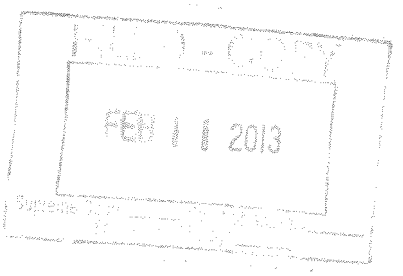
2-11-2013

American West Enterprises, Inc. v. CNH, LLC Respondent's Brief Dckt. 40230

IN THE SUPREME COURT OF THE STATE OF IDAHO

AMERICAN WEST ENTERPRISES, INC.,	)	
	)	
Plaintiff/Appellant,	)	SUPREME COURT NO. 40230-2012
	)	
v.	)	
	)	
CASE NEW HOLLAND, INC.,	)	
	)	
Defendant/Respondent.	)	
	)	



RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District for Minidoka County, Before the Honorable Jonathan P. Brody, District Judge Presiding

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I. STATEMENT OF THE CASE

This case arrives on appeal from the district court's grant of summary judgment to defendant/respondent Case New Holland, Inc. ("CNH") in a suit brought by plaintiff/appellant American West Enterprises ("American West"). American West filed suit in an effort to recover the cost of a remanufactured tractor engine sold by CNH to a local dealer/seller, Pioneer Equipment Company ("Pioneer Equipment"), and then purchased by American West from Pioneer Equipment. Several years after purchasing the engine, American West sold the tractor to a third party and the engine allegedly malfunctioned. The district court correctly ruled that because no privity existed between American West and CNH, American West could not maintain a claim against CNH for breach of implied warranty. The district court also correctly ruled that American West was not a third party beneficiary of any agreement between CNH and Pioneer Equipment or that Pioneer Equipment was acting as CNH's agent at the time of the purchase and sale of the tractor engine. Following the granting of summary judgment in the case, the district court erred, however, when determining that CNH was not entitled to attorney fees as the prevailing party.

II. STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

On or about June 26, 1997, Cameron Sales, Inc. and American West entered into an agreement wherein American West purchased a used Case 3394 tractor (the "Tractor"). R., p. 22, 27. More than ten years later, on August 7, 2007, American West entered into an agreement with Pioneer Equipment to replace the engine in the Tractor. R., p. 2. Approximately two years after the engine was replaced, the Tractor was then sold by American West to an individual

named Frank Jensen. *Id.* The replacement engine allegedly "froze up" during use by Mr. Jenson. R., p. 3.

No express warranty was provided in connection with the replacement of the engine. *Id.* There were no personal injuries sustained by any individual in connection with the replacement and alleged malfunction of the replacement engine. R., p. 22. No contractual relationship of any kind existed or exists between American West and CNH. *Id.* At all times, American West dealt directly with Pioneer Equipment Company. *Id.*

Approximately two years after the Tractor's engine allegedly malfunctioned and approximately four years after the Tractor's engine was replaced by Pioneer Equipment Company, American West brought suit against CNH. R., p. 1. The case was heard by the Honorable Jonathan P. Brody. CNH subsequently brought a motion for summary judgment. R. p. 17-18. American West opposed CNH's motion and brought a separate motion to amend its complaint to add claims for recovery as a third party beneficiary and under the theory that Pioneer Equipment Company was acting as CNH's agent for purposes of the sale of the engine. R., p. 30-46. After briefing and oral argument, the district court issued a written Memorandum Decision Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Leave to Amend Complaint. R., p. 70-79. In his decision, Judge Brody determined that: (1) privity of contract is required under Idaho law to recover for economic loss for breach of implied warranty; (2) American West was not a third party beneficiary of the contract between Pioneer Equipment and CNH for the purchase and sale of the Tractor engine; and (3) Pioneer Equipment

was not CNH's agent. *Id.* American West timely filed the present appeal, which is now before the Court.

