MISSOURI COURT OF APPEALS

WESTERN DISTRICT

WD88554

B & P EXCAVATING, LLC,
Respondent,

v.

MID-MO EQUIPMENT, LLC, ET AL,
Appellants.

Opinion Filed: November 17, 2026

Appeal from the Circuit Court of Pettis County, Missouri
The Honorable Jeff A. Mittelhauser, Judge

Before Special Division: Lisa White Hardwick, Presiding Judge, Cynthia L. Martin, Judge and Gary D. Witt, Judge

Mid-MO Equipment, LLC ("Mid-MO") and Top Shelf Hauling, LLC ("Top Shelf") (collectively, "Sellers") appeal the trial court's judgment in favor of B & P Excavating, LLC ("Buyer") on a claim for breach of the implied warranty of merchantability. On appeal, Sellers argue that the trial court erred in finding there was a breach of the implied warranty of merchantability because Buyer signed and acknowledged the terms and conditions that explicitly modified and disclaimed the

implied warranty of merchantability. Sellers further contend that the trial court misapplied the law when it calculated the damages for the breach of the implied warranty of merchantability claim. Finding no error, we affirm.

Factual and Procedural Background[1]

In early 2023, Sellers placed a 2015 CAT dump truck ("Dump Truck") for sale "as is, where is" on an online auction. Buyer was interested in purchasing the Dump Truck and sent a mechanic to assess it before bidding. Buyer's mechanic did not find any issues with the Dump Truck after driving it around and looking it over. At the time of Buyer's inspection, the Dump Truck had a visible emissions control system label ("Label"), which indicated that the Dump Truck had a factory-installed emissions control system ("Emissions System").

On February 8, 2023, Buyer won the bid for the Dump Truck and paid a total purchase price of $66,355 to Sellers. The following day, two of Buyer's employees went to pick up the Dump Truck. One of the employees signed the following terms and conditions of the sale ("Terms & Conditions"):

> All items sold as is/ where is. Inspection prior to bidding is recommended and available . . . . **All equipment is sold "As is" with no guarantees or warranties of any kind as to the condition of the Equipment express or implied, including, but not limited to any implied warranty of merchantability or fitness for a particular

[1] "In the appeal of a bench-tried case, the appellate court views the facts in the light most favorable to the trial court's judgment." *Maly Com. Realty, Inc. v. Maher*, 582 S.W.3d 905, 907 n.1 (Mo. App. W.D. 2019) (quotation omitted).

> purpose, all of which warranties are hereby disclaimed by Mid[-]MO . . . . All items are sold "AS IS, WHERE IS" without warranty.

After completing the purchase, Buyer had the Dump Truck inspected for licensing purposes. The Dump Truck passed the inspection and received some standard repairs.

Soon thereafter, the Dump Truck began consistently stalling and losing power. Because Buyer's mechanic could not determine the source of the issue, Buyer brought the Dump Truck to a CAT dealership ("dealership") for repairs in April 2023. The dealership eventually determined that the Emissions System had been deleted from the Dump Truck. Once this was discovered, the dealership would not do any further work on the Dump Truck until the Emissions System was set back to the factory standard because working on a truck without intact emissions equipment would place the dealership's license at risk. As a result, Buyer was unable to use the Dump Truck.

In May 2023, Buyer demanded that Sellers rescind the sale of the Dump Truck and return the purchase price. Sellers refused.

In March 2024, Buyer asked the dealership to determine how the Emissions System had been deleted from the Dump Truck. To assess the Emissions System, the dealership had to remove the steps on the passenger side of the Dump Truck. The overall Emissions System looked intact, requiring the dealership to use a scope to find that a part of the Emissions System called the diesel particulate filter ("DPF") had been gutted. The dealership also noticed that the Dump Truck's computer did not have the correct software

to use the Emissions System. The dealership quoted a cost of $45,459.71 to repair these issues.

On January 14, 2025, Buyer filed a second amended petition against Sellers, alleging seven counts: conversion ("Count I"), fraud ("Count II"), violation of the Missouri Merchandising Practices Act ("Count III"), rescission ("Count IV"), negligence per se ("Count V"), breach of implied warranty of merchantability ("Count VI"), and negligent misrepresentation ("Count VII"). As to all counts, Buyer alleged that "[i]t is an industry standard for a 2015 CAT diesel dump truck to be equipped with working emissions equipment as stated on the [Label] attached to such truck." Buyer further alleged that the Emissions System was required "for operation as a dump truck, for purposes of resale, and all other purposes for which a 2015 CAT dump truck would be purchased and operated." It contended that Sellers knew or had reason to know that the Emissions System was required to be intact on the Dump Truck and that it was illegal to delete or tamper with the Emissions System. Buyer asserted that Sellers' omission, concealment, and suppression of the deletion or alteration of the Emissions System had caused Buyer to be damaged.

