larly remember discussing with him or the circumstances or the place or the time, *but I do know that I did* because I noted it in my report to the court, the time spent, that we had a conference with the client, both Mr. Portman and I, about what he was about to do. So we did discuss something."

[2] The application for attorney's fees supports this statement. On December 17, 1972, a telephone conference with client regarding trial and discussion of plea is listed on the report to the court. The phone call lasted 15 minutes. It is quite evident that the attorneys in this case made it their routine practice to advise their clients of the elements of the crime and to distinguish and explain the degrees of a crime. In addition, the entire thrust of the defense was that the defendant acted out of anger and passion, therefore negating a charge of first or second degree murder. The defense argued to the jury that this was a case of manslaughter, not first degree murder, and in opening statements counsel emphasized that there was no premeditation, intent to kill or malice. The defendant's attorneys were competent trial attorneys, and we can only assume that the arguments they presented to the jury were the same ones they made to their client in the private conferences and the mock dry runs that every trial attorney experiences. Looking at all these circumstances, we find that the defendant was informed of the nature of second degree murder. Even though this court finds no express, specific representation, we do find this to be a case where the "defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Henderson, supra*, 426 U.S. at page 647, 96 S.Ct. at page 2258.

For the foregoing reasons, the judgment of the Court of Appeals is reversed.

Judgment reversed.

CELEBREZZE, C. J., and WILLIAM B. BROWN, PAUL W. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

HERBERT, J., concurs in the judgment.

60 Ohio St.2d 41

GODDARD, Appellant,

v.

GENERAL MOTORS CORPORATION, Appellee, et al.

No. 78-1528.

Supreme Court of Ohio.

Nov. 14, 1979.

Buyer of automobile brought action against seller and manufacturer. The Court of Common Pleas, Cuyahoga County, entered judgment in favor of buyer, and seller and manufacturer appealed. The Court of Appeals reversed and remanded, and motion to certify record was allowed. The Supreme Court, Herbert, J., held that where a new car express warranty limits buyer's remedy to repair and replacement of defective parts but the new car is so riddled with defects that limited remedy of repair and replacement fails its essential purpose, buyer may institute an action to recover damages for breach of warranty and, in a proper case, incidental and consequential damages.

Affirmed in part and reversed in part.

1. Sales ⇐426

Where a new car express warranty limits buyer's remedy to repair and replacement of defective parts but the new car is so riddled with defects that limited remedy of repair and replacement fails its essential purpose, buyer may institute an action to recover damages for breach of warranty and, in a proper case, incidental and consequential damages. R.C. §§ 1302.88(B, C), 1302.89.

2. Sales ⇐442(1)

Where new car warranty limited buyer's remedy to repair and replacement of defective parts, the warranty specifically

stated that loss of time, inconvenience, loss of use of vehicle, or other consequential damages were not covered by warranty, but the car was so riddled with defects that limited remedy of repair and replacement failed its essential purpose, buyer was not precluded by damages limitation in express warranty from seeking consequential damages. R.C. §§ 1301.06(A), 1302.01 et seq., 1302.93, 1302.93 comment.

Syllabus by the Court

Where a new car express warranty limits a buyer's remedy to repair and replacement of defective parts, but the new car is so riddled with defects that the limited remedy of repair and replacement fails its essential purpose, the buyer may institute an action to recover damages for breach of warranty under R.C. 1302.88(B) and, in a proper case, incidental and consequential damages under R.C. 1302.88(C) and 1302.89.

This action for breach of warranty was filed by appellant, James Bloomfield Goddard, III, against appellee, General Motors Corporation, and Bass Chevrolet, Inc. Appellant seeks recovery of compensatory damages amounting to $5,000 and punitive damages totaling $25,000.

