IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2010 Term

No. 35467

FILED
November 24, 2010
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

SCOTT McMAHON and KAREN JONES, individually, and on behalf of and others similarly situated,
Plaintiffs Below, Respondents

V.

ADVANCE STORES COMPANY, INCORPORATED, d/b/a Advance Auto Parts and DONN FREE,
Defendants Below, Petitioners

Certified Question from the Circuit Court of Ohio County
Honorable Arthur M. Recht, Judge
Civil Action No. 06-C-306

Submitted: September 15, 2010
Filed: November 24, 2010

Ancil G. Ramey, Esq.
Steptoe & Johnson, PLLC
Charleston, West Virginia

Karen E. Kahle, Esq.
Steptoe & Johnson, PLLC
Wheeling, West Virginia
Attorneys for Petitioners

Joseph J. John, Esq.
John Law Office
Wheeling, West Virginia

Anthony I. Werner, Esq.
Bachmann Hess Bachmann & Garden
Wheeling, West Virginia
Attorneys for Respondents

Jeffrey A. Holmstrand, Esq.
McDermott & Bonenberger,PLLC
Wheeling, West Virginia

Eric L. Silkwood
Flaherty Sensabaugh Bonasso, PLLC
Charleston, West Virginia

Attorneys for *Amicus Curiae*
Defense Trail Counsel of West Virginia

Alvin L. Emch, Esq.
Pamela D. Tarr, Esq.
Jackson & Kelly, PLLC
Charleston, West Virginia

Attorneys for *Amici Curiae*
West Virginia Retailers Association and
West Virginia Manufacturers
Association

JUSTICE BENJAMIN delivered the opinion of the Court.

CHIEF JUSTICE DAVIS concurs and reserves the right to file a separate opinion.

JUSTICE WORKMAN dissents and reserves the right to file a separate opinion.

JUSTICE KETCHUM dissents and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syllabus Point 1, *Gallapoo v. Wal-Mart Stores., Inc*., 197 W. Va. 172, 475 S.E.2d 172 (1996).

2. W. Va. Code §46A-6-108(a) does not apply to suits for breach of a limited warranty by subsequent purchasers where the limited express warranty involved specifically limits its availability to original purchasers.

Benjamin, Justice:

This matter is before the Court upon a certified question from the Circuit Court of Ohio County. The certified question is as follows:

> Does W. Va. Code §46A-6-108(a) apply to suits for breach of limited warranty by subsequent purchasers where the limited warranty involved limits its availability to original purchasers?

The circuit court answered this question in the affirmative. Upon review of the parties' briefs[1], the arguments of the parties and the record, we answer the certified question in the negative and remand this matter for further proceedings consistent with this opinion.

I.

FACTUAL AND PROCEDURAL BACKGROUND

This certified question arises from the respondent Scott McMahon's purchase of a new Autocraft car battery from the petitioner Advance Stores Company Incorporated, d/b/a Advance Auto Parts (hereinafter referred to as Advance). Mr. McMahon purchased the battery from the Advance store in Weirton, West Virginia, on or about March 2, 2004.

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[1]We wish to acknowledge the Amicus briefs filed by the Defense Trial Counsel of West Virginia, the West Virginia Retailers Association and West Virginia Manufacturers Association, all of which were in support of the position asserted by the petitioners, Advance Stores Company, Incorporated, and Donn Free.

McMahon received a receipt from his purchase that indicated that the battery cost approximately $49. Indicated on the receipt was an acknowledgment of an express warranty between Advance and the purchaser. Printed on the receipt was the statement "24 month free replacement, 72 month pro-rated." At the bottom of the receipt was a statement directing the purchaser to Advance's website where the limited express warranty information was available. This limited warranty information was also available to the purchaser at the store. The receipt also noted that the receipt was required for all returns. Advance's express warranty, stated, in pertinent part, as follows:

Advance Auto Parts Limited Warranty Policy

BATTERIES

OUR GUARANTEE

> We will replace any battery we sell, should it fail due to defects in materials or workmanship, under normal installation, use, and service, while under warranty. This warranty does not cover the exceptions listed below under "WHAT IS NOT COVERED."

LENGTH OF WARRANTY

> Your warranty begins the day you purchase the battery, and expires at the end of the warranty period printed on your original receipt, or when you sell your vehicle, whichever comes first.

FREE REPLACEMENT PERIODS

> Your free replacement period begins the day you purchase the battery, and expires at the end of the "Free Replacement Period" printed on your original receipt, or when you sell your vehicle, whichever occurs first.