On April 16, 2025, Sellers filed a motion for summary judgment. They asserted that Counts I, II, V, and VII were barred by the economic loss doctrine; that Buyer could not recover as to Count III since the Dump Truck was purchased for business purposes; that rescission could not be granted as to Count IV because the contract had been fully

performed; and that there could be no breach of the implied warranty of merchantability as to Count VI given that the Dump Truck was sold "as is."

On July 10, 2025, the trial court granted summary judgment in Sellers' favor on Counts I, II, III, V, and VII and denied Sellers' motion for summary judgment on Counts IV and VI. The trial court determined that summary judgment was not appropriate on Counts IV and VI because "questions remain about a number of disputed facts, including whether [Sellers] knew the [Emissions System] had been removed, whether a reasonable pre-purchase inspection should have revealed the absence of the [Emissions System], and whether an implied warranty of merchantability existed."

On November 6, 2025, the trial court held a bench trial on Counts IV and VI. At trial, the parties presented evidence of the Terms & Conditions, invoices of the Dump Truck's repairs, and photographs of the Dump Truck and its Emissions System. The parties also presented the testimony of several witnesses.

Buyer presented the testimony of Mike Brown ("Brown"), the managing member of Buyer's business. Brown testified that when he purchased the Dump Truck, he assumed the Emissions System was intact because of the Label on the Dump Truck indicating it had emissions equipment and because of the federal prohibition on deleting emissions equipment from a truck. He testified that he would not have purchased the Dump Truck had he known that the Emissions System was deleted. Brown testified that the Dump Truck "had no value" without the Emissions System since it could not be used or sold in its current condition. He testified that he knew that the Dump Truck was sold

"as is" and that he would have had to repair the motor if it "blew up on the way" home. But Brown explained that the Emissions System was not something expected within an "as is" disclaimer because there was no way to know that the Emissions System was deleted before purchasing the Dump Truck. He further explained that after purchasing the Dump Truck, it had been difficult for Buyer's mechanic and for the mechanics at the dealership to determine that the Dump Truck's problems stemmed from the Emissions System being deleted.

Buyer also offered the expert testimony of Justin Givens ("Givens"), a seasoned diesel mechanic. Givens testified that he had inspected the Dump Truck, read the deposition of Sellers' mechanic, reviewed invoices from the Dump Truck's repairs, and examined photographs of the Emissions System. Givens testified that although the Label signaled the Dump Truck had emissions equipment, the Dump Truck did not have an intact Emissions System. Givens testified that photographs showed that the DPF was missing from the Emissions System. He explained that without the DPF, the Dump Truck would derate, which "indic[at]es an issue in the emissions system" and "tells the computer in the truck to shut down and get serviced." He also noted that the Dump Truck was sometimes failing to derate when it otherwise should have based on error codes. Givens testified that the Dump Truck's computer had been tampered with because the dealership had been unable to connect to the Dump Truck's computer using the software intended for an emissions-equipped vehicle and that it could only use the software intended for pre-emission vehicles. He explained that the computer had to have

been altered or switched out to bypass the deletion in the Emissions System because, otherwise, the Dump Truck would consistently show a code that there was a problem with the emissions equipment.

Givens further testified that there was no standard pre-purchase inspection that would have detected that the Emissions System had been deleted. He testified that to physically see the Emissions System, the dealership had to remove the steps on the passenger side of the Dump Truck. Even then, everything looked intact until the dealership used a scope to find that the DPF had been gutted.

Sellers presented the testimony of Bryan Paver ("Paver"), the owner of both of Sellers' businesses. Paver testified that Mid-MO had sold "a lot" of trucks with deleted Emissions Systems. He testified that in general, when Mid-MO knew it was selling a truck with a deleted Emissions System, Mid-MO would highlight that fact in the advertisement because, in his opinion, trucks with deleted Emissions Systems were more valuable because emissions equipment was expensive to repair. He testified that Mid-MO had never deleted or tampered with an Emissions System themselves, however, because it would be illegal to do so and because Mid-MO did not have the technology to do so.

Paver testified that it was "safe to assume that the emissions equipment [wa]s on" a used heavy-duty truck, like the Dump Truck, when purchasing one. Paver testified that he had assumed the Emissions System was intact when Top-Shelf purchased the Dump Truck and that he had intended to sell the Dump Truck with an intact Emissions System.

