07/23/87 WENDY TOWNSEND v. ED FINE OLDSMOBILE V.

1987 | Cited 0 times | Superior Court of Delaware | July 23, 1987

This action was brought by Wendy Townsend as the result of injuries she received from an accident on May 10, 1982. She sued American Motor Corporation and Ed Fine Oldsmobile, Inc., asserting negligence and the breach of implied warranty for merchantability, 6 Del.C. § 2-314, and the warranty for fitness for a particular purpose, 6 Del.C. § 2-315.

On June 6, 1986, American Motors Corporation's motion for summary judgment was granted.

Ed Fine Oldsmobile filed an answer to the complaint, denying negligence and any breach of warranty. Defendant also filed a motion for summary judgment containing four arguments: (1) Statute of limitations defense; (2) warranty exclusions; (3) plaintiff had knowledge of vehicle's defects; and (4) plaintiff was contributorily negligent for assuming the risk.

The facts in this case are undisputed.

On May 10, 1982, Wendy Townsend was the passenger in a 1973 Jeep owned and driven by William McCoy ("Billy"). Billy bought the Jeep from Ed Fine Oldsmobile in March, 1982, as a "used-car", with no seat-belts and a removable roof and doors. On the day in question, the doors and roof were removed.

Earlier on May 10, 1982, Wendy Townsend, Billy McCoy and Christina L. Butler had been drinking. After Billy had taken Christina home, he and Wendy decided to take a ride in the country in Billy's Jeep. After a short time, Wendy said she felt like she was going to be sick. Driving down Ashland-Clinton School Road, Billy started to slow the Jeep down so that Wendy could get out. However, before the Jeep came to a complete stop, Wendy had fallen from the Jeep onto the roadway.

When Billy bought the Jeep, the sales contract contained language that there were no warranties, express or implied, and that the dealer disclaimed all warranties. Wendy had ridden in the Jeep before, and was aware that this Jeep had no seat-belts.

I. Statute of Limitations

Defendant Ed Fine Olds has moved for summary judgment on the ground that since the accident took place on May 10, 1982, and the complaint was not filed until March 21, 1985, this suit is barred as to plaintiff Wendy Townsend by the 2-year statute of limitations found in 10 Del.C. § 8119. Plaintiff contends that the applicable statute of limitations is 6 Del.C. § 2-725, which requires suit

within 4 years after the cause of action accrues. In this case, the cause of action accrued when the breach of warranty occurred, 6 Del.C. § 2-725(2), and therefore the suit would not be time barred.

In her complaint, plaintiff alleges that as a proximate result of the negligence of the defendant, and as a result of breaches of implied warranties of merchantability and fitness for a particular purpose, she sustained physical injuries and economic damages.

The Uniform Commercial Code provides a four-year statute of limitations for breach of warranty actions. 6 Del.C. § 2-725. See also, Johnson v. Hockessin Tractor, Inc., Del. Supr., 420 A.2d 154 (1980) (Breach of implied warranty actions under the U.C.C. are governed by the Code Statute of Limitations). [1]

However, the Superior Court, in interpreting Johnson, held that the Supreme Court intentionally excluded tort claims from its holding in Johnson, thus restricting the applicability of § 2-725 to actions involving breach of implied warranty, with no mention to those based in tort. Sayers v. Leon N. Weiner & Assoc., Inc., Del.Super. 442 A.2d 98 at 100 (1981). [2]

In the present case, plaintiff's claims are based on breach of warranties under the U.C.C., and on the negligence of defendant. Article 2 of the U.C.C. applies to transactions in goods. 6 Del.C. § 2-102. A Jeep is considered "goods" for purposes of this Article. 6 Del.C. § 2-105(1). Ed Fine Oldsmobile was the seller, in the ordinary course of business, of the Jeep to the buyer. I, therefore, find that the U.C.C. is applicable. However, I find that while the breach of warranty claim is governed by the 4-year limitation period of Code § 2-725, the claim for negligence falls under 10 Del.C. § 8119. While Code § 2-725 applies a uniform statute of limitations to all actions for breach of a sales contract, it has no application to causes of action for negligence. Cf. Matlack, Inc. v. Butter Mfg. Co., D.C. Pa., 253 F. Supp. 972 (1966).

A breach of warranty occurs when tender of delivery is made. 6 Del.C. § 2-725(2). The delivery of the Jeep was made sometime after 1982, when it was traded in by the previous owner. This action was instituted on March 21, 1985, clearly within the 4-year statute of limitations period found in the Code. The negligence claims are barred, however, because the action was not filed within 2 years of the date the accident took place. 10 Del.C. § 8119.

Accordingly, Ed Fine Oldsmobile's motion for summary judgment is denied as to the counts of breach of warranties and granted as to the counts of negligence.

II. Warranty Exclusions

Ed Fine Oldsmobile claims that since the requirements of 6 Del.C. § 2-316 are met in the sales contract, any express or implied warranties are excluded and therefore it is entitled to summary judgment on plaintiff's allegations of express and implied warranties. Plaintiff maintains that even if

the terms of 6 Del.C. § 2-316 are met, 6 Del.C. § 2-318 will apply to prevent defendant from excluding express or implied warranties as to third-parties, such as plaintiff Wendy Townsend.

6 Del.C. § 2-318 was enacted by the legislature as a response to Ciociola v. Delaware Coca Cola Bottling Company, Del. Supr., 172 A.2d 252 (1961), in which the State Supreme Court refused to impose strict liability upon a manufacturer for injuries caused by a defective product. One of the principal objectives and effect of the new statute [3] was to abrogate the common law requirement of privity of contract with the seller for recovery by an injured party and thus update Delaware law. Franchetti v. Intercole Automation, Inc., D.Del., 523 F.Supp. 454, 456 (1981).

I do not doubt that Wendy Townsend is within the class of persons who may reasonably be expected to be affected by the Jeep. Such analysis does not come into play, however, unless a warranty is in existence absent any disclaimers or defenses. In the cases cited by plaintiff, an injured bystander was found to be protected as one "affected by" a defective product in a direct sales situation covered by a warranty absent any disclaimers or defenses. See Martin v. Ryder Truck Rental, Del. Supr., 353 A.2d 581 (1976); and Nacci v. Volkswagen of America, Del. Super., 325 A.2d 617 (1974). [4]

Plaintiff's reliance on this section is misplaced. The words of the statute presume that a warranty, whether express or implied, is present. When such warranty exists, then any person who meets the requirements set forth therein may recover from the seller whether or not that person shares privity with the seller. However, that plaintiff has no more rights than the original buyer:

"Because the liability asserted by the nonprivity plaintiff is derivative, being derived from the buyer to whom the warranty sued upon was expressly or impliedly made, it follows that the plaintiff claiming the right to sue under UCC § 2-318 is in no better position than the original buyer.

"From this it follows that if in fact there were no warranties in the original transaction, a plaintiff cannot assert warranty liability merely because he is a person entitled to sue under UCC § 2-318 when there is in fact a warranty on which to bring suit. Consequently, when warranties are validly excluded with respect to the buyer, a plaintiff within the scope of UCC § 2-318 is subject to such exclusion."

Anderson, Uniform Commercial Code, Volume 3, § 2-318-9 (3d Ed., 1983).

In the present case, there are no warranties. Any implied warranties have been excluded pursuant to 6 Del.C. § 2-316 (2), which permits the exclusion of implied warranties of merchantability and fitness under certain limited circumstances.

Section 2-316(2) and (3) provide:

"(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any

part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.'

"(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties ,are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c)an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade."

The effectiveness of a warranty disclaimer under § 2-316(2) is tested by three requirements. It must be in writing; it must mention merchantability; and the language must be conspicuous.

