1949

William G. Carver dba Carver Sheet Metal Works v. W. T. Denn dba Hubbard-Denn Jewelers : Brief of Appellant

Utah Supreme Court

Robert B. Porter; Robert B. Porter, Jr.; Attorneys for Plaintiff and Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM G. CARVER, doing business as CARVER SHEET METAL WORKS,
Plaintiff and Appellant,

vs.

W. T. DENN, doing business as HUBBARD-DENN JEWELERS,
Defendant and Respondent.

CASE NO. 7374

Appellant's Brief

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STATEMENT OF FACTS

This action was instituted by plaintiff and appellant upon a complaint (Tr. 1), which alleged that the plaintiff between certain dates, at the special instance and request of the defendant, furnished the material and performed the labor in installing a Palmer Evaporative Air Conditioner in defendant's place of business in Salt Lake City, Utah, at an agreed price of $850.00 and that said sum had not been paid. The answer of the defendant (Tr. pp. 4

and 5) admitted the installation of the Palmer Evaporative Air Conditioner and the non-payment therefor and, as an affirmative defense, the defendant set up an implied warranty. The plaintiff's reply denied any warranty. (Tr. p. 7). This case was tried to the Court who found in favor of the defendant on his theory of an implied warranty and plaintiff's motion for a new trial was thereafter denied.

The evidence in this case shows that Mr. Fred Dunn, an employee of the defendant, approached Mr. George Maycock and informed him that the defendant was interested in the installation of an air conditioner. (Tr. p. 54 and 55). Mr. Dunn stated "We are figuring on putting an air cooler in and I knew he (Mr. George Maycock) was in the air cooler business, so I asked him if he would come and contact Mr. Denn about it." Mr. Fred Dunn further stated that Mr. George Maycock did come to the defendant's place of business and did discuss with the defendant this installation.

Mr. William T. Denn, the defendant in this action, also testified to conversations with George Maycock and with Mr. Andrew Maycock in which the installation was discussed and Mr. Denn further stated that he knew Mr. Maycock personally and knew that he was engaged in a business which he referred to as the Maycock Engineering Company. (Tr. pp. 42, 43 and 44).

Mr. George Maycock, called as a witness for the plaintiff, testified in substance that Fred Dunn, an employee of the defendant, first asked him to come to the defendant's place of business to discuss the installation

of an air cooling device. That he did so, and, after several meetings with the defendant, W. T. Denn and with Fred Dunn, they decided upon the installation of a Palmer Evaporative Air Conditioner. Mr. George Maycock further testified that W. T. Denn suggested that Carver Sheet Metal Works be asked to do the installation. The evidence further reveals that Mr. Jack Goaslind, representing the plaintiff, came to the defendant's place of business, made certain measurements under the direction of George Maycock and thereafter installed the Palmer Evaporative Air Conditioner under instructions furnished by George Maycock. (Tr. pp. 39 to 46 and pp. 70 to 73.)

The record also shows that the A. A. Maycock Company, at the time of the transaction in question, was engaged in the heating, ventilating and air conditioning business and was the representative of the company that manufactured the Palmer Evaporative Air Conditioner. (Tr. pp. 37 and 38.)

Further, all of the evidence negatives any conversations, discussions or negotiations of any kind between the plaintiff and the defendant other than the actual contract of installation.

STATEMENT OF ERRORS

1. That the Court below erred in granting judgment to the defendant and against the plaintiff.

2. That the Court below erred in denying plaintiff's motion for a new trial.

ARGUMENT

The only question to be determined upon this appeal is the proper application of Section 81-1-15, Utah Code Annotated, 1943, and particularly, subdivisions (1) and (4) of this section, to the facts recited above; or, in other words, can an installer, who is neither the dealer or the manufacturer, of an article, which is described by its patent or trade name, be charged with an implied warranty of quality, particularly where there is a complete absence of any evidence of reliance by the buyer upon the installer.

All of the cases that we have found involve an action between a buyer and a seller, who is either the manufacturer or the dealer, and we have found no case dealing with the precise set of facts in the case at bar. However, it would seem that those cases dealing with the question where it involves the buyer and a seller, who is also the dealer, where there is no reliance by the buyer upon the seller, should be conclusive of the question involved here.

The editors of American Law Reports, Annotated, at 59 A. L. R. 1180, make the following introductory remarks to the annotation of this problem contained there:

> "The raising of an implied warranty of fitness depends upon whether the buyer informed the seller of the circumstances and conditions which necessitated his purchase of a certain general character of article, and left it to the seller to select the particular kind and quality of article suitable for the buyer's use. And this is true without reference to whether the rules of the common law or the Uniform Sales Act apply, except that

under the latter act a dealer is placed under the same responsibility as a manufacturer, and the term 'trademark' or 'tradename' is employed, rather than the term, 'specific, described article.' Under either rule the major question, in determining the existence of an implied warranty of fitness for a particular purpose, is the reliance by the buyer upon the skill and judgment of the seller to select an article suitable for his needs, and the question as to whether the article was described by its tradename or trademark is not conclusive, if the other conditions exist which would raise an implied warranty of this character."