Paver admitted that based on the testimony that Buyer had presented, the Emissions System in the Dump Truck had been deleted. He testified that it was usually "obvious" when an Emissions System had been deleted but admitted that he had not noticed that the Emissions System had been deleted on the Dump Truck "[b]ecause everything was intact." He admitted that the Emissions System's deletion was "sophisticated."

At the close of evidence, the trial court took the matter under submission. On November 10, 2025, the trial court entered a judgment in favor of Sellers on Count IV (the claim for rescission) and in favor of Buyer on Count VI (the claim for breach of implied warranty of merchantability) ("Judgment"). The trial court specifically found that when Sellers sold the Dump Truck, it "was not fit for one of its primary purposes"; Buyer used the Dump Truck for such a purpose; Buyer gave Sellers notice that the Dump Truck was not fit for such a purpose within a reasonable time; and Buyer was damaged as a direct result of the Dump Truck being unfit for such purpose. The trial court explicitly found the testimony of Brown and Givens to be credible. It further concluded:

> [T]hat both physical parts and computer controls of the [Emissions System] were removed prior to the sale of the vehicle to [Buyer;] that despite the "as is, where is" sale conditions, that [Sellers] implicitly warranted that such [Emissions System] w[as] present, that it was reasonable for [Buyer] to believe the [Dump T]ruck's [Emissions System] w[as] intact and functioning, that [Buyer] conducted a reasonable inspection of the [Dump T]ruck prior to the sale, that such a reasonable inspection would not have disclosed the absence of the [Emissions System], that [Sellers] acted together in a joint venture in selling the vehicle to [Buyer] . . . .

The trial court concluded that "as a result of [Sellers'] breach of the implied warranty of suitability for normal dump truck usage, [Buyer] sustained damages in the amount of

$66,355.00." The trial court ordered Sellers to pay $66,355 with interest at the rate of 9% per annum and to pay costs.

On December 5, 2025, Sellers filed a motion to amend the Judgment. They argued that the trial court erred in finding that there had been a breach of the implied warranty of merchantability when the Terms & Conditions included a valid express disclaimer of any warranty. They further argued that the trial court misapplied the standard for calculating damages for breach of the implied warranty of merchantability. The trial court denied the motion.

Sellers timely appealed.

Standard of Review

"We review all court-tried cases using the standard articulated by *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976)." *Barron v. Parker*, 722 S.W.3d 1, 8 (Mo. App. W.D. 2025) (quoting *Bhoot v. 701-709 NE Woods Chapel Rd., LLC*, 704 S.W.3d 710, 724 (Mo. App. W.D. 2024)). The trial court's judgment will be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* We give "[g]reat deference . . . to the trial court's resolution of conflicts in evidence, and . . . due regard to the court's opportunity to have judged the credibility of the witnesses before it." *MC Dev. Co., LLC v. Cent. R-3 Sch. Dist. of St. Francois Cnty.*, 299 S.W.3d 600, 602 (Mo. banc 2009) (quoting *In re Competency of Parkus*, 219 S.W.3d 250, 255 (Mo. banc 2007)). We accept "all evidence and inferences therefrom in the light most favorable to the prevailing party and

disregard[] all contrary evidence." *Id.* (citing *Essex Contracting, Inc. v. Jefferson Cnty.,* 277 S.W.3d 647, 652 (Mo. banc 2009)).

Analysis

Sellers raise two points on appeal. In the first point, Sellers assert that the trial court erred by finding in favor of Buyer on the claim of breach of the implied warranty of merchantability "because no such warranty applied to the sale of the Dump Truck in that [Buyer] signed and acknowledged the Terms & Conditions, which explicitly modified and disclaimed the implied warranty of merchantability." The second point contends that the trial court erred in awarding $66,355 in damages to Buyer "because it misapplied the standard in calculating damages for a breach of the implied warranty in that the appropriate measure is the difference between the value of the Dump Truck when [Buyer] received it and the value it would have had if it had emissions equipment intact and functioning."

Point One: The trial court did not err in finding that there was a breach of the implied warranty of merchantability with respect to the Emissions System despite the "as is, where is" language in the Terms & Conditions due to the circumstances in this case

In the first point on appeal, Sellers contend that the trial court misapplied the law in finding that there was a breach of the implied warranty of merchantability since Buyer signed the Terms & Conditions that explicitly modified and disclaimed the implied warranty of merchantability. We disagree.