Following the district court's granting of CNH's summary judgment motion, CNH timely moved for an award of attorney fees and costs pursuant to Idaho Code § 12-120(3) and Idaho Rule of Civil Procedure 54. R., p. 83-113. After briefing and oral argument, the district court issued a written Memorandum Decision Denying in Part and Granting in Part Defendant's Motion for Attorney Fees and Costs. R., p. 122-128. In his decision, Judge Brody determined that no commercial transaction existed upon which American West based its Complaint and therefore denied CNH's attorney fee claim under § 12-120(3). *Id.* CNH timely filed its notice of cross-appeal, which is also before the Court.

III. RESTATEMENT OF THE ISSUES

1. Whether the district court correctly held, following nearly forty years of existing Idaho precedent, that privity of contract is required to maintain an action for breach of implied warranty to recover purely economic loss.
2. Whether the district court correctly held that America West was not a third party beneficiary of the purchase and sale agreement between CNH and Pioneer Equipment.
3. Whether the district court correctly held that no agency relationship existed between CNH and Pioneer Equipment.
4. Whether CNH is entitled to an award of attorney fees, both on appeal and in the underlying litigation, pursuant to Idaho Code § 12-120(3).

IV. STANDARD OF REVIEW

An Idaho appellate court reviewing a ruling on summary judgment employs the same standard as the district court below. *Erland v. Nationwide Ins. Co.*, 136 Idaho 131, 133, 30 P.3d 286, 288 (2001). Under Idaho Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled a judgment as a matter of law." Idaho R. Civ. P. 56(c). In order to demonstrate a genuine issue of material fact, the party opposing the motion must present more than a conclusory assertion that an issue of fact exists. *Allstate Ins. Co. v. Mocaby*, 133 Idaho 593, 596, 990 P.2d 1204, 1207 (1999). Instead, the party opposing summary judgment must respond to the motion with specific facts showing there is a general issue for trial. *Id.*; *see also* Idaho R. Civ. P. 56(e) ("[A]n adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."). A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). Moreover, the existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *E.g., Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992).

V. ARGUMENT

A. The District Court Correctly Granted Summary Judgment in This Case Because There Was No Privity of Contract between American West and CNH.

In 1975, in *Salmon River Sportsman Camps, Inc. v. Cessna Aircraft Co.*, this Court held that privity of contract is required to maintain a breach of implied warranty action for purely economic losses. *See Salmon River Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 355, 544 P.2d 306, 313 (1975). Since that time, and as recently as 2004, the Idaho appellate courts have followed *Salmon River Sportsman*, holding that a remote purchaser cannot bring a warranty action against a manufacturer to recover economic loss in the absence of privity. *See Ramerth v. Hart*, 133 Idaho 194, 198, 983 P.2d 848, 852 (1999); *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

The basis for the privity requirement is the idea that the parties to an agreement are free to bargain for themselves and allocate between them the risk of a product's failure. In other words, the privity requirement reinforces the principle that the law should not impose a contract that the parties did not wish to make. The privity requirement in suits brought by the ultimate purchaser of a product also serves to prevent "absurd and outrageous consequences" involving unlimited exposure of manufacturers to liability. William L. Prosser, *The Assault Upon the Citidel*, 69 Yale L.J. 1099, 1134 (1960). The present case serves as a good example, as it involves a lawsuit filed two years after the alleged failure of the Tractor's engine and approximately four years after the engine was replaced by the seller.

The privity requirement further serves to reinforce the boundaries between tort and contract.

In *Salmon River Sportsman*, this Court noted that although Professor Prosser "had criticized the use of the warranty concept to enlarge recovery in tort," he had also "stated in absolute terms the requirement of privity in a contract action for breach of warranty, regardless of the type of warranty or the type of recovery." *Id.* at 353-54, 544 P.2d at 311-12 (citing Prosser, *The Assault Upon the Citidel*, at 1134) ("No one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract.")).

