No. 35467 - Scott McMahon and Karen John, Individually and on behalf of other similarly situated v. Advance Stores Company, Incorporated, dba Advance Auto Parts, and Donn Free

FILED
November 24, 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Chief Justice, concurring:

In this case, the majority of the Court has determined that merchants can create express warranties that limit repair or replacement of goods to the original purchaser. I agree completely with the conclusion of the majority opinion and its legally sound reasoning. I have chosen to write separately to show how other courts have addressed the issue and to comment upon the dissenting opinion's mischaracterization of the relevant law.

No Court in the Country Has Invalidated an Express Warranty That Limited Replacement or Repair of a Product to the Original Purchaser

The first thing that must be understood about the majority opinion in this case is the limitation of its holding. This case presented a simple issue of whether Advance Stores could create an express warranty that limited replacement or repair of a battery to the original purchaser. This case did not address the issue of whether a claim could be asserted against Advance Stores by Ms. John, on the ground that the battery caused an actual physical injury to her or her vehicle. The latter issue is outside the scope of the holding in the majority

opinion and is controlled by the decision of this Court in *Dawson v. Canteen Corp.*, 158 W. Va. 516, 212 S.E.2d 82 (1975), and its progeny. The majority opinion stands for the proposition that a merchant can sell a product and have an express warranty that limits its replacement or repair to the original buyer. Thus, the ablution of privity, by *Dawson* and its progeny, for a claim of physical injury or property damage by a product was not relevant in this case.

The dissent has articulated unsupportable arguments which, in essence, state that, under *Dawson* and its progeny, W. Va. Code § 46A-6-108(a) (1987) (Repl. Vol. 2006) prohibits Advance Stores from creating an express warranty that limits replacement or repair of a product to the original buyer. Neither the statute nor *Dawson* and its progeny supports such an assertion. West Virginia Code § 46A-6-108(a) states:

> (a) Notwithstanding any other provision of law to the contrary, no action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the consumer and the party against whom the claim is made. An action against any person for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall not of itself constitute a bar to the bringing of an action against another person.

The intent of this statute is to allow a cause of action for injury to a consumer or his/her property against any company involved in the manufacture or distribution of a product, even though the consumer did not purchase the product from the manufacturer or other company

in the distribution chain. However, no language in this statute expressly or implicitly states that a merchant cannot create an express warranty that limits replacement or repair of a product to the *original purchaser*. The decision in *Dawson* and its progeny have interpreted the statute only to mean that a person not in privity with a manufacturer or distributor can sue the same for physical injury or property damage caused by the product. *See Taylor v. Ford Motor Co.*, 185 W. Va. 518, 520, 408 S.E.2d 270, 272 (1991) ("[A] person injured as a result of breach of an implied or express warranty can sue for his personal injury based on a breach of such warranties."); Syl. pt. 6, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988) ("Implied warranties of habitability and fitness for use as a family home may be extended to second and subsequent purchasers for a reasonable length of time after construction, but such warranties are limited to latent defects which are not discoverable by the subsequent purchasers through reasonable inspection and which become manifest only after purchase.").[1] Moreover, no court "has ever held that privity of contract is unnecessary to enforce an express warranty. Indeed, because an express warranty is a term of the contract itself . . ., privity of contract is necessary for a remote purchaser to enforce a manufacturer's express warranty." *Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp.*, 774 N.W.2d 332, 343 n.12 (Mich. Ct. App. 2009).

[1]It should be noted that the dissent in *Sewell* argued that the majority opinion therein misconstrued *Dawson*, because *Dawson* was only applicable to personal goods. *See Sewell*, 179 W. Va. at 590, 371 S.E.2d at 87 (Neely, J., dissenting) ("Clearly, the majority has misconstrued our decision in *Dawson*, which was restricted to goods which are mass produced and mass distributed.").

It has been correctly observed that "[t]he rationale for eliminating the requirement of privity in [certain] warranty actions recognized by the courts does not extend to a total elimination of privity in all actions[.]" *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312, 323 (D. Md. 1983). In other words, "'[p]rivity of contract remains an essential ingredient . . . in a breach of express warranty action not involving personal injury [or property damage], because privity between the plaintiff and defendant is requisite to maintain a contract action[.]'" *Copiers Typewriters*, 576 F. Supp. at 323 (quoting *Addressograph-Multigraph Corp. v. Zink*, 329 A.2d 28, 31 (Md. 1974)). Indeed, it has been observed that "[c]ourts have [only] relaxed the privity requirement where the express warranty was clearly intended to extend coverage to subsequent owners." *Federal Ins. Co. v. Lazzara Yachts of N. Am., Inc.*, No. 8:09-CV-607-T-27MAP, 2010 WL 1223126, at *6 (M.D. Fla. Mar. 25, 2010). In other words, unlike the dissent in the instant case, the majority view around the country is "that the benefit of a warranty does not ordinarily run with a product on its resale so as to give the subsequent purchaser any right of action thereon as against the original seller." *Johnson v. Anderson Ford, Inc.*, 686 So. 2d 224, 228 (Ala. 1996). *See TD Props., LLC v. VP Bldgs., Inc.*, 602 F. Supp. 2d 351, 360 n.5 (D. Conn.2009) ("In the Court's view, this is a form of economic loss because the Plaintiff seeks recovery for the value and costs of repair for the allegedly defective goods. . . . There is no indication that the Plaintiff's 'other property' [was] damaged. . . . Therefore, the privity requirement is not waived in this case."); *Texas Processed Plastics, Inc. v. Gray Enters., Inc.*, 592 S.W.2d 412,

