**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 23, 1997

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**No. 97-1544**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

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**WILLIAM HEINLEIN, DENSING REALTY, INC., A DOMESTIC CORPORATION, JOE WILLIAMS, DON MULLETT, LLOYD ENGINEERING AND ASSOCIATES, INC., A DOMESTIC CORPORATION, JAMES YOUKER AND BLAKE INVESTMENT CORP., A DOMESTIC CORPORATION,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**CLAYTON INDUSTRIES, A FOREIGN CORPORATION, AND ROEDEL-HANSON ASSOCIATES, A DOMESTIC CORPORATION,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Reversed and cause remanded.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. William Heinlein, Densing Realty, Inc., Joe Williams, Don Mullett, Lloyd Engineering and Associates, Inc., James Youker, and Blake Investment Corporation (collectively, the Arcadia Group) appeal a summary judgment in favor of Roedel-Hanson Associates and Clayton Industries, Inc. (collectively, Clayton). Arcadia Group purchased an energy system for which Clayton supplied the main components. Clayton's warranty provided that it could not be modified except in writing, signed by two Clayton officers. On appeal, the Arcadia Group asserts that it presented on summary judgment sufficient evidence to raise an issue of fact whether Clayton's conduct waived the modification requirement and demonstrated a modification of the warranty's terms. We agree and therefore reverse.

On September 9, 1985, the Arcadia Group purchased an integrated energy system for $1,850,000 from Edward & Lee Financial Services Ltd. (E&L). Clayton manufactured the system's key components, steam generators and feedwater pumps. E&L designed the Arcadia Group's system to provide low moisture steam to satisfy the hot water and steam requirements of A-G Co-op, a cheese-processing plant in Arcadia, Wisconsin. It was also designed to produce enough steam to power a turbine, generating electricity that the Arcadia Group would sell to the A-G Co-op plant and to the local electric company.

Prior to purchasing the equipment, E&L representatives met with a Clayton representative and its distributor's president, Bob Roedel. E&L explained that it required steam generators that could operate at high pressure and produce steam with low moisture content. Clayton and Roedel reassured E&L that Clayton's steam generators would meet its system needs.

The Clayton equipment was covered by a one-year warranty. All modifications to the warranty were to be in writing and signed by two Clayton officers. It provided in pertinent part:

> Clayton warrants its goods to be delivered hereunder to be free from defects in material and/or workmanship for a period of (1) year from the date of original installation by purchaser or 15 months from date of shipment from the factory, or for the period as may be specified in a Clayton written warranty shipped with such equipment, whichever is shorter. Upon the expiration of such warranty period, or in the event such goods are subjected to improper installation, misuse, negligence, alteration, accident, improper repair, or are operated contrary to Clayton's printed instructions, all liability of Clayton shall immediately cease. THE FOREGOING WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, EXCEPT TITLE AND DESCRIPTION, WHETHER WRITTEN, ORAL OR IMPLIED, AND CLAYTON MAKES NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE. No representative of Clayton has any authority to waive, alter, vary, or add to the terms hereof without prior approval in writing executed by two officers of Clayton.
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> ….
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> … It is expressly understood that the repair or replacement of such defective part or parts by Clayton shall constitute the sole remedy of purchaser and the sole liability of Clayton whether on warranty, contract or negligence ….

If adhered to, the warranty would have expired in June 1987, one year after installation of the Clayton equipment was complete.

After the Arcadia Group received the steam generator, the Clayton equipment experienced problems almost immediately. The boilers and feedwater pumps could not operate continuously at high pressure and otherwise leaked and failed. The boilers and pumps vibrated so significantly that several pumps broke apart. Unable to operate at high pressure, the system could not create sufficient

steam to run the plant and power the turbine. The problems were so severe that the system rarely operated for more than a few days without a breakdown.

Paul Lassanske, an E&L officer, met with Paul Smith of Clayton to discuss modifying Clayton's standard warranty so that the one year period would not begin to run until the system operated for thirty consecutive, trouble-free days at high pressure. Subsequently, Lassanske wrote two letters to Smith, Clayton's national service manager, stating that E&L would not accept the equipment until the thirty consecutive, trouble-free day period was accomplished. In his affidavit, Lassanske stated that Clayton agreed that its equipment would not be considered installed, and the warranty would not begin to run, until they operated at high pressure for thirty consecutive days, trouble-free. Clayton failed to respond to either letter and did not inform Lassanske that his understanding about the warranty obligations was mistaken. Later during deposition, Lassanske admitted he was unable in his second letter to refer to any agreement with Clayton to amend the warranty because none existed.