On October 2, 1972, appellant received delivery of a 1973 Vega Station Wagon that he had purchased from Bass Chevrolet for $3,180. As part of the terms of the purchase, appellant received a "1973 NOVA AND VEGA NEW VEHICLE WARRANTY," which, in applicable part, stated as follows:

"WHAT IS WARRANTED AND FOR HOW LONG

"Chevrolet (Chevrolet Motor Division, General Motors Corporation) warrants to the owner of each 1973 model Nova and Vega motor vehicle that for a period of 12 months or 12,000 miles, whichever first occurs, it will repair any defective or malfunctioning part of the vehicle—except tires which are warranted separately by the tire manufacturer. This warranty covers only repairs made necessary due to defects in material or workmanship.

"The 12-month/12,000 mile warranty period shall begin on the date the vehicle is delivered to the first retail purchaser or, if the vehicle is first placed in service as a demonstrator or company vehicle prior to sale at retail, on the date the vehicle is first placed in such service.

"WHAT IS NOT COVERED BY THE WARRANTY

"* * *

"3. Loss of time, inconvenience, loss of use of the vehicle or other consequential damages;

"* * *

"This is the only express warranty applicable to 1973 Nova and Vega motor vehicles and Chevrolet neither assumes nor authorizes anyone to assume for it any other obligation or liability in connection with such vehicles. * * *"

The evidence adduced at trial establishes that, within approximately ten months of its delivery date, appellant's automobile was subject to numerous mechanical problems. On or about October 29, 1972, the transmission failed requiring return of the vehicle to Bass Chevrolet's service department. After four attempts were made to repair the transmission, it was replaced. At this time, appellant advised the dealer to repair a vibration in the automobile. After these repairs were allegedly completed, appellant embarked upon a trip through Pennsylvania. After stopping for fuel on the Pennsylvania Turnpike, the car's starter failed. The automobile was towed to a Chevrolet dealer for repairs, which were completed several days later. On the Friday before Christmas, appellant departed on another trip through Pennsylvania, where, upon appellant's stopping for fuel, the starter failed again. Unable to contact a factory dealer, appellant had the vehicle towed to a repair shop. The shop could not replace the starter, but did start appellant's vehicle for him. Appellant completed his trip without shutting off the car's engine, and, subsequently, in Wilmington, Delaware, an authorized Chevrolet dealer replaced the starter with a factory rebuilt unit.

Appellant's problems with the automobile persisted. In January of 1973, the fuel pump failed while he was in Reading, Pennsylvania. The following day, a tow truck transferred the vehicle to Wilmington, Delaware, where a Chevrolet dealership ordered the fuel pump for the vehicle. After appellant waited a day, the fuel pump was replaced without charge.

When appellant returned home, he delivered the car to Bass Chevrolet for the correction of the vibration again and for an inspection. The dealer removed the rebuilt starter, and replaced it with a new one. Thereafter, the car developed electrical problems, precipitating the replacement of the alternator. The vehicle's water pump was also replaced at this time.

In late February, during a trip to North Carolina, the vehicle's transmission began slipping and losing fluid. Appellant returned from the trip without transmission failure, but immediately delivered the vehicle to Bass Chevrolet which replaced the transmission. These repairs took in excess of 20 days. When appellant delivered the car for the transmission work, the dealer was notified that the vibration in the vehicle still existed.

During the first week of April 1973, appellant's mechanical problems recurred. As he was leaving home, numerous fuses began to blow and the vehicle stalled. The car was subsequently towed to Bass Chevrolet, where repairs were made at appellee's expense. As warmer weather set in, the automobile began to overheat. A new thermostat was installed.[1]

In June 1973, appellant "gave up" on his automobile and ordered a new one from Bass Chevrolet. In August, with approximately 18,000 miles on the vehicle, it was "wholesaled" at a price of $2,200. Appellant's testimony was to the effect that at the time it was sold, the vehicle still vibrated so badly that certain bolts were lost and constantly had to be replaced, and that the engine still overheated.

On June 26, 1973, appellant commenced the instant suit, and a jury subsequently awarded him damages in the amount of $7,500. The trial court overruled appellee's motion for a new trial, but ordered a remittitur of the jury award to $5,000, the amount requested in the complaint.

