SECREST WARDLE

state of the art

EXPLORING THE CHANGING FACE OF PRODUCT LIABILITY

01.13.10

Plaintiff Hunts Wrong Parties Over Defective Tree Stand

By Robert B. Holt, Jr.

In *Curry v Meijer, Inc.*, _ Mich App _ (2009), the Michigan Court of Appeals held that a claim against a non-manufacturing seller or distributor of a product requires proof of fault or proof that the seller made an express warranty that was breached. These proofs are required regardless of whether the claim is for negligence or breach of implied warranty.

In the early 1990's, Plaintiff, Robert Curry, bought a tree stand from Meijer, a retailer. Tree stands are used to provide a hunter with an elevated position from which to hunt. The tree stand was made by Loc-On Corporation and distributed to Meijer by either Stream and Lake Tackle or Farber Brothers. Loc-On subsequently went out of business.

In 2001, Robert Curry fell out of the tree stand while hunting. He was injured by the 20 foot fall. He and his wife sued Meijer, Stream and Lake and Farber Brothers, claiming negligent design and manufacture, failure to warn, sale of a defectively designed and manufactured tree stand, and breach of express and implied warranties.

SECREST WARDLE NOTES:

This published case affirms that when a product liability claim is made against a non-manufacturing seller, whether under a negligence or implied warranty theory, plaintiff must plead and prove either that the seller failed to exercise reasonable care or that the seller made an express warranty and the product failed to conform to the warranty. The Michigan Court of Appeals cited with approval a similar analysis and ruling by the United States Court of Appeals for the Sixth Circuit, which addressed the same statute and issue in 2008, and reached the same result. These cases are binding precedent in State and Federal Courts.

After discovery, all the Defendants filed motions for summary disposition. They pointed out that they made no express warranty (the only warranty came from the manufacturer), and that there was no evidence that the retailer or either of the distributors did anything to constitute independent negligence. The Defendants argued that, under the 1996 tort reform statute, there could be no claim against a non-manufacturing seller without proof of independent negligence or breach of an express warranty extended by the seller.

Plaintiffs, in response, argued that a breach of implied warranty claim only requires proof that a product was sold in a defective condition and that the defect caused injury. Because the statute governing the liability of a non-manufacturing seller specifically includes claims for breach of implied warranty, the requirement for separate negligence on the part of the retailer or seller only pertained to a negligence claim, and not to an implied warranty claim. Everyone appeared to agree that there was no evidence of independent negligence by the retailer or distributors. Nor was there evidence that they extended their own express warranty. The main question involved interpretation of the law.

The Court of Appeals analyzed the language in the product liability tort reform statute, MCL §600.2947. It found that, "the language is about as clear and unambiguous as it could be." The Court then devoted several pages of its

opinion to a dissection of the sentences at issue and analysis of the terms and syntax chosen by the Legislature.

The Court of Appeals held that the Legislature did not intend failure to exercise reasonable care (that is, negligence) and breach of implied warranty to be separate product liability claims. Rather, the Legislature's choice of the word "including" showed its intention to make breach of implied warranty a "subordinate element" of the broader reasonable care standard. "Put another way, a breach of implied warranty claim is a type of, and not separate from, a breach of reasonable care claim." The Court pointed out that if Plaintiffs' interpretation – that sub-section (a) permitted two different types of claims – were correct, then the implied warranty "exception," under which no proof of fault would be required, would swallow the rule, which required proof of fault. This would effectively make the entire sub-section ineffective and thwart the clear intent of the Legislature to require proof of a seller's fault before imposing liability.

Plaintiffs also raised a public policy argument for imposing liability on a seller or distributor without proof of fault. They claimed that because many consumer goods sold in the United States are manufactured in China ("by which plaintiffs must also mean unavailable to sue"), the Legislature could not have intended to drastically limit recovery by requiring proof of fault of the U.S.-based sellers and distributors (who were, presumably, "available to sue"). The Court, in response, pointed out that the manufacturer in this case was American, and that any public policy issues should be taken up with the Legislature, and not with the judiciary.

The Court concluded that the statute required a plaintiff suing a non-manufacturing seller to prove both a failure to exercise reasonable care and proximate cause, in order to prevail on a product liability claim based on breach of implied warranty. Lacking that evidence, the trial Court properly dismissed the cases against Meijer, Stream and Lake Tackle and Farber Brothers.

CONTACT US

Farmington Hills
30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens
94 Macomb Place, Mt. Clemens, MI 48043-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing
6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids
2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

SECREST SW WARDLE

CONTRIBUTORS

Products Liability Practice Group Chair
Bruce A. Truex

Group Co-Chair
Mark F. Masters

Editor
Bonny Craft

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for State of the Art, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at **swsubscriptions@secrestwardle.com** or **248-539-2850**.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Blueprints – Mapping legal solutions for the construction industry
Boundaries – A guide for property owners and insurers in a litigious society
Community Watch – Breaking developments in governmental litigation
Contingencies – A guide for dealing with catastrophic property loss
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Industry Line – Managing the hazards of environmental toxic tort litigation
Landowners' Alert – Defense strategies for property owners and managers
No-Fault Newsline – A road map for motor vehicle insurers and owners
On the Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
Standards – A guide to avoiding risks for professionals
Structures – A framework for defending architects and engineers
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability