PLUNKETT COONEY

At Long Last, Appellate Court Clarifies Product Liability Reform Statute: Non-Manufacturing Sellers Not Liable for Breach of Implied Warranty Absent Showing of Fault

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Thirteen years after the enactment of sweeping product liability reform legislation, the Michigan Court of Appeals has finally provided some definitive clarification on a provision intended to protect product sellers from liability in the absence of any evidence of fault on their part.

In a recently published opinion, *Curry v. Meijer, Inc,* --- Mich. App. --- (2009), the appellate court held that MCL 600.2947(6)(a) of the Revised Judicature Act requires a plaintiff in a product liability case to prove that a non-manufacturing defendant failed to exercise reasonable care in order to prevail on a claim for breach of implied warranty.

The plaintiff in *Curry* fell from a tree stand while hunting. The plaintiff had purchased the tree stand from a Meijer store. Meijer was not the manufacturer of the tree stand. The manufacturer of the tree stand was defunct and not a party to the action. The plaintiffs brought suit against Meijer and the distributors of the tree stand, alleging claims of negligent design and manufacture, failure to warn, sale of a defectively designed and manufactured product, breach of express and implied warranties, and loss of consortium.

On motion for summary disposition, Meijer and the distributor argued that no express warranty was made and that, pursuant to MCL 600.2947(6)(a), no liability could be found without a showing of a failure to exercise reasonable care. The plaintiffs argued (as plaintiffs have done since enactment of the statute) that a breach of implied warranty claim against a product seller or distributor has never required a showing of negligence and that the non-liability language of MCL 600.2947(6)(a) applied only to the negligence portion of the statute.

The trial court granted the defendants' motions for summary disposition, holding that, under MCL 600.2947(6)(a), "for plaintiffs to prevail on a breach of implied warranty claim against a non-manufacturing defendant, they must show that the defendant failed to exercise reasonable care – that the defendant knew or had reason to know of the alleged defect." The plaintiffs appealed.

The appellate court began by observing that, prior to 1996, a plaintiff was not required to prove negligence in order to recover under a breach of implied warranty theory, but needed only to show that a defective product was sold and the defect caused the plaintiff's injury.

The court then discussed the product liability reform legislation that became effective in 1996, supplanting Michigan common law with respect to many product liability doctrines, including the liability of non-manufacturing sellers, who had previously been subject to liability under breach of implied warranty theories for simply being in the chain of distribution of defective products. The statutory provision in question is MCL 600.2947(6), which provides:

In a product liability action, a seller, other than a manufacturer, is not liable for harm allegedly caused by the product unless either of the following is true:

(a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.

(b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm.

The appellate court identified the issue in *Curry* as whether the statute required a showing of fault (i.e., that the defendants failed to exercise reasonable care, as the defendants argued, or whether common law claims against non-manufacturing sellers for breach of implied warranty survived the tort reform legislation, as the plaintiffs maintained).

The court concluded that "MCL 600.2947(6)(a) and (b) clearly and unambiguously predicate product liability on a non-manufacturing seller for harm allegedly caused by the product under only two scenarios: (a) where the seller fails to exercise reasonable care, or (b) where there is a breach of an express warranty."

The plaintiffs argued, however, that subsection (a) of the statute actually contained two liability standards – failure to exercise reasonable care and breach of implied warranty. Ever since this provision was enacted, plaintiffs have endeavored to maintain their claims against non-manufacturing sellers by arguing that its express reference to "breach of any implied warranty" preserved that common law theory of liability without a showing of fault.

The *Curry* court firmly rejected this argument, however, stating that, although subsection (a) contained the clause "including breach of implied warranty," the grammatical context and placement of that phrase clearly indicated that the Michigan Legislature did not intend to sanction a "third avenue of liability" (in addition to negligence and breach of express warranty). The court emphasized the importance of the Legislature's choice of the word "including" in the phrase concerning breach of

implied warranty, and that the dictionary definition of the verb "include" is "to contain as a subordinate element; involve as a factor" and "to take in or consider a member of."

Therefore, the court concluded that, as referenced in the statute, "a breach of any implied warranty" must be considered a subordinate element of the broader "reasonable care" standard, such that any breach of implied warranty claim asserted against a non-manufacturing seller must therefore be treated as a type of "breach of reasonable care" claim, and not a separate claim.

The court then went on to explain that its interpretation of the statute in this regard was strengthened by two other factors – that the statute refers only to a single "failure" and that the "breach of implied warranty" clause was located within subsection (a), which deals with fault, rather than in subsection (b), which concerns breach of an express warranty.

Specifically, the court noted that subsection contained a final condition for the imposition of liability (i. e., that "that failure" (singular) must have been a proximate cause of the plaintiff's injuries). The court found it significant that the only "failure" to which that condition could relate would be the seller's failure "to exercise reasonable care, *including* breach of any implied warranty." The court observed that the Legislature could have used the disjunctive, "or," instead of the participle, "including," had it chosen to do so, but the plain language of the statute was not subject to such interpretation. Also, the court noted that the very placement of the breach of implied warranty clause within subsection (a) was significant, because breach of warranty claims sound in contract, whereas breach of reasonable care (negligence) claims sound in tort. The placement of the breach of implied warranty clause in the tort subsection of the statute was indicative that the Legislature intended to add an element of fault to the common law breach of implied warranty claim.

Finally, the court observed that, while consideration of legislative history was unwarranted when interpreting an unambiguous statute, its conclusion on this issue was clearly consistent with both the broad scheme of the 1996 tort reform, as well as the specific intent of MCL 600.2947(6), as set forth in the Senate Fiscal Agency Analysis of SB 344. Rejecting the plaintiffs' argument that the court's conclusion rendered the phrase, "breach of any implied warranty" nugatory or mere surplusage, the court pointed out that acceptance of the plaintiffs' contention that subsection (a) permitted two types of claims would result in an "implied warranty" exception that would swallow the rule, rendering the entire subsection nugatory, as the common law breach of implied warranty theory would become the *de facto* standard in most, if not all, product defect cases, which would be the antithesis of the clear intent of the Legislature.

Therefore, the court held that MCL 600.2947(6)(a) required that, in order to prevail in a product liability claim under a theory of breach of implied warranty, a plaintiff must prove that a non-manufacturing seller failed to exercise reasonable care, in addition to proximate cause. The court held that the plaintiff had

failed to so prove, and, therefore, the trial court did not err in granting summary disposition.

In his concurrence, Judge Richard Bandstra, although agreeing with the majority that MCL 600.294796)(a) shielded Meijer from liability, because the plaintiffs failed to prove that Meijer failed to exercise reasonable care in the sale of the tree stand, disagreed that the statutory language was as clear and unambiguous as the majority maintained. Judge Bandstra wrote that the statute's reference to a breach of implied warranty, in light of the fact that it was not historically necessary to prove lack of reasonable care for such a claim, introduced "some question and confusion about the statute's meaning."

Consequently, pending reversal or modification of this decision via further appellate review, sellers of products that they did not manufacture can finally be quite confident that they cannot be held liable under Michigan law for defects in those products absent evidence of any negligence or breach of an express warranty on their part.

Should you have any questions about the Product Liability Reform Statute or *Curry v. Meijer, Inc.*, please feel free to contact Plunkett Cooney's Product Liability Practice Group Leader Matthew J. Stanczyk. For more information about Plunkett Cooney's Product Liability Practice, click here.