Missouri's Uniform Commercial Code ("UCC") provides in section 400.2-314(1) that "a warranty that the goods shall be merchantable is implied in a contract for their sale

if the seller is a merchant with respect to goods of that kind."[2] To be merchantable, a good must be at least "fit for the ordinary purposes for which such goods are used . . . ." Section 400.2-314(2)(c). To succeed on a claim for breach of implied warranty of merchantability, "a plaintiff must prove (1) that a merchant sold goods, (2) which were not 'merchantable' at the time of the sale, (3) injury and damages to the plaintiff or his property (4) which were caused proximately or in fact by the defective nature of the goods, and (5) notice to the seller of the injury." *Ragland Mills, Inc. v. Gen. Motors Corp.*, 763 S.W.2d 357, 360 (Mo. App. S.D. 1989) (citations omitted).

Here, the trial court found that each element for breach of the implied warranty of merchantability was met. It determined that (1) Sellers sold the Dump Truck, (2) which was not merchantable at the time of sale, as it was not fit for one of its primary purposes; (3) Buyer was damaged (4) by the Dump Truck being unfit for such purpose; and (5) Buyer gave Seller notice that the Dump Truck was not fit for such purpose within a reasonable time. *See Ragland Mills*, 763 S.W.2d at 360.

However, a seller can exclude or modify the implied warranty of merchantability at the time of sale through a written provision that is "conspicuous" and mentions the word "merchantability." Section 400.2-316(2). One such expression in writing that can be effective to exclude the implied warranty of merchantability is the phrase "as is."

[2]All statutory references are to RSMo 2016 as supplemented to February 8, 2023, the date that Buyer purchased the Dump Truck, unless otherwise indicated.

Section 400.2-316(3)(a). Sellers rely on these statutory provisions to argue that the Terms & Conditions excluded the implied warranty of merchantability as a matter of law.

The trial court disagreed and determined that despite the "as is, where is" disclaimer in the Terms & Conditions, Sellers implicitly warranted that the Emissions System was present, noting that it was reasonable that Buyer had believed the Emissions System was intact, that Buyer had conducted a reasonable inspection of the Dump Truck prior to the sale, and that such a reasonable inspection would not have disclosed the Emissions System had been deleted.

The trial court did not misapply the law in so finding. Although section 400.2-316(2) permits a seller to exclude the implied warranty of merchantability with express and conspicuous written language to that effect, that section is preceded by the phrase "[s]ubject to subsection (3)." And section 400.2-316(3) begins by similarly qualifying its provisions with the phrase "[n]otwithstanding subsection (2)." Section 400.2-316(3)(a) then explains that phrases like "as is" can qualify as express, conspicuous language in writing that will exclude the implied warranty of merchantability but conditions the effect of such language by the limiting phrase "unless the circumstances indicate otherwise."

We agree with the trial court's conclusion that the "as is, where is" language in the Terms & Conditions did not exclude an implied warranty of merchantability as to the Emissions System given the circumstances of this case. *See* section 400.2-316(3)(a). Those circumstances include the Label on the Dump Truck and the fact that a pre-

purchase inspection of the Dump Truck could not have revealed that the Emissions System had been deleted.

First, the presence of the Label constituted a representation that the Emissions System was intact so that a reasonable buyer would conclude that the "as is, where is" condition of the Dump Truck included an Emissions System. Buyer relied on the presence of the Label to conclude that the Dump Truck had an intact Emissions System. That presumption was reasonable as both Brown and Paver testified that it was illegal to delete emissions equipment from a truck, and Brown testified that in the absence of an intact Emissions System, it would be illegal to use or sell the Dump Truck. Paver, who was Sellers' witness, acknowledged that Sellers have sold equipment without a required Emissions System before, but disclose that fact in advertisements for the sale, supporting the reasonable inference that a deleted Emissions System is not something a reasonable buyer would contemplate, even with equipment that is sold "as is, where is." Though Sellers argue that the presence of the Label cannot be relied on because it would have been illegal to remove the Label, Paver's testimony discredits this argument, as notice of a deleted Emissions System could have been given without removing the Label.[3]

[3]Paver's testimony may have been intended to establish that Sellers did not know that the Emissions System had been deleted from the Dump Truck. However, they do not argue on appeal that their purported lack of knowledge about the deleted Emissions System was material to the trial court's finding that they breached the implied warranty of merchantability, notwithstanding the "as is, where is" language in the Terms & Conditions.

Second, the evidence established that a standard pre-purchase inspection could not have discovered that the Emissions System was deleted, and that the Dump Truck was not always derating while it was being driven to "alert" a driver to an issue with the Emissions System. Paver admitted that the Emissions System's deletion was hard to detect because "everything was intact" and the deletion was "sophisticated." Brown testified that the Dump Truck had passed two inspections before any issues were noticed, and that when the Dump Truck started having consistent problems, both Buyer's mechanic and the dealership's mechanics had trouble diagnosing the problem. Givens testified that to learn what was physically deleted from the Emissions System, the dealership had to remove the steps on the passenger side of the Dump Truck and then use a scope to discover the DPF was missing.

