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CONTRACTS

IMPLIED WARRANTY OF WHOLESALER; DOES IT RUN FROM WHOLESALER TO CONSUMER?

Texas. In the recent case of *Bowman Biscuit Company v. Hines*[1] the court made great strides in bringing to the law of implied warranty on packaged goods a more definite basis than has heretofore existed in Texas. A. C. Hines sued the Bowman Biscuit Company for injuries sustained by Hines when he swallowed a wire contained in an Apricot-Puff cookie. The cookie was contained in a sealed package purchased from a retail grocer who had purchased it from the defendant as a wholesaler. The court of civil appeals certified the following question to the supreme court:

> Where the ultimate consumer of food, sold in the original sealed package for human consumption, suffers injury and damage from such food being contaminated, is the wholesaler, or middleman, as well as the manufacturer and retailer, liable to such ultimate consumer for damages proximately resulting to him by reason of the eating of such food, under an implied warranty imposed by law as a matter of public policy?[2]

On the original hearing the supreme court answered the question "Yes" in a five-to-four decision. This decision was based on *Griggs Canning Company v. Josey*[3] and *Decker & Sons Inc. v. Capps.*[4] In the *Capps* case a non-negligent manufacturer sold contaminated sausage, and, as a result of eating this sausage, the plaintiff's son died. In holding the manufacturer liable the Texas Supreme Court said, "Liability in such a case is not based on negligence nor on a breach of the usual implied contractual warranty but on the broad principle of the public policy to protect human health and life."[5] In the *Josey* case a non-negligent retailer sold a labeled contaminated can of spinach causing the illness of

[1] ___Tex.___, 251 S.W. 2d 153 (1952).
[2] *Id.* at 154.
[3] 139 Tex. 623, 164 S. W. 2d 835 (1942), noted, 142 A.L.R. 1424 (1943).
[4] 139 Tex. 609, 164 S.W. 2d 828 (1942), noted, 142 A.L.R. 1479 (1943).
[5] *Id.* at 612, 164 S.W. 2d at 829.

the plaintiff. Although the supreme court recognized that a retailer of canned goods could not inspect the food, it said, "We hold that a retailer who sells unwholesome food for human consumption is liable to the consumer for the consequences under an implied warranty imposed by law as a matter of public policy, even though the food is in sealed containers bearing the label of the manufacturer and the retailer has no means of knowing that the contents are unfit for human consumption."[6]

Reasoning from these two decisions the court said that there was no logical reason why the injured consumer could not proceed against the wholesaler. The court stressed the value of *stare decisis* in a case of this kind and pointed out that this decision was supported by the majority view in the United States.

On the second and final hearing, again a five-to-four decision, the supreme court answered the certified question, "No". In a vigorous reversal of the previous majority decision, the court held that, in respect to implied warranty on packaged goods, the injured consumer should be allowed to recover only against the manufacturer of such packaged goods and not against the wholesaler.

In answering the certified question, the court said that at the time of the *Josey* case, the majority common law view in the United States was that the retailer of sealed goods was not liable to the injured consumer. The majority view in the United States, due to the Uniform Sales Act, was that the retailer should be liable, but since Texas had not adopted the Uniform Sales Act, the decisions of other states having this law were less persuasive.

Also, in following the majority view in the United States, which is based on the Uniform Sales Act, the court on the original hearing had indulged a "judicial" presumption that the consumer relied upon the superior knowledge of the retailer, refusing to make a distinction between packaged and open goods. In refuting

[6] *Id.* at 634, 164 S.W. 2d at 840.

this presumption the court said there was no superior knowledge in fact. Due to the vast increase in the amount of goods that are either canned or packaged, the retailer is seldom in a position to inspect the food any better than the buyer. The whole idea of implied warranty at common law was based on the fact that the seller had superior knowledge concerning the goods he sold, and that being in a better position to judge the goods than the buyer, he should be held accountable for selling contaminated food. The court concluded from this that the reason for the old rule ceasing, a new rule should be applied. ". . . [T]here is no social desirability in condemning an innocent party by manufacturing a warranty based upon a 'superior knowledge' *which can be shown does not exist to escape criminal liability in this state.*"[7] The court thought that procedural convenience was, in reality, the basis of the majority United States opinion, but that liability should not rest on convenience.

The court spoke of an implied warranty imposed by law as a matter of public policy. A warranty action is composed of the two elements of tort and contract. The tort characteristic is one of misrepresentation by the seller to the the damage of the unknowing buyer. The contract characteristic is that there is an implied promise on the part of the seller not to injure the buyer. The main difficulty in basing a warranty on a contract action in the instant type of case is that there is no privity of contract between the buyer and seller. The courts have confused these two elements of liability and have simply implied a "warranty" as a matter of law on a seller of edible goods. This "warranty" is interpreted strictly, and negligence is not necessary as a basis for liability.

The actual decision of the court was to answer that a wholesaler is not responsible for contaminated packaged goods that pass through his hands. Also, the court's opinion may be said implicitly to uphold the *Capps* case, which held the manufacturer of contaminated goods liable to an injured consumer. As a result

[7] 251 S. W. 2d at 163.

of these two decisions, the liability and non-liability of the manufacturer and wholesaler, respectively, are definitely established.

It appears that the liability of the retailer of contaminated goods to the ultimate consumer is an open question in Texas today. Although the cases holding the retailer liable were not expressly overruled in this case, the majority emphatically criticized such liability, and it seems doubtful that the previous cases will be followed. However, in his separate concurring opinion in exonerating the wholesaler from liability, Justice Wilson said the question of the retailer's liability was not before the court and would not be considered at this time. Justice Wilson's opinion, which was the deciding opinion in the case, is based on two theories: lack of privity of contract between the wholesaler and the purchaser, and the "innocent seller" doctrine, insulating the wholesaler from liability.

It should be pointed out, however, that the concurring majority stated that privity of contract was not to be considered. As to Justice Wilson's second theory, further problems are to be considered and weighed. As between an innocent purchaser and an innocent seller, who should bear the loss if the manufacturer is insolvent? If convenience is to be considered, who can be more easily reached by the injured party? Finally, should multiplicitous litigation be encouraged, or should the plaintiff be allowed to proceed directly against the party who has incurred liability by his business operation?

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