In its opening brief, America West sets forth three arguments as to why the Court should overturn nearly forty years of Idaho jurisprudence requiring privity of contract in a breach of warranty action seeking purely economic loss. First, American West contends that the cumulative result of Idaho caselaw has left it with no available legal redress. Second, American West suggests that since other jurisdictions have done away with the privity requirement in breach of warranty cases, Idaho should do the same. Third, American West contends that because this case involves goods, as opposed to services, the privity requirement should be relaxed. As discussed in more detail below, however, each of American West's arguments is misplaced.

1. American West Chose Not to Avail Itself of an Available Legal Remedy and is Therefore Not Unfairly Prejudiced by the Privity Requirement.

American West contends that, as a result of the privity requirement, it has no redress though contract theory because the Court's decisions in *Salmon River Sportsman* and *Ramerth v. Hart* preclude its claim for breach of implied warranty. Notably, the plaintiffs in *Nelson v. Anderson Lumber Co.*, like American West, argued that their case was "the case" the Idaho Supreme Court spoke of in *Ramerth v. Hart* when it mentioned that "'there may be cases where the plaintiff may be

unfairly prejudiced by the operation of the economic loss rule in combination with the privity requirement.'" *Id.* (quoting *Ramerth v. Hart*, 133 Idaho 194, 198, 983 P.2d 848, 852 (1999)).

In *Nelson*, the plaintiff homeowners asserted claims for breach of the implied warranties of merchantability and fitness for a particular purpose against various individuals and entities when it was discovered that the cabin they had built did not meet the county's snow load requirements. *Id.* at 705, 99 P.3d at 1095. The *Nelson* court noted, however, that although the plaintiffs in that case were precluded from recovery on their implied warranty claims based upon the privity requirement, the plaintiffs still had a viable cause of action against the party with which they contracted with to design and obtain the materials to build their cabin. 140 Idaho at 711, 99 P.3d at 1101. Similarly, in this case, based upon the alleged failure of the Tractor's engine, American West had a viable cause of action for breach of contract against the party it directly dealt with, i.e., Pioneer Equipment. CNH should not be substituted in Pioneer Equipment Company's place because American West failed to take advantage of an available legal remedy against the party with whom it dealt. *Cf.*, *Nelson*, 140 Idaho at 711, 99 P.3d at 1101 ("The fact that the [plaintiffs] may not be fully compensated for their losses does not mean that the [plaintiffs] have been unfairly prejudiced nor does it persuade us to allow recovery against another party ....") (emphasis added).

2. Numerous Jurisdictions Continue to Adhere to the Privity Requirement in Breach of Warranty Actions Alleging Purely Economic Loss.

America West next argues that other jurisdictions have abolished the privity requirement, thus suggesting that Idaho should do the same. American West ignores, however, that a large number of jurisdictions across the country continue to adhere to the privity requirement. For

example, in the recent case of *Curl v. Volkswagon of America, Inc.*, the Supreme Court of Ohio, held that the purchasers of vehicles may only assert a contract claim for breach of implied warranty against parties with whom they are in privity of contract. 871 N.E. 2d 1141, 1142 (Ohio 2007). Notably, the *Curl* court cited a "significant number of states retaining privity requirements in some form for parties asserting claims of breach of implied warranty." *Id.* at 1147 (citing decisions from Alabama, Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, New York, North Carolina, Oregon, Tennessee, Washington, and Wisconsin). The privity requirement in breach of warranty cases involving purely economic loss thus continues to be the law in numerous jurisdictions throughout the country.

