2003

C.A. Johnson Trenching, L.C. v. Vermeer Manufacturing Co.: Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

C.A. JOHNSON TRENCHING, L.C.	)	
	)	Case No. 20030714-CA
Plaintiff and Appellant,	)	
	)	
vs.	)	
	)	
VERMEER MANUFACTURING CO.,	)	
	)	
Defendant and Appellee.	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

HONORABLE LYNN W. DAVIS, DISTRICT COURT JUDGE

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ARGUMENT

I. C.A. Johnson Trenching, L.C.'s strict liability claim is not barred under the Economic Loss Rule.

Vermeer Manufacturing Co. (hereinafter referred to as "Vermeer") argues that C.A. Johnson Trenching, L.C.'s (hereinafter referred to as "Johnson") claim for strict liability was barred and properly dismissed by the trial court under the Economic Loss Rule. (Brief of Appellee, at 5). The Economic Loss Rule has been defined as:

> damages for inadequate value, costs of repair and replacement of the defective product, or consequential loss of profits--without any claim of personal injury or damage to other property . . . as well as 'the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.'

American Towers Owners Association, Inc. v. CCI Mechanical, Inc., 930 P.2d 1182, 1139 (Utah 1996) quoting Maack v. Resource Design & Construction, Inc., 875 P.2d 570 , 579-80 (Ut. Ct. App. 1994). Therefore, unless there is damage to property other than the defective product or personal injury, the Economic Loss Rule would preclude such recovery.

Johnson's Complaint alleged that Vermeer was strictly liable "for all damages resulting from the trencher's failure caused by the Defendant Vermeer Manufacturing Co." (R. at 3). The Complaint's prayer for relief sought both special and general damages as may be determined by the Court. (R. at 2). Vermeer argues that the Complaint did not seek damages to property other than the trencher or personal injuries. (Brief of Appellee,

at 6). However, that is not a proper characterization of what the Johnson's Complaint was seeking—Johnson was seeking both special and general damages "as a result of the failure of the trencher as alleged [in the Complaint]". (R. at 2). Such broad language may have included damages to property other than the trencher or bodily injury. Because Johnson's Complaint was drafted with such broad, inclusive language, any bodily injury or damage to other property would have been included in the claim for damages. Therefore, it was improper for the trial court, using the Economic Loss Rule, to dismiss Johnson's claim for strict liability.

II. Johnson never agreed to be bound by Vermeer's disclaimer of the implied warranties of merchantability and fitness for a particular purpose.

Vermeer claims that the implied warranties of merchantability and fitness for a particular purpose were both disclaimed by it in the Limited Warranty when Johnson "received and acknowledged on the date the trencher was purchased." (Brief of Appellee, at 9). Using the language of Utah Code Ann. §70A-2-316(2), which requires that any exclusion or modification of the implied warranty of merchantability and fitness for a particular purpose must be in writing and conspicuous, Vermeer argues that the Limited Warranty expressly excluded the implied warranties of merchantability and fitness for a particular purpose, and that Johnson "explicitly agreed" to the terms of the Limited Warranty by filling out and signing the small document entitled Limited Warranty for

Industrial Equipment (referred to by Vermeer as "the warranty registration form"). (Brief of Appellee, at 9).

An examination of the document does not reveal language that Johnson specifically agreed to be bound by Vermeer's disclaimer of the implied warranties of merchantability and fitness for a particular purpose. Vermeer's Limited Warranty for Industrial Equipment merely states that "I, the owner, hereby acknowledge that...I am familiar with the Limited Warranty Statement in the operator's manual." Johnson's employee may have acknowledged familiarity with the Limited Warranty Statement, but the document does not state that Johnson agreed to be bound by it. With no language evidencing agreement to be bound by the Limited Warranty Statement, the disclaimer of the implied warranties of merchantability and fitness for a particular purpose is ineffective.

Vermeer cites Boud v. SDNCO, Inc., 2002 UT 83, 54 P.3d 1131 (Utah 2002) for further support for its argument that the disclaimer was proper. (Brief of Appellee, 11). However, Boud is distinguishable from the present case based upon the precise language of the disclaimers. In Boud, the contract between the parties stated:

> Purchaser agrees that his contract includes all of the terms, conditions and warranties on both the face and reverse side hereof, that this agreement cancels and supersedes any prior agreement and as of the date hereof comprises the complete and exclusive statement of the terms of the agreement relating to the subject matter covered hereby. PURCHASER BY HIS/HER EXECUTION OF THIS AGREEMENT ACKNOWLEDGES THAT HE/SHE WAS READ ITS TERMS, CONDITIONS AND WARRANTIES BOTH ON THE FACE AND THE REVERSE SIDE HEREOF AND A[SIC] HAS RECEIVED A

TRUE COPY OF THIS AGREEMENT, AND FURTHER AGREES TO PAY THE 'BALANCE DUE' SET FORTH ABOVE ON OR BEFORE THE DATE SPECIFIED.

Boud, 2002 UT at ¶18, 54 P.3d at 1136. In comparison to this case, there is no language on the Limited Warranty for Industrial Equipment that the 'purchaser agrees,' only that the purchaser is "familiar with the Limited Warranty Statement." (R. 21). While the Boud court correctly upheld the disclaimer of warranties because the specific contract's language evidenced an agreement by the purchaser to be bound by the contract's terms, this Court should not uphold Vermeer's disclaimer of the implied warranties of merchantability and fitness for a particular purpose.

CONCLUSION

Based upon the foregoing reasons and analysis, Johnson respectfully requests that this Court reverse the trial court's July 30, 2003 Order of Dismissal with Prejudice.

DATED this 28th day of June, 2004.

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CERTIFICATE OF MAILING

I hereby certify that on the 28th day of June, 2004, I caused the foregoing Reply Brief of Appellant to be served upon Appellees by mailing, via first class mail, true and correct copies of the same, to:

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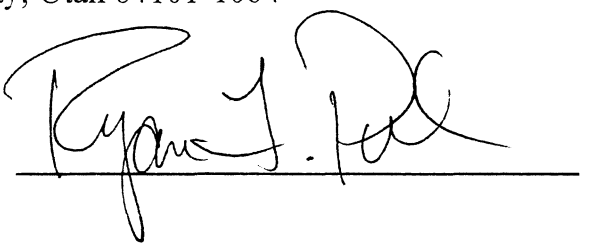

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