller. Since the majority is remanding the case to the trial court to determine the amount of finance charges, I would remand for the trial court to also determine whether the plaintiffs are obligated to a third party for the full purchase price/amount financed, or if rescission of the sale releases them from further obligation.

Additionally, I believe the trial court is in the best position to determine the amount of attorney fees that are due in this case. While the amount determined by the majority is certainly reasonable, I feel the better action would be to remand to the trial court to make this determination. If the case were not already being remanded for the trial court to make additional findings, I would readily accept the majority's assessment of attorney fees. However, since it is being remanded, I would also instruct the trial court to determine the appropriate amount, in accordance with the factors set out in the opinion. In all other respects, I agree with the opinion of the majority.

For these reasons I respectfully concur in part and agree in the rest of the opinion.