

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-3085

Cir. Ct. No. 98-CV-66

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KENNETH W. RUPENA AND SHARON RUPENA,

PLAINTIFFS-APPELLANTS,

V.

PALMER JOHNSON OF RACINE, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Door County:
PHILIP M. KIRK, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kenneth and Sharon Rupena appeal a summary judgment dismissing their action against Palmer Johnson of Racine, Inc., for breach of express and implied warranties and breach of contract. The trial court concluded that the warranty in the contract for the sale of a yacht was ambiguous, but that Kenneth Rupena's deposition testimony clarified the parties' intent that

Palmer Johnson's warranty only guaranteed that the yacht would have certain equipment and accessories and that its builder, Jefferson Yachts, would guarantee the yacht's quality. We conclude that Rupena's deposition testimony is not sufficiently clear regarding the parties' intent to allow summary judgment. We also decline Palmer Johnson's invitation to rule that the Rupenas' settlement with Jefferson Yachts precludes any further recovery. That was not the basis of the trial court's decision, and therefore, the court did not make appropriate findings or analysis on that issue. Further, Palmer Johnson's brief does not direct this court to sufficient evidence in the record to support that theory. Therefore, we reverse the judgment and remand for further proceedings.

¶2 The Rupenas agreed to purchase the yacht from Palmer Johnson for one million dollars to replace another yacht. The purchase agreement offers three express warranties, one from Palmer Johnson and two from the yacht's manufacturer Jefferson Yachts. The Palmer Johnson warranty provides that it "warrants that besides all other specifications listed as exhibits and discussed between the parties, the vessel being purchased shall have no less equipment and fittings as those the Buyer had installed as standard equipment on the [yacht being replaced]." The complaint alleges that the new yacht had numerous defects and problems. The Rupenas' complain of electrical fires, a foul odor in a cabin, air locks in the forward bilge pump, an underwater stern and elevated bow, and insufficient fuel capacity. They further allege problems with the davit and dinghy, a broken rudder, a shaft malfunction that damaged the engine, inadequate bilge drainage, rotting plywood and sawdust, problems with the exhaust system tail pipe and overall structural problems.

¶3 The trial court initially denied both of defendant's motions for summary judgment. After the Rupenas settled their claims with Jefferson Yachts,

the court granted Palmer Johnson's second motion for summary judgment. After concluding that the contract language was "poorly contemplated," "poorly thought out," and "tortured," the court focused on Kenneth Rupena's deposition testimony to determine the parties' intent. Rupena agreed that the intent of the Palmer Johnson warranty paragraph was "to make sure that [he] had certain types of equipment and fittings on this particular boat," that Jefferson Yachts, and not Palmer Johnson, provided a performance warranty and that Palmer Johnson was not warranting the hull. Concluding that Rupena's testimony was "extremely harmful to him," the court dismissed the claim for breach of an express warranty. Without further analysis, the court also concluded that the breach of contract and breach of implied warranty claims also failed.

¶4 Although both parties contend that the contract is unambiguous and favors their positions, we conclude that the contract is ambiguous because it is reasonably susceptible to more than one interpretation. *See Danbeck v. American Family Mut. Ins. Co.*, 2001 WI 91 ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. Palmer Johnson warranted that "besides all other specifications listed as exhibits and discussed between the parties" the vessel would have no less equipment and fittings than had been installed as standard equipment on the Rupenas' previous yacht. While this language could be interpreted as warranting only that the new yacht shall have certain features, the word "besides" might be construed to warrant other things including the yacht's quality. The language can be construed as Palmer Johnson's adoption of warranties also granted by Jefferson Yachts that were exhibits to the contract. Some of these exhibits include Jefferson Yachts' letters assuring quality. In addition, by warranting specifications "discussed between the parties," Palmer Johnson has expressly agreed to guarantee something

that is not identified. The parties' mutual intent cannot be gleaned from the contract language.

