

June 2, 2003

**News Story**

# Shopper Wins Product Liability Suit, But Damages Are Capped

## No Distinction Between Types Of Plaintiffs

**By Karen M. Poole**

A shopper who was injured by a store's automatic sliding doors can recover for her injuries under a breach of implied warranty theory, but her award is subject to the cap on noneconomic damages imposed by MCL 600.2946a, the Michigan Court of Appeals has determined.

The manufacturer of the doors argued that the plaintiff's claim for breach of implied warranty should fail because the plaintiff withdrew its design and manufacturing defect claim. It further argued the trial court erred in finding the damage cap unconstitutional when applied to product liability actions.

The Court of Appeals disagreed as to the claim, but agreed as to the cap.

"Contrary to defendant's assertions, plaintiff's concession that the product was neither negligently designed nor negligently manufactured is not fatal to her breach of implied warranty claim," wrote Judge Kurtis T. Wilder.

However, "[w]e conclude that MCL 600.2946a does not arbitrarily distinguish between plaintiffs bringing products liability actions and plaintiffs bringing negligence actions," the judge held. "We agree with the *Zdrojewski [v. Murphy]* Court's finding, in connection with its equal protection analysis, that the classification created by the damages limitation is not arbitrary."

The 9-page decision is *Kenkel v. Stanley Works, et al.*, Lawyers Weekly No. 07-48790. Judges Michael R. Smolenski and Bill Schuette joined Wilder's opinion.

### **Questionable Cap**

Southfield attorney Robert M. Raitt, who represented the plaintiff at trial, applauded the Court of Appeals for recognizing the validity of his client's claim, but was disappointed with the court's ruling concerning the damage cap.

"I was happy that a very conservative court upheld the portion of the verdict that meant my client's cause of action was justified, but I am not happy that they found the damage cap constitutional," he stated.

Raitt said he thinks it is "ridiculous that how you are injured determines how you can be compensated."

For example, "if you are involved in an accident in which someone is negligent, there's no cap on

your damages," he explained. "But if you are injured by a non-functioning product such as a sliding door, they are capped. It doesn't make any sense."

In any event, Raitt said it is significant that the court recognized the breach of implied warranty claim.

"We're happy the court determined that it was a viable cause of action and that we were entitled to prove the elements of the claim without having to prove a specific defect," he said. "The fact that the door closed on my client showed that it was not fit for its intended purpose."

Meanwhile, the plaintiff's appellate counsel, Mark R. Granzotto of Royal Oak, told Lawyers Weekly this is a significant decision because it shows that product liability law is not dead despite the statute limiting product liability actions.

"This case is important to the extent that product liability law still exists even though it was substantially undermined by the passage of the product liability act," he explained.

"It's the rare case that a plaintiff can make a good claim for a product defect under Michigan law," he noted. "But this case reaffirms the law that has existed in Michigan for a very long time — that you can have a product defect without specifically identifying the actual component that failed."

Counsel for the defendant could not be reached for comment before deadline.

### **Trapped**

On April 14, 1997, plaintiff Rosemarie Kenkel went shopping at a Rite Aid store in Dearborn. Because she walked rather slowly with the use of a walker, she waited until a customer in front of her left the store "to get the 'full cycle'" of time for the automated doors to open and close. She mistakenly believed the doors operated on a timer.

As the plaintiff was passing through the doors, they closed, trapping her sideways. When the doors opened, she fell to the ground.

Although the plaintiff said she didn't feel any pain when she was trapped, she indicated that she felt much pain when she fell. Since the fall, the plaintiff has had constant back pain, cannot drive and can only walk short distances.

Defendant Stanley Works manufactured the automatic doors, which were installed in 1995.

Microwave motion detectors cause the doors to open and an overhead presence sensor system, manufactured by Stan-Guard, prevents the doors from closing when an obstruction is present.

A national standard association requires that overhead presence sensors detect the presence of a person or object 28 inches from the floor. The beam emitted by the door's sensor spans 30 inches.

The zones covered by the Stan-Guard and the microwave motion detectors overlap by 10 inches, so at least one sensor detects the individual at any location in the threshold.

The doors also have a back-up safety feature — if the doors strike any object, the doors reopen. If they malfunction, they are designed to automatically open and stay open.