In the present case, there were four separate writings which may be deemed disclaimers. First, on the sales invoice the following language was contained in capital letters and in an area void of other writing:

"VEHICLE SOLD AS TRADED NO WARRANTY EXPRESSED OR IMPLIED"

The agreement of sale has a stamp across the area for description of the goods, in larger type and signed by the buyer, William McCoy, which reads:

"VEHICLE SOLD AS TRADED WITH NO WARRANTY EXPRESSED OR IMPLIED.

Signed: "

(Signature is filled in)

At the bottom of this same document, in bold type, is the following:

"ALL WARRANTIES, IF ANY, BY A MANUFACTURER OR SUPPLIER OTHER THAN DEALER ARE THEIRS, NOT DEALER'S, AND ONLY SUCH MANUFACTURER OR OTHER SUPPLIER SHALL BE LIABLE FOR PERFORMANCE UNDER SUCH WARRANTIES. UNLESS DEALER

FURNISHES BUYER WITH A SEPARATE WRITTEN WARRANTY OR SERVICE CONTRACT MADE BY DEALER ON ITS OWN BEHALF, DEALER HEREBY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE: (A) ON ALL GOODS AND SERVICES SOLD BY DEALER, AND (B) ON ALL USED VEHICLES WHICH ARE HEREBY SOLD 'AS IS - NOT EXPRESSLY WARRANTED OR GUARANTEED.'"

Finally, on the Simple Annual Rate Conditional Sales Contract are the following words in larger capital letters:

"THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED OF MERCHANTABILITY OR OTHERWISE, WHICH EXTEND BEYOND THE BELOW DESCRIPTION OF THE PROPERTY, EXCEPT AS MAY BE SET FORTH IN THE MANUFACTURER'S CURRENT WARRANTY, IF ANY."

It is clear that the above disclaimers are in writing and at least two of the paragraphs mention merchantability, thus satisfying two aspects of the three-fold requirement of 6 Del.C. § 2-316(2). The only remaining issue as to the effectiveness of the disclaimer under 6 Del.C. § 2-316(2) is the conspicuousness of the language.

The Uniform Commercial Code provides:

"A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color . . . Whether a term or clause is 'conspicuous" or not is for decision by the court." 6 Del.C. § 1-201(10).

I am convinced that the disclaimers have been so written that a reasonable person against whom it is to operate ought to have noticed it. I conclude in this manner because (1) All writings are in capital letters, larger than the normal [5] (2) the language is repeated in all writings expressly type; [6] (3) expressions like "as is", "with all faults", are used; [7] and (4) William McCoy's signature is directly below one of the disclaimers and on the same sheet of at least two others.

In light of my granting defendant's motion for summary judgment on the allegations of breach of implied warranties, I need not address the issues of no breach of warranty where plaintiff had knowledge of the vehicle's defects, or whether plaintiff assumed the risk.

SO ORDERED,

Original to Prothonotary.

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1. In so holding, the Supreme Court stated in dictum: Since a single action in breach of implied warranty under the Code may allege both economic and personal injury, it is difficult to conceive how a system of dual limitations could simplify or clarify the law of commercial transactions. 420 A.2d at 158.

2. Cf. Comer v. Getty Oil Co., Del. Super., 438 A.2d 1239 (1981) (Holding 4-year statute of limitations, in 6 Del.C. § 2-725, governs personal injury suits alleging negligence and breach of implied warranty of fitness.)

3. 6 Del.C. § 2-318 provides:

"A seller's warranty whether express or implied extends to any natural 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."

4. Recovery denied for other reasons.

5. See Todd Equipment Leasing Company v. Milligan, Me. Supr., 395 A.2d 818 (1978).

6. See National Trailer Sales Company v. Pate, Md. App., 130 A.3d 747 (1957).

7. See Johnson v. Waisman Brothers, N.H. Supr., 36 A.2d 634 (1984); Fairchild Industries v. Maritime Air Service, Ltd., Md. App., 333 A.2d 313 (1975).