* * *

WHAT IS NOT COVERED

This warranty does not cover: failure due to misuse, abuse, modification, accident or collision, or improper installation. THIS WARRANTY DOES NOT COVER INCIDENTAL OR CONSEQUENTIAL DAMAGES SUCH AS PHYSICAL INJURIES, PROPERTY DAMAGE, LOSS OF TIME, LOSS OF USE OF THE VEHICLE, INCONVENIENCE, RENTAL VEHICLE, TOWING CHARGES, OR ACCOMMODATIONS RESULTING FROM THE FAILURE OF THE BATTERY.

WHAT YOU MUST DO

You must take the defective battery and the purchase receipt therefore, to an Advance Auto Parts store during normal business hours. If "proration" applies and Advance Auto Parts does not refund the prorated purchase price, you must pay the difference between the cost of a new battery and the amount of the proration when you receive your new battery, plus any taxes.

LEGAL

This limited warranty represents the total liability of Advance Auto Parts for any part it warrants. Advance Auto Parts makes no other warranties expressed or implied, including the warranties of merchantability and fitness for a particular purpose. Some states to not allow limitations on how long an implied warranty lasts, so the above information may not apply to you. This warranty gives you specific rights and you may have other rights, which vary from state to state. Advance Auto Parts does not authorize any person to vary the terms, conditions, or exclusions of this warranty.

In September of 2004, after the purchase of this battery but within the 24-month time period during which the battery could be replaced under the express warranty, McMahon sold the Jeep into which the Advance battery had been placed. The purchaser of the Jeep was Karen John. In January, 2005, the Advance battery quit working, and on

January 20, 2005, John's husband, Joseph, [2] and the respondent Karen John, went to an Advance store to inquire about the warranty on the battery. At this time they were told that nothing could be done under the warranty without a receipt. They then purchased a new Autocraft battery on that day. McMahon later provided the original receipt to Karen John, who passed it along to her husband who presented it to Advance on February 8, 2005, for action on the express warranty. The petitioner, Donn Free, the manager of the Advance Auto Parts store, advised John that because he was not the original purchaser of the battery, he was not entitled to relief under the limited express warranty. McMahon then reimbursed John for the cost of the battery.

Not satisfied with Advance's response to his request, McMahon instituted suit against Advance and Donn Free, the employee with whom McMahon and John dealt on the refund issues. McMahon sued the petitioners for their failure to honor the express limited warranty. In a four-count complaint, McMahon alleged that the petitioners had breached the express warranty by failing to replace the battery; had breached the implied warranty of merchantability; had engaged in fraud by never telling McMahon that the limited express warranty applied only to the original purchaser; and had violated West Virginia consumer protection laws. McMahon sought damages for annoyance, inconvenience and aggravation; replacement cost of the battery and expenses incurred in attempting to have the warranty

[2]Joseph J. John is also counsel to the respondents, Scott McMahon, and Karen John.

honored; attorney fees and litigations expenses; damages allowed by the Consumer Protection Act; and incidental and consequential damages. A jury trial was requested.

After the filing of the complaint, McMahon sought to amend his complaint and to certify the action as a class action. The complaint was then amended to include Karen John as a named plaintiff. At one point the case was removed to the United States District Court for the Northern District of West Virginia but was remanded to state court. Discovery ensued and the parties filed various motions and pleadings throughout the proceedings. The respondents filed a motion for summary judgment, requesting "this court to test the policy of the Defendant, Advance Stores Company, Inc., d/b/a Advance Auto Parts (hereinafter Advance), relating to warranties attached to the sale of its motor vehicle batteries." On February 20, 2008, the circuit court granted partial summary judgment to the respondents, stating, *inter alia*:

> West Virginia has abolished the concept of both vertical and horizontal privity in a series of cases with the seminal opinions being *Dawson v. Canteen Corp*., Syllabus 158 W. Va. 516, 212 S.E.2d 82 (1975), and *Sewell v. Gregory*, 371 S.E.2d 82, 179 W. Va. 585. (Footnote omitted).
>
> Thus, independently of any statutory provisions, this Court has evolved the remedy of breach of implied warranty of fitness. Accordingly, Advance shall be required to abide by its warranty notwithstanding the person

> attempting to assert the warranty may not have been the original purchaser. The Plaintiffs' Motion for Summary Judgment is hereby granted.