The Court of Appeals reversed the judgment of the trial court and remanded the cause for additional proceedings on the question of damages.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Roemisch & Wright Co., L.P.A., and Thomas R. Chase, Cleveland, for appellant.

James, Moore, Douglas & Co., L.P.A., and William D. Moore, Cleveland, for appellee.

HERBERT, Justice.

Appellant urges principally that the retail purchaser of a motor vehicle may recover consequential damages when the seller breaches its express warranty, notwithstanding language in the warranty which denies recovery of such damages.

Appellee, General Motors, expressly warranted to owners of 1973 Vega automobiles that "for a period of 12 months or 12,000 miles, whichever first occurs, it * * * [would] repair any defective or malfunctioning part of the vehicle," and that such repairs would be "performed by any authorized Chevrolet dealer within a reasonable time following delivery of the vehicle to the dealer's place of business." Appellee provided further that it would not be liable for, "[l]oss of time, inconvenience, loss of use of the vehicle or other consequential damages."

In our view, a fair reading of appellee's warranty demonstrates the creation of an express 12 month or 12,000 mile warranty in favor of appellant. See R.C. 1302.26. Furthermore, as authorized by R.C. 1302.-93(A)(1), appellee attempted to limit its lia-

1. This repair was completed and billed as warranty work even though the car had been driven in excess of 12,000 miles.

bility under the express warranty to the repair and replacement of defective parts. Pursuant to R.C. 1302.93(C), appellee purports to exclude from the face of the express warranty any liability for consequential damages.

In spite of the disfavor which the Uniform Commercial Code (hereinafter Code) places on the limitation of remedies (see R.C. 1302.93[A][2], Comment 1), and the presumption which arises that a limiting clause provides a cumulative remedy rather than an exclusive one (R.C. 1302.93, Comment 2), a significant number of authorities have held that language similar to that in the cause at bar is an adequate expression of the seller's intent to limit the buyer's remedy to the repair and replacement of defective parts. *Clark v. International Harvester Co.* (1978), 99 Idaho 326, 581 P.2d 784, citing *Cox Motor Car Co., v. Castle* (Ky.1966), 402 S.W.2d 429; *McCarty v. E. J. Korvette, Inc.* (1975), 28 Md.App. 421, 347 A.2d 253; *Lankford v. Rogers Ford Sales* (Tex.Civ.App.1972), 478 S.W.2d 248; White & Summers, Uniform Commercial Code, Section 12–9 (1972). But, see, *Ford Motor Co. v. Reid* (1971), 250 Ark. 176, 465 S.W.2d 80.

We hold that this is the result intended in the cause at bar. However, whether in fact such a limitation of remedy provision is effective to preclude recourse to the other remedial provisions of the Code, depends in part on whether the limitation of remedy provision complies with R.C. 1302.93, the enabling statute.

R.C. 1302.93 provides, in applicable part:

"(A) Subject to the provisions of divisions (B) and (C) * * *:

"(1) [T]he agreement may * * * limit or alter the measure of damages recoverable * * * to [the] repair and replacement of non-conforming goods or parts."

Division (B) of R.C. 1302.93 states:

"Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in Chapters 1301, 1302 * * * of the Revised Code."

Comment 1 to R.C. 1302.93 states that "[u]nder division (B), where an apparently fair and reasonable clause because of [the] circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Chapter."

Although in most cases a limited remedy may be fair and reasonable, and satisfy the reasonable expectations of a new car purchaser, other courts and some commentators have generally recognized that when a seller is unable to fulfill its warranted obligation to effectively repair or replace defects in goods which are the subject matter of the sale, such as in the instant cause, the buyer is deprived of the benefits of the limited remedy and it therefore fails its essential purpose. *Clark v. International Harvester Co., supra*, 99 Idaho 326, 581 P.2d 784; *Murray v. Holiday Rambler, Inc.* (1978), 83 Wis.2d 406, 265 N.W.2d 513; *Durfee v. Rod Baxter Imports, Inc.* (Minn.1978), 262 N.W.2d 349; *Fargo Machine & Tool Co. v. Kearney & Trecker Corp.* (E.D.Mich. 1977), 21 UCC Rep. 80; *Ehlers v. Chrysler Motor Corp.* (1975), 88 S.D. 612, 226 N.W.2d 157; *Eckstein v. Cummins* (1974), 41 Ohio App.2d 1, 321 N.E.2d 897; *Riley v. Ford Motor Co.* (C.A.5, 1971), 442 F.2d 670; *Jones & McKnight Corp. v. Birdsboro Corp.* (N.D. Ill.E.D.1970), 320 F.Supp. 39. See White & Summers, Uniform Commercial Code, *supra*, at pages 379–383, Section 12–10.