3. The Idaho Court of Appeals Has Upheld the Privity Requirement in an Analogous "Goods" Case.

American West last asserts that the Court should decline to follow well settled Idaho law requiring privity in a contract action to recover economic loss for breach of implied warranties on the basis that this is a "goods," as opposed to a "services," case. As noted above, however, in *Nelson*, the Idaho Court of Appeals upheld the privity requirement in a "goods" case involving building materials for a cabin. 140 Idaho 702, 99 P.3d 1092. In *Nelson*, the trial court determined that no contract existed between the plaintiffs and any of the defendants who answered the plaintiffs' complaint including, significantly, the manufacturer of the wall panels used in constructing the plaintiff's cabin. *Id.* at 706, 99 P.3d at 1096. On appeal, the Idaho Court of Appeals upheld the trial court's ruling, citing the lack of privity of contract as an

necessary element to succeed on claims of breach of the implied warranties of merchantability and fitness for a particular purpose. *Id.* at 707, 99 P.3d at 1097. American West's reliance on the "goods" versus "services" distinction is therefore misplaced.

B. The District Court Properly Granted Summary Judgment in This Case Because No Contract Existed Between CNH and Pioneer Equipment Company From Which American West Could Be a Third Party Beneficiary.

1. There is No Evidence in the Record of an Express Intent to Benefit American West.

Idaho Code Section 29-102 provides that a contract made expressly for the benefit of a third person may be enforced by the third person at any time before the parties thereto rescind it. *Nelson*, 140 Idaho at 708, 99 P.3d at 1098 (citing *Cannon Builders, Inc. v. Rice,* 126 Idaho 616, 622, 888 P.2d 790, 796 (Ct. App.1995)). The test for determining a party's status as a third-party beneficiary is whether the agreement reflects an intent to benefit the third party. *Idaho Power Co. v. Hulet,* 140 Idaho 110, 112, 90 P.3d 335, 337 (2004). Thus, in order for a third party beneficiary to recover on a breach of contract claim, the third party must show that the contract was made for its direct benefit and that it is more than a mere incidental beneficiary. *Id.* (citing *Adkison Corp. v. American Bldg. Co.*, 107 Idaho 406, 409, 690 P.2d 341, 344 (1984)). Notably, the contract itself must express an intent to benefit the third party. *Id.*

In the present case, as noted by the district court, there is no evidence in the record of a written agreement between CNH and Pioneer Equipment Company. As a result, there can be no written expression of an intent to benefit American West. Moreover, to the extent there was an oral "agreement" between CNH and Pioneer Equipment Company for the purchase and sale of

the Tractor engine, there is no evidence in the record that American West was the intended beneficiary. American West argues that the Affidavit of Chuck Simmons indicates that the Tractor's engine was ordered specifically from CNH for the benefit of American West. As noted by the district court, however, American West was a beneficiary "only in the sense that anyone who takes their vehicle into a mechanic is a beneficiary when that mechanic must order parts to repair the vehicle." R., p. 75.

What is clear from the record in this case is that CNH had no knowledge, implied or otherwise, of the Tractor at issue or that the Tractor belonged to anyone in particular. Thus, under the undistputed facts of the case, American West was, at best, an incidental beneficiary of Pioneer Equipment Company's purchase of the engine from CNH, whether that purchase is termed an "agreement" or not. As a result, American West cannot be an intended beneficiary of CNH's "agreement" to provide the engine for the Tractor.

2. The *Reed v. City of Chicago* Decision is Clearly Distinguishable.

American West also cites to the decision by the United States District Court for the Northern District of Illinois in *Reed v. City of Chicago* as support for the position that a remote plaintiff may maintain an action for breach of implied warranty as a third party beneficiary. 263 F. Supp.2d 1123 (N.D. Ill. 2003). The *Reed* case, however, is distinguishable from this case in several important respects. For instance, the plaintiff in *Reed*, the mother of a young man who hung himself while in a detention cell by using a paper isolation gown made and designed by the defendant, did not have purely economic losses – a fact the *Reed* court noted when it stated that, in designing and manufacturing the isolation gown, the safety of detainees "was necessarily a

part of the bargain, whether explicitly or implicitly, between the seller and buyer." *Id.* at 1126. The *Reed* court also pointed out that in Illinois, the Supreme Court had made clear that the privity requirement still existed in breach of implied warranty cases involving purely economic loss. *Id.* at 1125, n. 2 (citing *Szajna v. General Motors Corp.*, 503 N.E.2d 760, 767 (Ill. 1986)). Here, as noted above, there is no allegation of personal injury. The public policy concerns regarding safety (i.e., "[i]f protection is not provided to plaintiffs like Reed, any warranty as to the safety of the gown would have little, if any effect") underlying the court's decision in *Reed* are simply not present under the facts of this case.

