

IN THE COURT OF APPEALS 05/07/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00095 COA

DRESSER-RAND COMPANY

APPELLANT

v.

ARKWRIGHT MUTUAL INSURANCE COMPANY

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT L. GIBBS

COURT FROM WHICH APPEALED: YAZOO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

REILLY MORSE

COMPTON, CROWELL & HEWITT, P.L.L.C.

ATTORNEYS FOR APPELLEE:

BRENT J. KAPLAN

JOHN B. MACNEILL

NATURE OF THE CASE: CIVIL: SUBROGATION ACTION FOR BREACH OF WARRANTY

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR APPELLEE

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

The Yazoo County Circuit Court granted summary judgment in favor of Arkwright Mutual Insurance Company in its subrogation action against Dresser-Rand Company for breach of warranty. Dresser-Rand appeals, contending that provisions in its agreement with Arkwright's insured bar liability for damages based upon breach of implied warranties. We disagree and affirm.

FACTS

Mississippi Chemical Company, Arkwright's insured, purchased manufacturing equipment from Dresser-Rand in the mid-1960s. Mississippi Chemical decided to update this equipment and, in 1988, obtained an engineering study from Dresser-Rand that resulted in the installation of new equipment. The total cost incurred by Mississippi Chemical to update its equipment was well over \$1.5 million.

In 1989, when the equipment became operational, it failed. Under an express warranty in the agreement between Dresser-Rand and Mississippi Chemical, Dresser-Rand attempted to cure the failure. Notwithstanding its efforts, Dresser-Rand was unable to prevent over \$1 million in production losses to Mississippi Chemical. Mississippi Chemical was compensated for these losses through insurance provided by Arkwright. Arkwright was then subrogated to Mississippi Chemical's interests and undertook this action to recover the insurance proceeds it paid.

DISCUSSION

The central issue in this case concerns the impact of the following provisions in the agreement between Dresser-Rand and Mississippi Chemical:

SELLER MAKES NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

....

Seller shall not be liable to purchaser for any special, punitive, or consequential damages of any kind or character which might arise under the contract.

The issues before us are whether a contract for the purchase of goods in a commercial setting may contain a disclaimer of implied warranties or disclaim liability for consequential damages from breach of an implied warranty. We conclude that such disclaimers are unenforceable in Mississippi.

1. Disclaimer of Implied Warranties

Mississippi has two statutory provisions within the framework of its commercial code that deal directly with disclaimer of implied warranties. In 1976, the Mississippi Legislature enacted the older of the two provisions which states:

There shall be no limitation of remedies or disclaimer of liability as to any implied warranty of merchantability or fitness for a particular purpose.

Miss. Code Ann. § 11-7-18 (1972). Another provision enacted in 1987 as a formal part of the commercial code states:

Any oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable

Id. § 75-2-315.1(1) (Supp. 1995). Dresser-Rand argues that 11-7-18 is so inconsistent with 75-2-315.1 that it is impliedly repealed.

"A repeal may arise by necessary implication from the enactment of a subsequent act." *Greenville Pub. Sch. Dist. v. Western Line Consol. Sch. Dist.*, 575 So. 2d 956, 963 (Miss. 1990) (citation omitted). "When a subsequent enactment covering a field of operation co-existent with a prior statute cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict." *Id.* (citation omitted).

However, the doctrine of repeal by implication is not favored. *Associated Press v. Bost*, 656 So. 2d 113, 115 (Miss. 1995) (citation omitted); *Roberts v. Mississippi Republican Party State Exec. Comm.*, 465 So. 2d 1050, 1051 (Miss. 1985) (citations omitted). Thus, "statutes on the same subject, although in apparent conflict, should be construed in harmony with each other to give effect to each if possible." *Bost*, 656 So. 2d at 115 (citation omitted); *Roberts*, 465 So. 2d at 1052 (citations omitted). "A series of acts upon one subject are to be construed as one whole; and where in a subsequent statute there is no express repeal of a former, the court will not hold the former to be repealed by implication, unless there be a plain and unavoidable repugnancy between them." *Roberts*, 465 So. 2d at 1052 (citation omitted).

