No. 35467 - *Scott McMahon and Karen Jones, individually and on behalf of others similarly situated v. Advanced Stores Company, Inc. d/b/a Advanced Auto Parts and Donn Free*

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OF WEST VIRGINIA

Workman, Justice, dissenting:

The majority holds that "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." Because I find that the holding conflicts with existing West Virginia case law and statutory law, I dissent.

The first hurdle that the majority opinion fails to overcome is this Court's long-standing decision in *Dawson v. Canteen Corp.*, 158 W. Va. 516, 212 S.E.2d 82 (1975). In *Dawson*, the Court addressed the same two statutory provisions that are currently before the Court. *See* W. Va. Code § 46-2-318 (2007) and W. Va. Code § 46A-6-108(a) (2006). West Virginia Code § 46-2-318 is found in the West Virginia Uniform Commercial Code ("UCC") and abolishes horizontal privity as follows:

> 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.

Id. The second statutory provision is found in the West Virginia Consumer Credit and Protection Act ("CPA"). West Virginia Code § 46A-6-108(a) 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 who 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.

Id. The Court in *Dawson* found that the Legislature, in enacting the foregoing provision, intended to abolish vertical privity. 158 W. Va. at 519-20, 212 S.E.2d at 83-84.

After acknowledging the erosion of privity by the passage of the these two statutory provisions, the Court, in a very succinct opinion in *Dawson*, held in the sole syllabus point 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." *Id.* at 516, 212 S.E.2d at 82, syllabus. This holding was very broadly written with no equivocation.

In the majority opinion, there is no recognition of, nor any reconciliation with the Court's holding in *Dawson*, which must occur for the majority to reach the result it did. Rather, the majority opinion provides that the Court, in *Dawson*, only relied upon West Virginia Code § 46-2-318, stating that "[i]t was upon this section [referring to W. Va. Code § 46-2-318] of the code that the *Dawson* court relied to reach the landmark holding we consider herein." This statement is disingenuous at best. The Court relied equally upon both West Virginia Code § 46-2-318 and West Virginia Code § 46A-6-108 (a) in reaching its

holding in *Dawson* and the Court did not hinge its decision on the type of warranty or claim involved.

Moreover, the majority opinion also provides that "[w]hile 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." The majority is at least recognizing a limitation or modification of *Dawson*, however, this limitation occurs without any explanation. Instead, the majority summarily concludes that "[n]othing 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." The fallacy of this conclusion is that there is nothing in *Dawson* that even remotely suggests that it does not apply to a consumer transaction like the one before the Court involving an express warranty. Thus, the majority effectively has overruled *Dawson*, in part, and fails to recognize what it has done.

Furthermore, the majority's analysis of the provisions of West Virginia Code § 46A-6-108(a) is flawed. In the opinion, the way the majority attempts to circumvent the privity requirement being abolished is by finding that the only Mr. McMahon, the original purchaser of the battery, is a "consumer" as that term is defined in the CPA. As the majority

reasons in the opinion:

> 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 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.

An examination of Karen John's role under the relevant statutory definitions, however, reveals that she was definitely a "consumer" involved in a "consumer transaction," as defined by the West Virginia Legislature. Both of these terms are defined in West Virginia Code § 46A-6-102(2) (2006) as "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 personal, family, household or agricultural purpose." *Id*. Karen John's was a "a natural person to whom a sale . . . [was] made . . . for personal, [or] family purpose." *Id*. In other words, Karen John bought the battery in the car as part of a sale for personal or family purpose. *Id*. The majority's determination that Ms. John's was not a consumer involved in a consumer transaction as set forth in the statute will have far-reaching implications to the availability of the CPA to the class of individuals – consumers – that it was enacted to protect.

Furthermore, the majority ignores the fact that there is no requirement in the foregoing definition that the sale be made by the original seller or that there be any

relationship with the original seller. Likewise, there is no such requirement in the provisions of West Virginia Code § 46A-6-108. Succinctly stated, the majority opinion reinstates the privity requirement which was abolished by both the Legislature in enacting West Virginia Code § 46A-6-108 and the Court in *Dawson.* In so doing, the majority's holding is that because there is no privity between Karen John and Advanced, there is no cause of action for breach of express warranty. This is not only judicial activism in its true sense, but it is anti-consumer judicial activism in an area of the law that the Legislature has clearly enunciated, and it tosses out prior case law of this Court with no real explanation. Because of the majority's dramatic and poorly-reasoned departure from well-established case law and statutory law, I respectfully dissent.