Clayton continued to service the system throughout 1987. Michael Franco, a field technician for Clayton, performed some of the work during this time and signed corresponding service orders. At deposition, he testified that Clayton's billing practices consisted of five categories: start up, preventative maintenance, demand or emergency service, goodwill and warranty. He stated that he did not determine how to bill work; rather, either his superiors told him in which category to bill the completed work or Franco sent the service orders to the branch office where his supervisor would indicate the appropriate category on the order.

A service order during 1997 noted a thirty-day run (no shutdowns) on the Clayton equipment had begun, while another also noted a "30-day Run." Service orders from July through December of 1987 noted that the system was under warranty. Further, on February 26, 1988, Clayton's president wrote to Grant Densing, a member of the Arcadia Group, assuring him that Clayton was continuing its efforts to get the equipment properly operational so that Arcadia could "begin to get a return on [their] investment." Clayton declared that "if [the fault] lies with Clayton, we will pay for it."

On July 15, 1988, Clayton's vice-president wrote Arcadia Group member Heinlein, stating that the equipment was no longer under warranty. Heinlein was surprised and requested clarification. On September 26, 1988, Clayton announced that it had cured the defects in its equipment and that it believed the warranty had "long since expired." The Clayton equipment, however, would not operate consistently at high pressure. On October 4, 1993, the Arcadia Group filed suit against Clayton alleging breach of contract based on the failure of the exclusive warranty of repair and replacement.

Clayton moved for summary judgment. The court denied Clayton's motion, finding that the Arcadia Group had raised a factual dispute as to whether there was an agreement to modify the warranty. After Lassanske had been deposed, Clayton renewed its motion for summary judgment. Clayton presented Lassanske testimony that Clayton and the Arcadia Group had no agreement to modify the warranty. The court concluded that there was no factual dispute indicating waiver of the warranty's written modification requirement and no agreement to modify it, and therefore granted summary judgment. The Arcadia Group appeals.

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). If a dispute of any material fact exists, or if the material presented on the motion is subject to conflicting factual interpretations or inferences, summary judgment must be denied. ***State Bank v. Elsen***, 128 Wis.2d 508, 512, 383 N.W.2d 916, 918 (Ct. App. 1986). The burden is on the moving party to establish the absence of a genuine issue of material fact. ***Bantz v. Montgomery Estates, Inc.***, 163 Wis.2d 973, 984, 473 N.W.2d 506, 510 (Ct. App. 1991). We draw all reasonable inferences in favor of the nonmoving party. *See* ***Grams v. Boss***, 97 Wis.2d 332, 339, 294 N.W.2d 473, 477 (1980).

An attempt at modification may operate as a waiver even though it fails to satisfy a contractual requirement that modifications be in writing. *See* § 402.209(4), STATS. Section 402.209(4) is intended to prevent contractual provisions excluding modification except by a signed writing from limiting in other respects the legal effect of the parties' actual later conduct. ***Id.***, cmt. 4. Thus, in determining whether there was a waiver, a court must examine the parties' conduct. ***Id.;*** *see also* ***Christensen v. Equity Co-op Livestock Sale Ass'n***, 134 Wis.2d 300, 303, 396 N.W.2d 762, 763 (Ct. App. 1986) (in establishing waiver, intent may be shown by conduct).

We conclude that the Arcadia Group presented evidence sufficient to demonstrate a material issue of fact as to whether Clayton, by its conduct, both waived the warranty modification requirements and also in fact modified the warranty. Lassanske's inability to point to an express agreement for waiver and modification does not result in an inevitable conclusion that Clayton did not implicitly agree. Viewing the evidence in the light most favorable to the Arcadia

Group, whether Clayton waived the warranty provisions in question and modified the warranty is unclear. We conclude that a reasonable jury could accept that Clayton's conduct of not responding to Arcadia's requests for modification, its continued warranty work, its service order notations consistent with the suggested modification, and Clayton's reassurances that it was committed to getting the equipment properly operational, cumulatively demonstrate modification of the warranty and waiver of its written modification requirement. Therefore, summary judgment was inappropriate.

Clayton argues that this action is barred by the six-year statute of limitations. *See* § 402.705, STATS. It contends that under § 402.705, the statute of limitations for breach of warranty began to run on the date of tender of delivery, which it asserts is June 9, 1986, the date the system was installed. We disagree. The Arcadia Group has raised an issue of material fact as to whether the warranty was modified and the written modification provision waived, in which case the date of tender is altered. At most, the statute of limitations did not begin to run until Clayton informed the Arcadia Group that it believed the warranty had long since expired. This is the date of Clayton's second letter, September 26, 1988. Thus, by filing its suit on October 4, 1993, the Arcadia Group brought its action within the six-year statute of limitations.

*By the Court.*—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.