¶5 Kenneth Rupena's deposition testimony is not sufficiently clear to establish the parties' intent as a matter of law. While Rupena conceded that the paragraph in question was intended to warrant that certain equipment and fittings would be included, he was not asked and did not say whether that was his and Palmer Johnson's sole intention. He did not indicate that Palmer Johnson did not warrant the yacht's quality. While Rupena did state that Jefferson Yachts and not Palmer Johnson warranted the yacht's "performance," the word "performance" does not necessarily entail all of the Rupenas' complaints about the yacht. Likewise, Rupena's concession that Palmer Johnson did not warrant the hull does not cover all of the Rupenas' complaints because they are not necessarily hull defects. When summarizing Rupena's deposition testimony, the trial court overstated Rupena's concessions when it noted "Rupena says that Palmer Johnson wasn't warranting the quality of the yacht." While that might be a reasonable interpretation of Rupena's testimony such that he could be impeached with that statement at trial, he could also explain the language he used in a manner that defeats only claims that relate to "performance" and "the hull." His language is not sufficiently specific to support the conclusion as a matter of law that Palmer Johnson did not warrant the yacht against any of the defects listed in the complaint.

¶6 The trial court also improperly dismissed the actions for breach of contract and breach of implied warranty of merchantability. Because we cannot determine the parties' intent regarding Palmer Johnson's guarantee of quality, we cannot conclude as a matter of law that it did not breach the contract. Likewise, the record before this court does not conclusively defeat the claim that the yacht

was not merchantable. An implied warranty is not invalidated merely because another entity has provided an express warranty. Palmer Johnson's alleged express warranty is not inconsistent with an implied warranty of merchantability. Palmer Johnson correctly notes that where there is an express warranty as to quality, there is no need to rely on an implied warranty. Yet Palmer Johnson argues that it has not provided an express warranty. Rather, it argues that Jefferson Yachts' express warranty overrides Palmer Johnson's implied warranty. It cites no authority for that proposition. Express and implied warranties must be construed as consistent with each other and cumulative unless such construction is unreasonable. *See* WIS. STAT. § 402.317 (1999-2000).¹

¶7 Palmer Johnson also argues that the yacht was merchantable as a matter of law. However, an expert witness opined that the yacht was unsafe. As in the case of a car, the yacht is merchantable if it can provide safe, reliable transportation. *See Taterka v. Ford Motor Co.*, 86 Wis. 2d 140, 146, 271 N.W.2d 653 (1978). Given the expert's opinion to the contrary, we cannot conclude as a matter of law that the yacht was safe. Therefore, an issue of fact exists as to merchantability.

¶8 Finally, Palmer Johnson argues that the hold-harmless clause in the settlement agreement between Jefferson Yachts and the Rupenas precludes any further action against Palmer Johnson. Under the terms of the settlement

¹ Palmer Johnson notes the Rupenas' return of the yacht to Jefferson Yachts for a partial refund. It analogizes these circumstances to a merchant who provides an express warranty on a bicycle. If the bicycle is defective and the merchant buys it back, the buyer cannot also recover under an implied warranty. In that analogy, Palmer Johnson assumes that the merchant refunded the entire purchase price. Here, Jefferson Yachts did not refund the entire purchase price or compensate the Rupenas for any consequential damages.

agreement, the Rupenas now stand in Jefferson Yachts' shoes. If Jefferson Yachts is solely responsible for all of the defects alleged in the complaint, the Rupenas would ultimately assume all responsibility for the defects by the settlement agreement. Although the trial court alluded to the settlement agreement, it made no findings and no analysis of the effect the settlement agreement would have on this case. In its brief, Palmer Johnson does not identify specific contractual language between Jefferson Yachts and Palmer Johnson that would make Jefferson Yachts solely responsible for all of the alleged defects. Depending on the parties' intent, Palmer Johnson may have created joint or several warranty responsibilities with Jefferson Yachts. Palmer Johnson has not directed this court's attention to evidence that would manifest its and Jefferson Yachts' intentions. Palmer Johnson's argument is based on its assertion that it did not adopt the manufacturer's warranty. We cannot conclude as a matter of law that the ambiguous warranty does not adopt Jefferson Yachts' warranty.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