C. The District Court Properly Granted Summary Judgment in This Case Because Pioneer Equipment was not CNH's agent.

Last, while conceding that no contract existed between American West and CNH, American West argues that its implied warranty claims should still succeed based upon the theory that Pioneer Equipment was CNH's agent with respect to the purchase and sale of the engine. There are three separate types of agency, any of which are sufficient to bind the principal to a contract entered into by an agent with a third party. *Bailey v. Ness,* 109 Idaho 495, 497, 708 P.2d 900, 902 (1985). The three types of agencies are: express authority, implied authority, and apparent authority. *Id.* Both express and implied authority are forms of actual authority. *Id.* Express authority refers to that authority which the principal has explicitly granted the agent to act in the principal's name. *Id.* Implied authority refers to that authority "which is necessary, usual, and proper to accomplish or perform" the express authority delegated to the agent by the principal. *Id.* Here, there is no evidence in the record of any express authority and,

therefore, no actual authority was expressly granted or impliedly conferred upon Pioneer Equipment Company by CNH.

Apparent authority differs from express and implied authority in that it is not based on the words and conduct of the principal toward the agent, but on the principal's words and conduct toward a third party. *Tri–Circle, Inc. v. Brugger Corp.*, 121 Idaho 950, 954–55, 829 P.2d 540, 544–45 (Ct. App. 1992). As a result, apparent authority cannot arise from the acts and statements of the agent alone; it must be based upon the principal's words and conduct. *See Idaho Title Co. v. American States Ins. Co.*, 96 Idaho 465, 468, 531 P.2d 227, 230 (1975). In this case, there is no evidence in the record of an act or statement by anyone from CNH suggesting that Pioneer Equipment was acting as CNH's agent with respect to Pioneer Equipment's sale of the Tractor engine to American West. To the contrary, as noted by the district court, Pioneer Equipment was acting solely on its own behalf when procuring the engine to complete its contract with American West.

American West also incorrectly asserts that because Pioneer Equipment was an "authorized dealer" of CNH products, it was – and had authority to act as – CNH's agent. American West's argument ignores both that Pioneer Equipment Company was acting on its own accord in selling the engine to American West and that courts in multiple other jurisdictions have rejected the same "authorized dealer" argument. *See, e.g., Bruce v. ICI Americas, Inc.*, 933 F. Supp. 781, 789–790 (S.D. Iowa 1996) (insufficient control by manufacturer over authorized distributors to create question of material fact regarding existence of principal-agent relationship); *Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 540 (D. Md. 2011) ("In the

Amended Complaint, Plaintiffs have not pled any facts to show that an agency relationship existed between Ford and the dealer. Plaintiffs merely state that the Illinois dealership from which Abraham bought his car is an authorized Ford dealership. (Am. Compl. ¶ 6). This sole fact fails to demonstrate the existence of an agency relationship."); *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 592 (Ill. 1997) ("Plaintiffs, in their complaint, alleged that they 'purchased their vehicles from authorized Suzuki dealers, who were agents of defendants,' and further alleged that certain named plaintiffs 'understood' the local Suzuki dealers to be agents of Suzuki. Such allegations alone are mere legal conclusions and thus insufficient to plead agency because they contain no facts to support a finding that the local Suzuki dealers had actual or apparent authority to act on Suzuki's behalf."); *Cline v. Allis–Chalmers Corp.,* 690 S.W.2d 764, 769 (Ky. Ct. App.1985) (simply being an "authorized dealer" is insufficient to establish true agency); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1122 (Mass. 2000) ("Similarly, Vigor's representation of itself as an authorized parts and service dealer of Mack is not a sufficient ground for Theos to reasonably believe that Vigor had apparent authority to act as Mack's agent ....").