In *Clark v. International Harvester Co., supra*, the court stated, 581 P.2d at page 798:

"The purpose of the exclusive repair or replacement remedy is to ensure that the purchaser receives a product which conforms to the express warranty, *i. e.*, that the product is free from defects, and if the product proves defective within the warranty period the seller is obligated to cure the defect within a reasonable time. * * * [Citations omitted.] If, however, the seller is subsequently unable or unwilling to repair or replace a defective part within a reasonable time, the buyer is left with a defective product—not conforming to the

warranty—and the limited remedy has not achieved its purpose. In such circumstances § 28–2–719(2) permits the buyer to pursue the other remedies provided by the UCC if the defect substantially affects the value of the buyer's bargain."

Similarly, the United States Fifth Circuit Court of Appeals applied the Alabama Uniform Commercial Code in *Riley v. Ford Motor Co., supra*, a cause which also involved a seller's express warranty limiting the buyer's recourse to the repair or the replacement of defective parts. Upon the seller's inability to remedy at least 14 major and minor defects in the vehicle within a reasonable time, the buyer brought an action for breach of warranty against the Ford Motor Company. The court held that under the circumstances of that cause, it was "unable to conclude that the jury was unjustified in its implicit finding that the warranty operated to deprive the purchaser 'of the substantial value of the bargain.'" *Id.*, at 673.

In *Murray v. Holiday Rambler, Inc., supra*, 83 Wis.2d 406, 265 N.W.2d 513, it was held that a warrantor's limited remedy to repair and replace defective parts fails its essential purpose where the cumulative effect of a substantial number of defects within the vehicle substantially impairs the value of the goods to the buyer. In that case, the seller was given a reasonable opportunity to cure the defects but, notwithstanding his efforts, the vehicle failed to operate as should a new vehicle. Under such circumstances, the court concluded that the buyer may then invoke the general remedy provisions of the Code.

[1] In accordance with R.C. 1302.93(B), we conclude that where a new car express warranty limits a buyer's remedy to repair and replacement of defective parts, but the new car is so riddled with defects that the limited remedy of repair and replacement fails its essential purpose, the buyer may institute an action to recover damages for breach of warranty under R.C. 1302.88(B) and, in a proper case, incidental and consequential damages under R.C. 1302.88(C) and 1302.89. See, *e. g., Adams v. J. I. Case Co.* (1970), 125 Ill.App.2d 388, 261 N.E.2d 1; *Jones & McKnight Corp. v. Birdsboro Corp., supra; Murray v. Holiday Rambler, Inc., supra; Ehlers v. Chrysler Motor Corp., supra; Fargo Machine & Tool Co. v. Kearney & Trecker Corp., supra; Riley v. Ford Motor Company, supra;* White & Summers, Uniform Commercial Code, *supra*, Section 10–4 at pages 314–318.

[2] Appellee contends vigorously that, notwithstanding the purchaser's ability to recover direct damages under R.C. 1302.88(B), the Court of Appeals correctly found the limitation of consequential damages in the express warranty effective to bar appellant's claim for such damages. Appellee argues that the limitation of consequential damages expressed in the warranty should be effective to disclaim such damages under the facts at bar unless to do so would be unconscionable. R.C. 1302.93(C).