And at 59 A. L. R. 1192, in this same annotation, the editors make the following remarks:

"The question whether the buyer relied upon the skill and judgment of the seller is also involved in more or less confusion. According to the great weight of authority the facts must be such as to indicate the selection of the article by the seller, or there must be something tantamount to a selection of the article by him, rather than by the buyer, in order for the case to come within the rule relative to an implied warranty of fitness. While it would not be practical to attempt to indicate the particular facts which might be sufficient to show a selection by the seller, or a reliance by the buyer upon the skill and judgment of the seller, and the latter's assumption of a superior knowledge or skill, it seems clear that the mere fact of knowledge by the seller of the purpose for which the buyer desired the article is not sufficient, nor will evidence of representations by the seller relative to the desirable qualities of the article, amounting to no more than trade talk, be sufficient to show a reliance by the buyer upon the skill and knowledge of the seller."

And, continuing at 59 A. L. R. 1197, there is the following general statement:

> "Where the buyer selects some article by its tradename or trademark as suitable for his particular purpose or needs, there is no implied warranty that the article will be fit for this particular purpose, or suitable for the peculiar needs of the buyer, even though he has communicated to the seller his particular use for or need of the article, or the seller has otherwise obtained information in this respect."

And in support of this statement, cases from numerous jurisdiction are cited on the two pages following this quotation in A. L. R.

There seem to be only two Utah cases dealing with the questions involved here. The first is the case of Landes & Co. v. Fallows, 81 Utah 432, 10 P. (2nd) 389. This case dealt with the sale of a second hand Gleaner harvester with a Fordson engine and in a suit to recover the purchase price the defendant pleaded a breach of an implied warranty. The court found a nonwarranty clause in the contract precluded any implied warranty but went on to say: "Moreover, there is no warranty of fitness where the buyer orders a specific article for a specific purpose known to the seller."

The second Utah case is Battle Creek Bread Wrapping Machine Co. v. Paramount Baking Co., 88 Utah 67, 39 P. (2d) 323. This action was brought in replevin to recover certain machinery and the defense was a breach of an implied warranty of quality. The court made the

following statement, after finding that the contract of sale contained a written guarantee as to performance:

> "The fact that an article has a trade name does not negative an implied warranty of fitness for a particular purpose, where it is purchased, not by name, but for a particular purpose and supplied for that purpose. In the present contract, the machine was ordered by the name of 'Duplex Wrapping Machine.' Had the contract remained silent as to warranties, there would have been some justification for the conclusion that it was a purchase of a specified known article."

A good statement of the law applicable to these situations is found in the case of Oil Well Supply Co. v. Watson, 168 Ind. 603, 80 N.E. 157, 15 L.R.A. (N.S.) 868, 59 A.L.R. 1181, where the court said:

> "There are but few subjects of the law that appear, upon a cursory examination of the authorities, to be in such a hopeless state of confusion as that which relates to what constitutes proper exceptions to the rule of caveat emptor. A closer study, however, will reveal that the apparant disagreement is largely the result of unguarded language employed by judges and writers not in sympathy with the harshness and apparent incongruities of the old rule; and while there has been much breaking away from the ancient maxim, and considerable difference in the paths chosen, yet the ostensible conflict is due quite as much to the difference in the facts of particular cases as to the doctrine applied. 'The maxim of "caveat emptor",' says Mr. Story, 'seems gradually to be restricted in its operation and limited in its domain, and beset with the circumvallations of the modern doctrine of implied warranty, until it can no longer claim the empire over the law of sales, and is but

a shadow of itself.' Story, Sales, 4th ed. Page 359. It may be said, however, that when chattels are sold generally for all purposes to which they are adapted, and the seller is not the manufacturer or producer, and the property is in existence and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim 'caveat emptor' applies, even though defects exist in the goods which are not discoverable on examination. The doctrine of caveat emptor rests upon the principle that the purchaser sees, or may see and know, what he buys; and, not demanding an express warranty, it will be conclusively held that he was content to rely upon his own judgment; and if the goods prove inferior in quality, the purchaser has no remedy, but must bear the loss himself."

And again in Iron Fireman Coal Stoker Co. v. Brown (1931), 182 Minn. 399, 234 N.W. 685, the court says:

"The spirit and intent of subd. 4 of the statute is that the seller is not held to an implied warranty because the buyer gets the distinct thing selected by him, an exact article, for which he bargains. So, acting upon his own desires, he takes his own chances as to the fitness of the article, and should not be permitted to complain of the seller who has supplied him with the very thing he sought. B. B. Sturtevant Co. v. LeMars Gas Co. (1920), 188 Iowa 584, 176 N. W. 338. In such cases it is not important that the buyer discloses to the seller his intentions as to the use of the article. It is usually helpful to determine upon whose judgment and responsibility the purchase was made. Or, to state it another way, if the thing is itself specifically selected and ordered, the buyer takes upon himself the risk of its effecting the desired purpose. Under such circumstances, the law does not impose an implied warranty; nor