D. CNH is Entitled to an Award of Attorney Fees, Both on Appeal and in the Underlying Litigation.

Idaho Code Section 12–120(3) allows for an award of attorney fees to the prevailing party in a civil action to recover "in any commercial transaction." A commercial transaction includes all transactions except those for personal or household purposes. *See* Idaho Code § 12–120(3). Here, the district court ruled that CNH was not entitled to attorney fees under § 12-120(3), despite

American West's contention that it was a third party beneficiary of an agreement between CNH and Pioneer Equipment for the purchase and sale of the Tractor's engine.

Whether a district court has correctly determined that a case is based on a commercial transaction for the purpose of Idaho Code Section 12-120(3) is a question of law over which this Court exercises free review. *See Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 470, 36 P.3d 218, 222 (2001). Pertinent to the inquiry as to whether allegations made by American West in this case can invoke application of § 12–120(3) is this Court's decision in *Magic Lantern Productions, Inc. v. Dolsot,* 126 Idaho 805, 892 P.2d 480 (1995). In that case, the *Magic Lantern* court stated:

> In *Farmers Nat. Bank v. Shirey,* 126 Idaho 63, 878 P.2d 762 (1994), the Court said:
>
> > Where a party alleges the existence of a contractual relationship of a type embraced by section 12–120(3) ... that claim triggers the application of [I.C. § 12–120(3)] and a prevailing party may recover fees even though no liability under a contract was established.
>
> *Id.* at 73, 878 P.2d at 772.
>
> > This same principle applies where the action is one to recover in a commercial transaction, regardless of the proof that the commercial transaction alleged did, in fact, occur.

Id. at 808, 892 P.2d at 483. In the case of *Garner v. Povey*, this Court recently reaffirmed the *Magic Lantern* holding, noting that it "makes eminent sense" and that it "would be anomalous to hold, as we have on a number of occasions, that a prevailing party is entitled to attorney fees under the contract prong of I.C. § 12–120(3), where the opposing party has alleged a contract as

the basis for recovery, even though no contract was established, and then not allow the prevailing party to recover under the commercial transaction prong of I.C. § 12–120(3) where the opposing party has alleged a commercial transaction as the basis of his claim." 151 Idaho 462, 469, 259 P.3d 608, 615 (2011). *Garner* thus suggests that, since American West contends that it should recover as a third party beneficiary of a contractual relationship between CNH and Pioneer Equipment's for the purchase and sale of the Tractor's engine, even if no liability under the contract is established, CNH may still recover its attorney fees from American West pursuant to Idaho Code § 12-120(3). *Cf.*, *Cannon Builders, Inc. v. Rice*, 126 Idaho 616, 888 P.2d 790 (Ct. App. 1995) ("With respect to Crooks, we conclude that the nature of the suit, which includes a claim that Crooks was entitled to enforce the Rice-Cannon contract as a third-party beneficiary, was sufficiently based on commercial transaction to warrant an award of fees under § 12-120(3).").

VI. CONCLUSION

For the above reasons, CNH respectfully requests that the Court uphold the decision of the district court granting summary judgment in CNH's favor. CNH further requests that the Court overturn the district court's ruling denying CNH attorney fees pursuant to Idaho Code § 12-120(3).

DATED this 11 day of February, 2013.

Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.

By: 

WILLIAM A. FUHRMAN

CERTIFICATE OF SERVICE

The undersigned certifies that on the 11 day of February, 2013, he caused a true and correct copy of the foregoing to be forwarded by the method(s) indicated below, to the following:

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