415 (Tex. Civ. App. 1979) ("[T]he rule has evolved that in situations involving solely economic loss based upon breach of express warranty, privity of contract between the parties is required. In the case at bar appellees' suit was brought to recover damages based upon a breach of express warranty, *i.e.*, a suit sounding on contract for economic loss rather than in tort for injuries to person or property. Therefore, in order for appellee . . . to recover under a theory of breach of express warranty from appellant . . ., privity of contract must exist between the parties.").

For example, in the case of *Haas v. DaimlerChrysler Corp*., 611 N.W.2d 382 (Minn. Ct. App. 2000), the defendant automobile dealer limited express warranties to original purchasers. In order for subsequent purchasers to obtain the benefits of the express warranties, the subsequent purchasers had to pay a fee. The plaintiff filed a class action against the defendant for failing to honor the original express warranties without an additional fee. The plaintiff argued that limiting the express warranties to original purchasers violated state and federal law. The trial court disagreed and dismissed the case. On appeal, the appellate court agreed with the dismissal. In the single syllabus point of the opinion, the appellate court held: "An automobile manufacturer's clearly stated warranty limitation requiring the second purchaser of a vehicle to pay a $150 fee to transfer the remaining warranty coverage does not violate either the federal Magnuson-Moss Warranty Act or the Uniform Commercial Code." Syl., Haas, *id.* The opinion addressed the state Uniform

Commercial Code claim as follows:

> [Plaintiff] argues that section 2-318 of the UCC prevents Chrysler from charging the $150 transfer fee. Minnesota's version of that statute provides as follows:
>
> > A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section.
>
> Minn.Stat. § 336.2-318 (1998). [Plaintiff] contends that the statute by its terms extends the warranty to persons who would reasonably be expected to use the vehicle, including second-hand purchasers such as she. . . .
>
> The flaw in [plaintiff's] argument is that it confuses the first-party right to receive services under the warranty with the third-party statutory right to recover for damages caused by breach of the warranty. . . . Until [plaintiff] is injured by a breach of the warranty, section 2-318 grants her no third-party beneficiary rights.
>
> The warranty in this case specifically provides that it "is extended only to the first buyer/owner of the vehicle." The warranty goes on to provide that the vehicle's second buyer can transfer any remaining warranty coverage by having the Chrysler dealer submit a "Transfer of Coverage Application" at a cost to the second purchaser of $150.
>
> Those contractual terms define and limit any rights [plaintiff] may have as a third-party beneficiary of the warranty. . . .
>
> Because the warranty specifically provides that subsequent purchasers may only assume any remaining warranty coverage on the payment of a $150 fee, charging [plaintiff] the $150 fee was not a "breach" of the warranty. Without a breach

> of the warranty, [plaintiff] cannot be a person "who is injured by breach of the warranty." As a result, section 2-318 does not grant [plaintiff] the right to assume the warranty without paying the $150 transfer fee. The district court therefore did not err in concluding that [plaintiff] failed on this point to state a claim for which relief could be granted.

Haas, 611 N.W.2d at 385-86.

Similarly, in *Lankarani v. Jeld-Wen, Inc*., No. 98, 208, 2008 WL 4471685 (Kan. Ct. App. Oct. 3, 2008), plaintiffs sued the defendant window manufacturer because of defects in the windows of their home. The defendant moved for summary judgment. One of the grounds for summary judgment was that the plaintiffs could not enforce the express warranty on the windows because it was limited to the original homeowner/purchasers. The trial court rejected the argument on the grounds that privity of contract was abolished by enactment of the State's Consumer Protection Act. The defendant appealed the ruling. The appellate court found that the state's Consumer Protection Act *did not* abolish privity under the facts of the case presented:[2]

> The statute at issue here is part of the Kansas Consumer Protection Act, K.S.A. 50-623, *et seq.* It states: "Notwithstanding any provision of law, no action for breach of warranty with respect to property subject to a consumer transaction shall fail because of a lack of privity between the claimant and the party against whom the claim is made." K.S.A. 50-639(b).