We disagree. Those agreements made pursuant to R.C. 1302.93(A) which purport to limit a buyer's remedies to the repair or the replacement of defective parts are made subject to the terms of R.C. 1302.93(B). R.C. 1302.93(B) provides that where an exclusive remedy fails of its essential purpose, remedy may be had as provided under the various chapters of Revised Code. This is further explained by Comment 1 to R.C. 1302.93, which states that a limited remedy which fails gives way to the "general remedy provisions" of R.C. Chapter 1302.

In declining to enforce the disclaimer of consequential damages expressed by appellee in its warranty, we take note of the stated purpose of the remedial provisions of the Uniform Commercial Code. R.C. 1301.06(A) provides that the remedies expressed in the Code should be liberally administered with the view of placing the aggrieved party in as good a position as if the other party had fully performed. Furthermore, the Code indicates that parties who conclude a contract for sale "must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract." R.C. 1302.93, Comment 1.

Our conclusion in this regard is buttressed by the majority of authorities which have ruled upon the validity of a disclaimer for consequential damages when the limited remedy of repair or replacement of defective parts fails its essential purpose. *Murray v. Holiday Rambler, supra*, citing 265 N.W.2d at page 526; *Beal v. General Motors Corp.* (Del.1973), 354 F.Supp. 423; *Koehring Co. v. A.P.I., Inc.* (E.D.Mich.S.D. 1974), 369 F.Supp. 882; *Reynolds v. Preferred Mutual Ins. Co.* (Mass.App.Div.S.D. 1972), 11 UCC Rep. 701; *Ehlers v. Chrysler Motor Corp., supra; Clark v. International Harvester Co., supra; Adams v. J. I. Case Co., supra; Jones & McKnight Corp. v. Birdsboro Corp., supra.*

In *Adams v. J. I. Case Co., supra*, 125 Ill.App.2d 388, 261 N.E.2d 1, the court, at page 402, 261 N.E.2d at page 7, predicated its allowance of consequential damages, irrespective of the seller's disclaimer for such damages, upon the following rationale:

"* * * The manufacturer and the dealer have agreed in their warranty to repair or replace defective parts while also limiting their liability to that extent. Had they reasonably complied with their agreement contained in the warranty, they would be in a position to claim the benefits of their stated limited liability and to restrict plaintiff to his stated remedy. The limitations of remedy and of liability are not separable from the obligations of the warranty. Repudiation of the obligations of the warranty destroys its benefits. * *"

The Supreme Court of South Dakota, in *Ehlers v. Chrysler Motor Corporation, supra*, 88 S.D. 612, 226 N.W.2d 157, held that a seller who fails for an unreasonable length of time to repair a buyer's automobile pursuant to the warranty, cannot in fairness assert the limitation of remedy provision to shield itself from liability under the other remedial provisions of the Code. The court stated, at page 621, 226 N.W.2d at pages 161–162:

"It is impermissible for appellant to choose which sections of the warranty to be bound by. Appellant Chrysler's actions in breaching the warranty by refusing to honor its obligations under it has caused the limited remedy of repair and replacement 'to fail of its essential purpose'. It necessarily follows that plaintiff-respondent is entitled to seek damages for incidental and consequential losses caused by appellant's breach."

We find the above-cited authorities persuasive and therefore reverse that portion of the judgment of the Court of Appeals which disallowed appellant's claim for consequential damages. However, as did the Court of Appeals, we remand the cause to the trial court for the purpose of adducing evidence upon the amount of direct and consequential damages properly recoverable.[2]

The judgment of the Court of Appeals is affirmed in part and reversed in part.

Judgment affirmed in part and reversed in part.

CELEBREZZE, C. J., and WILLIAM B. BROWN, PAUL W. BROWN, SWEENEY, LOCHER and HOLMES, JJ., concur.

2. The Court of Appeals correctly noted that the ordinary measure of damages for a buyer in a breach of warranty action is specified by R.C. 1302.88(B), which states:

"The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value 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."

R.C. 1302.88(C) provides, however, that the buyer may recover "[i]n a proper case any incidental and consequential damages under section 1302.89 of the Revised Code * * *."