In light of these circumstances, the trial court did not misapply the law in determining that the "as is, where is" language in the Terms & Conditions did not exclude the implied warranty of merchantability with respect to the Emissions System because the circumstances in this case permitted Buyer to reasonably conclude that the "as is, where is" condition of the Dump Truck included an Emissions System. *See* section 400.2-316(3)(a) ("as is" disclaimer excludes implied warranty of merchantability unless circumstances indicate otherwise).[4]

[4]In the few cases we have been located that address the "unless circumstances indicate otherwise" language in similar Uniform Commercial Code provisions in other jurisdictions, circumstances sufficient to limit the "as is" disclaimer appear, as in this case, to involve circumstances that are contemporaneous with or that surround the sale

Point One is denied.

Point Two: The trial court did not misapply the law in calculating Buyer's damages for breach of the implied warranty of merchantability

Sellers' second point on appeal contends that the trial court misapplied the law when it awarded $66,355 in damages for breach of the implied warranty of merchantability because the appropriate measure for damages was the difference between the value of the Dump Truck when Buyer received it and the value it would have had if it had an intact and functioning Emissions System. Though Sellers have identified the correct measure of damages, we disagree that the trial court incorrectly applied that measure.

The trial court found that because of Sellers' breach of the implied warranty of merchantability, Buyers sustained damages of $66,355. In so finding, the trial court properly applied UCC section 400.2-714, which provides the remedies available to a buyer who has accepted goods but discovers that the goods are defective in some manner. UCC section 400.2-714(2) specifically provides that "[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value

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itself. *See, e.g., Knipp v. Weinbaum*, 351 So.2d 1081, 1084-85 (Fla. 1977) (statements by seller indicated seller intended "as is" disclaimer only to apply to minor defects); *Alpert v. Thomas*, 643 F.Supp. 1406, 1415-17 (D. Vt. 1986) (circumstances limited the "as is" disclaimer where the parties' negotiations demonstrated that they intended the horse to be merchantable for breeding); and *Sorchaga v. Ride Auto, LL*C, 909 N.W.2d 550, 557 (Minn. 2018) ("[s]tatements about the fitness of a truck for the purpose for which a truck is purchased are a circumstance that make the 'as is' disclaimers of implied warranties ineffective . . . .").

of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." The evidence at trial established that Buyer purchased the Dump Truck at a value of $66,355 and that the Dump Truck "had no value" without an intact Emissions System since it could not be legally used or resold in its current condition. The difference between the Dump Truck's value as accepted ($0) and its value if it had been as warranted was $66,355.

Sellers nonetheless argue that this calculation was incorrect because the record established that the Dump Truck could be repaired for $45,459.71. Sellers assert that the trial court should have awarded the cost to repair as the measure between the difference in value of the Dump Truck as accepted and as warranted.

We agree that the cost of repair or replacement can be a "useful objective measurement of the difference in value as is warranted . . . ." *Davis Indus. Sales, Inc. v. Workman Constr. Co., Inc.*, 856 S.W.2d 355, 360 (Mo. App. S.D. 1993) (quotation omitted). However, while the cost of repair can be "useful," it is not controlling in measuring the difference in value between goods as accepted and as warranted.

UCC section 400.2-714(1) allows damages for any nonconformity of tender to be determined in "any manner which is reasonable," and UCC section 400.2-714(2) does not specify how to calculate the difference in value, even permitting the trial court to award "proximate damages of a different amount" in "special circumstances." Thus, UCC section 400.2-714 grants trial courts the discretion to award damages that are reasonable

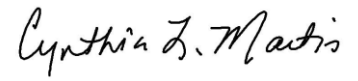
according to the circumstances of the case. It was not unreasonable for the trial court to base its damages determination on evidence that the Dump Truck had no value without an intact Emissions System, particularly in light of the evidence that Buyer would not have purchased the Dump Truck had it known of the deleted Emissions System.

Because substantial evidence supports the trial court's determination that the Dump Truck had no value in the absence of a functioning Emissions System and such determination was reasonable, *see* section 400.2-714(1), the trial court did not misapply the law in awarding damages of $66,355 for Sellers' breach of the implied warranty of merchantability. *See* section 400.2-714(2).

Point Two is denied.

Conclusion

The Judgment is affirmed.



Cynthia L. Martin, Judge

All concur