The plaintiff sued the door manufacturer, alleging claims of breach of implied warranty and design

and manufacturing defects. Prior to trial, the plaintiff withdrew her claim that the doors were negligently designed or manufactured.

An engineer who examined the doors testified they were not fit for pedestrian use. Although the doors opened and closed when an associate walked through the doors, they did not detect a rubber ball, a cone, and an attaché case, which the engineer used to test the sensors. However, he did not know about the overhead sensors or that an object had to be 28 inches high for the sensors to detect the object.

The defendant moved for a directed verdict, claiming that since the plaintiff dropped her design and manufacturing defect claims, she could not prevail on her claim for breach of implied warranty. The trial court denied the motion, ruling the breach of implied warranty claim was a distinct claim.

A service technician then testified that he tested the doors on two occasions and found they worked properly. The defendant again moved for a directed verdict, which the court also denied.

Finally, the defendant's vice president testified, noting that if the presence sensor was properly working, the doors would not have closed on the plaintiff.

At the conclusion of proofs, the trial court instructed the jury on breach of implied warranty. The jury awarded the plaintiff \$1,496,703.

The defendant moved for judgment notwithstanding the verdict, arguing that since the plaintiff dismissed the design and manufacturing defect claims, there could be no breach of implied warranty.

It then asked the court to reduce the damage award under MCL 600.2946a, which imposes a \$280,000 cap on noneconomic damages unless a design defect caused the person's death or permanent loss of a vital bodily function. In that case, a damage award cannot exceed \$500,000.

The court did not reduce the award, finding the statute unconstitutional as applied to product liability cases because it limits a plaintiff's right to a jury trial.

### **Concession Not Fatal**

On appeal, the defendant argued that it was entitled to a directed verdict because the plaintiff did not prove the doors were defective. It also argued the trial court improperly instructed the jury on the plaintiff's breach of implied warranty claim because the evidence was insufficient that the doors were unfit for their foreseeable use when they left the defendant's control.

Judge Wilder disagreed.

"Claims of breach of implied warranty and negligence in manufacturing or design may require the same proofs in certain circumstances," Wilder explained. "However, 'the theories of negligence and implied warranty remain separate causes of action with different elements.'"

Moreover, Wilder pointed out that "[a] product may not be reasonably fit for its intended or foreseeable use even if the product is 'technically ... not defective.'"

Thus, the issue is whether the plaintiff presented sufficient evidence showing a defect existed that could be attributed to the defendant," the judge noted.

"We conclude that plaintiff presented sufficient evidence to warrant denial of defendant's directed verdict motion," he stated.

Not only did the plaintiff and her experts testify the doors malfunctioned, but one of the defendant's experts testified that if the doors shut on the plaintiff, they must have malfunctioned.

"Together, plaintiff's testimony and the testimony of the parties' experts was sufficient to permit the jury to draw the inference that the doors were defective because they did not fulfill their intended use to accommodate safe entry to and exit from the store," Wilder concluded.

### **Cap**

Despite disagreeing with the defendant's arguments regarding the plaintiff's claim, Wilder agreed with the defendant that the trial court improperly found the damage cap unconstitutional as applied to product liability actions.

Wilder recognized the damage cap has been found to be constitutional in actions against the lessor of a vehicle, *Phillips v. Mirac, Inc.*, and in medical malpractice actions, *Zdrojewski*.

The plaintiff conceded the analysis used in both of those actions is applicable in this case, but argued the court should adopt their dissenting opinions.

"We decline to do so because we conclude that both *Phillips* and *Zdrojewski* were properly decided, that the analysis employed in those cases applies with equal force to MCL 600.2946a, and that MCL 600.2946a is rationally related to the legitimate governmental interests of encouraging the manufacture and distribution of products in Michigan and protecting those who place products in the stream of commerce from large damage awards in jury trials," Wilder declared.

Wilder also observed the trial court improperly found the damage cap statute violates due process.

"Because we have rejected plaintiff's equal protection claim, and because the test for determining whether a statute survives a due process challenge is 'essentially the same' as the test for evaluating an equal protection challenge, we find that the statute does not violate due process," the judge concluded.