On February 27, 2008, the petitioners sought entry of a final appealable order pursuant to Rule 54 (b) of the West Virginia Rules of Civil Procedure,[3] as well as certification of a question regarding batteries. Discovery continued, and both parties sought protective orders. On November 14, 2008, the petitioners moved the Court to reconsider its earlier grant of partial summary judgment. On December 5, 2008, the circuit court made the following findings of fact and granted summary judgment to the respondents:

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[3]R. Civ. P. 54(b) states:

> (b) *Judgment upon multiple claims or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, the order of other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminated the action as to any of the claims or parties, and the order or other form of decision is subject ot revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

> The Plaintiff, Scott McMahon, purchased a car battery from Advance which contained a twenty-four (24) month free replacement/seventy-two (72) month pro-rated warranty in the event the battery was defective. McMahon installed the battery in a motor vehicle which he subsequently sold to Karen John.
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> Within the time period expressly warranted by Advance, the battery ceased to function. Joseph John, on behalf of his wife, Karen John, sought to obtain relief from Advance regarding the defective battery. Advance refused, because John was not the original purchaser. In essence, Advance took the position that because John was not in privity with Advance by being the subsequent purchaser, the warranty failed. Advance is wrong.
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> West Virginia has abolished the concept of both vertical and horizontal privity in a series of cases with the seminal opinions being *Dawson v. Canteen Corp*., Syllabus 158 W. Va. 516, 212 S.E.2d 82 (1975), and *Sewell v. Gregory*, 371 S.E.2d 82, 179 W. Va. 585.
>
> Thus, independently of any statutory provisions, this Court has evolved the remedy of breach of implied warranty of fitness. Accordingly, Advance shall be required to abide by its warranty notwithstanding the person attempting to assert the warranty may not have been the original purchaser. The Plaintiffs' Motion for Summary Judgment is hereby granted.

Petitioners filed an appeal to the ruling of the circuit court granting summary judgment to the respondents. This Court rejected the direct petition for appeal on June 24, 2009. The petitioners then moved the circuit court again to certify the aforementioned question to this Court. The certified question was accepted by this Court on January 26, 2010

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II.

STANDARD OF REVIEW

This Court has held that "[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syllabus Point 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996). Under this plenary standard of review, we now proceed to consider the parties' arguments.

III.

DISCUSSION

Today we address the question of whether our elimination of the requirement of privity extends, by operation of our holding in *Dawson v. Canteen Corp.*, 158 W. Va. 516, 212 S.E.2d 82 (1975), to an express limited warranty given by a retailer to a purchaser. At issue is whether the retailer may limit such an express warranty to the purchaser only in view of the abolition of the requirement of privity of contract. A recurring theme throughout the circuit court's order and the position urged upon us by the respondents is that our case law eliminated the requirement of privity of contract in all warranty matters, including for limited express warranties such as at issue herein.

In *Dawson*, we detailed the demise of the privity requirement in West Virginia. The underlying cause of action in *Dawso*n was products liability and the breach of implied warranties. The plaintiff in *Dawson* suffered gastroenteritis and other conditions after eating a hamburger bun tainted by rodent feces that was sold in a vending machine at his place of employment. The circuit court dismissed Dawson's complaint against the company supplying the burger because there was no privity between the two. In reversing the circuit court's dismissal of the case, we noted:

> The requirement of privity of contract in warranty actions in West Virginia began to erode with the passage of the Uniform Commercial Code. W. Va. Code, 46-2-318 (1963) eliminated the privity of contract requirement for warranty actions in what is known as the 'horizontal' chain of users. That section says:
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> > 'A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.'
>
> This process of statutory erosion of the common law doctrine continued with the passage of the 'West Virginia Consumer Credit and Protection Act,' Chapter 12, Acts of the Legislature, Regular Session, 1974, which eliminated the requirement of privity in the 'vertical' chain of distribution for Consumer transactions. The pertinent part of that chapter, now W. Va. Code, 46A-6-108 (1974), provides:

> '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.'

Dawson at 519-520, 83-84.

In the sole syllabus point in *Dawson* we held that "[t]he requirement of privity of contract in an action for breach of an express or implied warranty in West Virginia is hereby abolished."

We later addressed the issue of privity in *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988). *Sewell* dealt with the warranties associated with the sale of residential real estate. The homeowners, who were the second owners of a residence, sued the homebuilder after their home was severely damaged by flooding. The homeowners alleged negligent construction and design of the home, as well as a breach of the implied warranty of habitability and fitness for use as a residence. The circuit court dismissed the homeowners' case, because there was no privity between the second owners of the home and the original contractor. In *Sewell*, we reaffirmed the elimination of the requirement of

privity in actions arising from breaches of the implied warranties and allowed the subsequent purchasers' action to proceed.

In 2001, in a case involving the City of Salem's sewer system, we referred to the elimination of the requirement for privity in a case alleging professional engineering negligence and breaches of implied warranties regarding the engineering firm's plans and specifications. We specifically noted the special duties owed to a contractor hired by the same entity hiring an engineering group and the relationship between the contractor and the engineering firm, even when there was no direct contract between the two. *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001).

All of the above-cited cases are actions based upon some theory of product or professional liability, and all of the plaintiffs therein sought economic damages based upon the breaches of implied warranties related to the sale of such products. None of these cases involved a request for replacement of a product pursuant to an limited express warranty that by its very terms contained a limitation on its longevity as well as its applicability to only the original purchaser.

Here we consider an limited express warranty given by a retailer to a purchaser, not an implied warranty. *Causes of Action* §2-313 at §2 (2007) defines an

express warranty as "...a warranty which is created by the making of express representations concerning the subject of the warranty, the terms of which are determined by the substance or content of those representations." Our U.C.C. further provides that "express warranties by the seller are created as follows: Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation of promise. *West Virginia Code* §46-2-313(1)(a)(2007). As such, the notion of an express warranty is founded squarely on contractual bargaining notions, as opposed to the notion of an implied warranty, which "rest[s] so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated." Commentary to *West Virginia Code* §46-2-313.

The state's U.C.C. provides some guidance in terms of whether a warranty is transferrable. *West Virginia Code* §46-2-318, provides that "[a] seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." It was upon this section of the code that the *Dawson* court relied to reach the landmark holding we consider herein..

The respondents further assert that the West Virginia Consumer Credit and Protection Act[4] and especially Article 6, which deals with general protections afforded to consumers, prohibits the limitation of any consumer warranty on the basis of lack of privity of contract. *W. Va.* Code §46A-6-108(a) states, in pertinent part:

> 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...

We first address whether the respondents are in fact consumers within the definitions section of this article such that they are entitled to general consumer protections for consumers. *W. Va.* §46A-6-102(b) defines consumer as follows:

> ...a natural person to whom a sale or lease is made in a consumer transaction, and a "consumer transaction" means a sale or lease to a natural person or persons for a personal, family, household or agricultural purpose.

Under this definition, only McMahon is the "consumer" in terms of the sale of the battery. Karen John is not "a natural person to whom a sale or lease is made in a consumer transaction," as it relates to the sale of the battery by the petitioners. Karen John had no direct relationship to Advance in regard to the battery that ceased to operate in the

[4]*W. Va. Code* §46A-1-101, *et seq.*

car she purchased from Scott McMahon. As such, she did not participate in a consumer transaction with Advance relating to the purchase of the failed battery.

With Karen John not being a "consumer,"we return to the language of the limited express warranty of Advance as it relates to Scott McMahon. The respondents contend that under our holdings in *Dawson* and its progeny, and the elimination of the notion of privity in express and implied warranties, there can be no limitations on Advance's warranty. We disagree. As noted by the petitioner, limited express warranties are commonplace throughout the country, and have been upheld as they relate to sprinkler systems,[5] fencing,[6] bedding[7] and countless other products.

The respondents argue that Advance is not able under West Virginia law to limit the terms of an express warranty it chooses to extend to initial purchasers. If this were the case, what incentive does any retailer have in making any express warranty? The simple truth is that retailers do not have to provide express warranties for their products. They may sell their wares without them, forcing the consumer to rely only upon those implied warranties created by statute or our body of case law.

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[5]*St. Paul Mercury Ins. Co. v. The Viking Corporation*, 539 F.3d 623 (7th Cir. 2008).

[6]*Nebraska Plastics, Inc. v. Holland Colors America, Inc.*, 408 F.3d 410 (8th Cir. 2005).

[7]*Stearns v. Select Comfort Retail Corp.*, 2008 WL 4542967 at *4 (N.D.Cal.)

While our holding in *Dawson* would appear, at first glance, to apply to all express and implied warranties, we believe that the application of the *Dawson* holding should be limited to actions that are essentially product liability claims, consistent with the facts then before this Court. Nothing in *Dawson* or its progeny suggests that our holding in *Dawson* should extend to the $49 consumer transaction between Advance and Mr. McMahon or the subsequent motor vehicle transaction between Mr. McMahon and Ms. John. To expand *Dawson* to Advance's limited express warranty herein would essentially have this Court rewrite the stated limitation of the warranty itself and thereby rendering the bargained-for limitations by the parties meaningless.

We hold that *W. Va. Code* §46A-6-108(a) does not apply to suits for breach of a limited express warranty by subsequent purchasers where the limited express warranty involved specifically limits its availability to original purchasers. Because it is permissible for a retailer to create a limited express warranty, the conclusion reached in this case must be guided by the words of the limited express warranty of Advance. The limited express warranty clearly and unambiguously spelled out a specific time during which the battery would be warranted by Advance, as well as the appropriate remedy available to the purchaser seeking action under the warranty. The limited express warranty also clearly and unambiguously limited the availability of the remedy to the original purchaser who held the

original transactional receipt. At the moment the original purchaser sold the battery, Advance's limited warranty, by its express terms, ceased to exist.

IV.

CONCLUSION

Based on the foregoing, we answer the certified question in the negative. Accordingly, we remand this matter to the Circuit Court of Ohio County for further proceedings consistent with this opinion.

Certified question answered.