should it. The situation is quite different where the buyer yields to the trade talk of a salesman who sells him something that is wholly unknown to him. Perhaps it might be said that, where the buyer selects the article, subd. 4 applies, and, where the seller selects the article suitable for the purpose needed, subd. 1, hereinafter mentioned, applies. We are of the opinion that, where the buyer fully informs the seller of his particular needs, and the seller undertakes to select or supply an article suitable for the purpose involved, subd. 1 applies even though the article may be described in the contract of sale by its tradename * * * These are authorities that seem to put a strict construction upon this provision of the Uniform Sales Act, and hold that, if the contract describes an article by the tradename, there is no implied warranty, but such authorities apparently involve cases where the contract discloses the article sold under a tradename and the record fails to disclose any circumstances such as are involved in this case. It would seem that such a contract, in the absence of evidence of circumstances to the contrary, should be construed under the statute as if the purchaser had selected the article purchased."

In the case of Dunn Road Machinery Co. v. Charlevoix Abstract & Engineering Co., 247 Mich. 398, 225 N.W. 592, 64 A.L.R. 947, the Court quotes with approval from 2 Mechem, Sales, Section 1349, as follows:

"The implied warranty of fitness is not to be extended to cases which lack the necessary conditions upon which it depends. The essence of the rule is, that the contract is executory; that the particular article is not designated by the buyer; that only his need is known; that he does not undertake or is not able to determine what will best

> supply his need and therefore necessarily leaves the seller to make the determination and take the risk; and if these elements are wanting, the rule does not apply. If a known, described and defined article is agreed upon and that known, described or defined article is furnished, there is no implied warranty of fitness, even though the seller is the manufacturer ,and the buyer disclosed to him the purpose for which the article was purchased."

And this same section is again quoted with approval in another Michigan Case, Sibley Lumber Co. v. Schultz, 297 N.W. 243.

The following cases are also cited as holding that there can be no implied warranty that the article will suit the particular needs of the buyer where it is selected by its tradename or trademark; even though the buyer has communicated to the seller his particular use for or need of the article, or the seller has otherwise obtained information in this respect:

> General Motors Acceptance Corp. v. Jerry, 181 Ark. 771, 27 S.W. (2d) 997;
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> Oil Well Supply Co. v. Hopper, 129 Kan. 300, 282 Pac. 701;
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> Henderson v. United States Sheet & Window Glass Co., 168 La. 66, 121 So. 576;
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> May Oil Burner Corp. v. Munger, 159 Md. 605, 152 A. 352;
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> Snelling v. Dine, 270 Mass. 501, 170 N.E. 403;
>
> Whitty Mfg. Co. v. Clark, 278 Mass. 370, 180 N.E. 315;
>
> Damman v. Mercier-Bryan-Larkins Brick Co., 253 Mich. 392, 235 N.W. 194;
>
> Cuthwaite v. A. B. Knowlson Co., 259 Mich. 224, 242 N.W. 895;

Tinius Olsen Testing Mach. Co., v. Wolf Co.,
297 Pa. 153, 146 A. 541;
Madison-Kipp Corp. v. Price Battery Corp.,
311 Pa. 22, 166 A. 377;
Russell Grader Mfg. Co. v. Budden, 197 Wis. 615,
222 N.W. 788;
Mallow v. Hill, 290 Wis. 426, 245 N.W. 90.

We again call attention to the testimony contained in the record. Mr. George Maycock, an employee of A. A. Maycock Company, a firm handling air cooling equipment meets Mr. Fred Dunn at a luncheon meeting. Mr. Dunn, an employee of the defendant, asks Mr. Maycock to call upon the defendant as the defendant is desirous of installing such equipment in his store. Some days later Mr. Maycock calls upon the defendant and in due time they agree upon the type of equipment to be installed. Thus far the plaintiff has not entered into the picture. However, the defendant, upon learning that the A. A. Maycock Company does not do the installation work, suggested that the work be done by the plaintiff. The plaintiff tendered a bid, which included the type of air cooler selected by the defendant and performed the installation as outlined by the Maycock Company and as they desired it to be done and to their complete satisfaction. The plaintiff accordingly was not required to do anything except to install the equipment, and, insofar as the testimoney shows, he did his work properly.

And, in conclusion, may we emphasize, at the risk of repetition, the elements necessary to create an implied warranty of fitness where the article is sold by a tradename. First, the article must be selected by the seller

and not designated by the buyer. Second, the buyer must be shown to have relied on the seller to select the article. Third, the buyer's needs must be fully communicated to the seller. In the instant case, the record shows that there was no discussion between the plaintiff and the defendant as to the air conditioner furnished or as to any other kind of air conditioning. The plaintiff did not select the air conditioner but on the contrary was directed by the defendant to install the named air conditioner. And finally the record negatives any reliance by the defendant on the plaintiff and affirmatively shows that the defendant was placing his reliance upon a third party.

It is respectfully submitted that the decision of the trial court was erroneous and should be reversed and judgment entered for the plaintiff upon his complaint.

Respectfully submitted,

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