[2]The relevant provision of the Consumer Protection Act of Kansas is similar to W. Va. Code § 46A-6-108(a) (1987) (Repl. Vol. 2006).

> * * * *
>
> Comments to K.S.A. 50-639(b) indicate that concepts of horizontal and vertical privity are eliminated and that the subsection allows suits by bystanders who suffer loss as a result of a defective product. Importantly, the comment references a specific comment of our version of the UCC-K.S.A. 84-2-318.
>
> That statute states that a seller's warranty extends to any natural person who may reasonably be expected to use or be affected by the goods and " who is injured in person " by breach of the warranty.
>
> Clearly, the homeowner in the present case cannot recover under K.S.A. 84-2-318 because they [sic] were not injured in person– they [sic] suffered only economic loss as a result of the alleged breach.
>
> * * * *
>
> We emphasize that an express warranty is a creature of contract. . . . Accordingly, a seller such as [defendant] is free to limit, as a matter of contract, an express warranty to the first/original purchaser if it chooses to do so. . . .
>
> An express warranty is a promise made in addition to any implied warranties arising out of law. Here, the express warranty promised to repair or replace defective windows for 10 years. But [defendant] chose to extend this warranty only to the supplier/contractor and the first buyer of the home. Such a promise does not violate the law.

Lankarani, 2008 WL 4471685, at *2-3 (citation omitted).

Another relevant case is *Goodman v. PPG Industries, Inc*., 849 A.2d 1239 (Pa. Super. 2004) which was brought as a class action against a manufacturer of a wood preservative product. The wood preservative was sold to a lumber company that used the

product to treat windows and doors. The manufacturer provided an express warranty to the lumber company that guaranteed the wood preservative would protect wood for twenty-six years. The plaintiffs sued the manufacturer solely on the theory of breach of express warranty after their doors and windows became damaged. The trial court dismissed the action on the grounds that the express warranty was limited to the lumber company. The plaintiffs appealed. On appeal, the plaintiffs argued that the requirement of privity was abolished in that state, and, therefore, they should be allowed to sue for breach of express warranty. The appellate court agreed with the plaintiffs that, in Pennsylvania, "privity of contract is not required between the party issuing a warranty and the party seeking to enforce the warranty." *Goodman*, 849 A.2d at 1246 n.6. However, the appellate court also agreed with the trial court that "[l]ack of privity between the manufacturer and the ultimate consumer in the actual sales transaction is irrelevant." *Goodman*, 849 A.2d at 1242. The appellate court found that the plaintiffs could not enforce the express warranty because it was limited to the lumber company:

> In our view, a manufacturer who is willing to make a specific and ambitious express warranty (such as the one in the instant case) must be able to retain some measure of control over both the class of people to whom it is willing to extend the warranty, and the precise parameters of the warranty that it will be obliged to honor. Similarly, given that express warranties are based on the notion of offer and acceptance, it would appear incongruous to allow third parties the benefit of an express warranty when no evidence exists that they were aware of the terms of the warranty or the identity of the party issuing the warranty. . . .

> The express warranty in the instant case went beyond the implied warranty of merchantability, and specifically provided that [the preservative] would protect against wood rot for at least 26 years. Moreover, this specific warranty formed a basis of the bargain between [defendant] and [the lumber company]. Here, however, it is clear that [defendant] extended its warranty only to [the lumber company]. [Defendant] did not extend its express warranty to [plaintiffs], either directly, or indirectly through an intermediary. . . . Under the facts of this case, we conclude that [plaintiffs] cannot as a matter of law maintain their action for breach of express warranty against [defendant].

Goodman, 849 A.2d at 1245-46.

Likewise, the case of *Barre v. Gulf Shores Turf Supply, Inc.*, 547 So. 2d 503 (Ala. 1989), involved the resale of a lawnmower. In *Barre*, the plaintiff purchased a lawncare business. The purchase included a lawnmower that had been sold by the defendant to the former owner of the lawncare business. As a result of operating problems with the lawnmower, the plaintiff sued the defendant seller. The plaintiff's complaint alleged liability theories that included, negligent repair work, breach of the original express warranty, and breach of the extended warranty. The plaintiff sought damages for loss of business and profits due to the repeated mechanical failures of the lawnmower. The trial court granted the defendant's motion for summary judgment on the grounds of lack of contractual privity. The plaintiff appealed and argued that, as the buyer of the lawncare business, privity extended to him. The appellate court disagreed, explaining as follows:

> The plaintiff must prove privity of contract in an action on an express warranty where no injuries to natural persons are

> involved. . . .
>
> * * * *
>
> . . .The [plaintiff] may not maintain an action on an express warranty, where no injuries to natural persons are involved, even though [defendant] had given the express warranty to [plaintiff's] vendor, Thompson/T & T Yard Care. The express warranty on the mower given to Thompson/T & T Yard Care did not follow with the mower on its resale automatically. There is no evidence that [defendant], through its agents, even knew that [plaintiff] was the owner of the mower. . . . There is no evidence that [defendant] intended to extend the express warranties to him. Therefore, we find no basis for establishing privity of contract, and [plaintiff's] breach of warranty action must fail.