We perceive no conflict between the two provisions at issue in this case. At most, there is an overlap. Section 11-7-18 prohibits limitation of implied warranties generally. Within the coverage of section 11-7-18 are consumer transactions. Perhaps redundantly, but not irreconcilably, section 72-2-315.1(1) proscribes the limitation of implied warranties in consumer transactions. There is no evidence that the legislature intended to repeal the broader proscription in favor of a more limited one covering only consumer transactions. Implied repeal does not arise from mere redundancy, but only from irreconcilable conflict. Accordingly, section 11-7-18 is in effect and voids Dresser-Rand's contractual effort to obviate implied warranty liability.

2. *Disclaimer of Consequential Damages*

Dresser-Rand argues that it is entitled to enforce the limitation of recovery of consequential damages provided in its contract with Mississippi Chemical. Specifically, Dresser-Rand points to a provision of the Mississippi Code that states: "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." Miss. Code Ann. § 75-2-719(3) (1972). This provision is, however, followed by another that states: "[a]ny limitation of remedies which would deprive the buyer of a remedy to which he may be entitled for breach of an implied warranty of merchantability or fitness for a particular purpose shall be prohibited." Miss. Code Ann. § 75-2-719(4). Dresser-Rand asserts two theories in support of its argument: implied repeal and harmonious statutory construction.

Neither provides Dresser-Rand with the relief it desires.

We first hold that consequential damages are a "remedy" within the meaning of section 75-2-719(4). The point is conceded by Dresser-Rand. Dresser-Rand contends that the adoption of section 75-2-315.1(1) in 1987, which specifically prohibited disclaimer of implied warranties in consumer transactions, narrowed the proscription against exclusion of liability for consequential damages found in section 75-2-719(4). In other words, Dresser-Rand argues that after 1987 only in consumer transactions must consequential damages always be allowed.

Dresser-Rand suggests that, without implied repeal, section 75-2-719(4) is in conflict with section 75-2-719(3). It relies on *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15 (Miss. 1981), to support its position. In *Massey-Ferguson*, the supreme court held that a disclaimer of warranties was ineffective against a buyer seeking repair or replacement of defective equipment under an express warranty. *Id.* at 17. In dicta, the supreme court stated that a "limitation of damages as allowed under section 75-2-719[(3)] presupposes that the warrantor has fulfilled his [contractual agreement to repair or replace the defective equipment]." *Id.* at 19. By negative implication, Dresser-Rand argues that when a warrantor has complied with its promise to repair or replace defective equipment, then it is entitled to disclaim liability for consequential damages whatever the terms of subsection (4).

We do not find *Massey-Ferguson* to stand for this proposition. It is important to understand the distinction that *Massey-Ferguson* makes between express and implied warranties. *Massey-Ferguson* establishes that consequential damages are a "remedy" to which a buyer is entitled when a seller breaches its implied warranty. *Id.*; see *Fedders Corp. v. Boatright*, 493 So. 2d 301, 308 (Miss. 1986). Under a plain reading of subsection (4), obtaining such a remedy upon a breach of implied warranty may not be proscribed. Subsection (3) is not, by this reading, rendered a nullity because it remains applicable to breaches of express warranties and any implied warranties other than merchantability or fitness for a particular purpose. Therefore, the limitation presented here by Dresser-Rand—a disclaimer of consequential damages for breach of these two implied warranties—is unenforceable under Mississippi's statutory scheme.

The parties agree that, for many years, Mississippi has been the only state whose legislature has prohibited the disclaimer of implied warranties of merchantability and fitness in all transactions affected by the commercial code. The effect of Dresser-Rand's argument is that, after implied repeal, we would be the only state that allows disclaimer of implied warranties in commercial, non-consumer transactions, without any statutory restraint. That is because the implied repeal argument would leave us with no statute governing disclaimer as to non-commercial sales, while the other forty-nine states have some statutory restrictions. The legislature intentionally made us unique in this area. It remains its prerogative to revise or reverse our *sui generis* status. The facts alleged here do not support a finding that such an abrupt metamorphosis was intended or inadvertently occurred.

THE JUDGMENT OF THE YAZOO COUNTY CIRCUIT COURT IS AFFIRMED AND ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT DRESSER-RAND COMPANY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING,

McMILLIN, AND PAYNE, JJ., CONCUR.