Barre, 547 So. 2d at 504-05 (citations omitted). *See also St. Paul Mercury Ins. Co. v. The Viking Corp.*, 539 F.3d 623, 626 (7th Cir. 2008) ("[P]rivity was lacking here because [defendant's] warranty was limited to the original purchaser, and did not encompass Johnson Bank or, by extension, its subrogee [the plaintiff]."); *Austin v. Will-Burt Co.*, 232 F. Supp. 2d 682, 687 (N.D. Miss. 2002) ("If any express warranty was rendered, the more likely party to such a warranty would be Quality Coach, to whom [defendant] sold the mast, not to [plaintiffs]. [Defendant] was not even aware that [plaintiffs] had acquired the mast nearly ten years after [defendant] made its original sale to Quality Coach. . . . As such, the court finds that no express warranty could have existed between [defendant] and the plaintiffs."); *Stratos v. Super Sagless Corp.*, No. CIV. A. 93-6712, 1994 WL 709375, at *7 (E.D. Pa. Dec. 21, 1994) ("Because the scope of the limited warranty did not extend beyond the original consumer purchaser, and because Plaintiff offers no alternative interpretation of the warranty

language, I will grant Defendant's motion to the extent Plaintiff's breach of express warranty[.]"); *Tokio Marine & Fire Ins. Co., Ltd. v. Bell Helicopter of Textron, Inc*., No. Civ. A. H-80-1074, 1982 WL 623495, at*15 (S.D. Tex. July 8, 1982) ("Because there is no issue as to any material fact as to the disclaimers and because we find as a matter of law that the disclaimer in the sales warranties effectively limited [defendant's] liability to purchasers . . . we are of the opinion that [defendant] breached no warranties, either express or implied, to [plaintiff] and that defendant's motion for summary judgment as to plaintiffs' breach of warranty claim should be granted."); *Blanco v. Baxter Healthcare Corp*., 70 Cal. Rptr. 3d 566, 582 (Cal. Ct. App. 2008) ("The general rule is that privity of contract is required in an action for breach of either express or implied warranty and that there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale." (internal quotations and citation omitted)); *Intergraph Corp. v. Stearman*, 555 So. 2d 1282, 1283 (Fla. Dist. App. Ct. 1990) ("We find that the award of compensatory damages to Stearman P.A. in the amount of $34,000 for breach of express warranties cannot stand because there was a complete absence of privity between Stearman P.A. and the seller of the computer system, Intergraph. Privity is required in order to recover damages from the seller of a product for breach of express or implied warranties."); *Ramerth v. Hart*, 983 P.2d 848, 851 (Idaho 1999) ("[P]rivity of contract is required in a contract action to recover economic loss for breach of implied warranty."); *Bagel v. American Honda Motor Co., Inc*., 477 N.E.2d 54, 59 (Ill. App. Ct. 1985) ("Because plaintiff was not in privity of contract with

American Honda and purchased the used motorcycle from a seller who was not a merchant, plaintiff cannot claim breach of implied warranty of merchantability. We need not consider, therefore, American Honda's argument that the terms of its express warranty limited its implied warranty of merchantability to the first purchaser for six months or 6,000 miles."); *Tomka v. Hoechst Celanese Corp*., 528 N.W.2d 103, 107 (Iowa 1995) ("Even if [plaintiff] can be considered a buyer, he did not buy the product from the defendant manufacturer. He purchased Finaplix from the veterinarians. Therefore, [plaintiff] was not in privity with [defendant]."); *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W.3d 112, __ (Mo. 2010) ("[A]n express warranty of fixed duration in a sale of personal property runs with the property on re-sale unless the warranty clearly limits coverage to the first purchaser."); *Thompson v. Rockford Mach. Tool Co.*, 744 P.2d 357, 364 (Wash. Ct. App. 1987) ("Similarly, here, no privity of contract exists between the Thompsons and Boeing. Thus, the implied warranty claim was properly dismissed.").

In sum, although courts around the country have moved away from requiring privity to enforce implied warranties when a product injures a person or property, courts permit merchants to grant express warranties for replacement or repair of products that can be enforced only by *the original purchaser*. The majority opinion in this case is consistent with the decisions of other courts around the country.

In view of the foregoing, I concur.