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Utah Cooperative Association v. Egbert-Haderlie Hog Farms : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH COOPERATIVE ASSOCIATION,

Plaintiff and Respondent,

vs.

NO. 14233

EGBERT-HADERLIE HOG FARMS, INC.,

Defendant and Appellant.

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court of Salt Lake County, Honorable Hal B. Taylor, Judge

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STATEMENT OF THE KIND OF CASE

This is an action for livestock loss and property damage sustained by defendant which defendant alleges was caused by plaintiff's sale to it of salmonella contaminated livestock feed.

DISPOSITION IN LOWER COURT

This case was tried to a jury upon defendant's Counterclaim and trial proceeded upon the theories of express and implied warranty. Defendant appeals to this Court from the verdict directed against it upon its Counterclaim.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the directed verdict entered against it and a new trial.

STATEMENT OF FACTS

The parties will be identified as they were at trial. The appellant, Egbert-Haderlie Hog Farms, Inc., will be identified throughout as defendant and the respondent, Utah Cooperative Association, will be identified throughout as plaintiff.

The facts at issue in this action focus upon the condition of hog feed processed and sold by plaintiff to defendant during June, 1973.

Defendant is a close corporation hog farm located in the proximate vicinity of Spanish Fork, Utah. During 1973, sole ownership and management of the farm was vested in Paul F. Haderlie, Howard B. Egbert, and his wife, Rita Egbert. The hog farm is income producing and directed solely toward the breeding and marketing of the registered, purebred Duroc pig as both breeding stock and fattened hogs (Tr. at 6, 77). During 1973, the herd size averaged 280 - 300 head in size, of which 45 were sows (Tr. at 4). Defendant maintains a continuous, year around farrowing program which it conducts within a modern hog house building divided into a farrowing unit and nursery unit (Tr. at 7 - 10; defendant's exhibits 1 - 11). The physical plant, facilities and housekeeping procedures of the defendant medically qualify the operation as one bordering upon a specific, pathogen-free hog farm (Tr. at 192).

From 1971 through June, 1973, plaintiff's Orem, Utah feed mill processed, for purchase by defendant, three kinds of pellet hog feed as per ration formulae submitted to it by defendant -- e.g., a lactation feed for pigs from 20 pounds to 60 pounds, a gestation feed for sows during pregnancy term, and a fattening feed for pigs from 60 pounds to 200 plus pounds (Tr. at 16 - 17, 19 - 21, 76 - 77). The basic components of each feed formula included ground corn, ground barley, soybean meal, and a meat base mix processed by Standard Chemical under the brand name Mr. Meaty Mix (Tr. at 20; plaintiff's exhibit 59). All components within the hog feed were processed and supplied by the Orem feed mill with the exception of the Mr. Meaty Mix which was supplied directly by defendant to the mill in 50 pounds bags (Tr. at 20 - 21).

From 1971 through June, 1973, plaintiff's Orem feed mill neither sold nor supplied a meat base mix for integration into hog feeds processed by it (Tr. at 79).

Defendant ordered and purchased only processed hog feed from plaintiff's Orem feed mill (Tr. at 16 - 17, 19). One sale price was computed by plaintiff for each transaction and this price was for processed hog feed only. Plaintiff's billings to defendant contained no itemized breakdown or individual charges directed toward processing and mixing costs or toward the costs of the individual ingredients within the feed (Tr. at 21, 76 - 77). Defendant purchased all hog feed from plaintiff during this three year period in bulk loads averaging two tons for each type of feed formula (Tr. at 18). All bulk purchases were delivered by plaintiff's Orem mill to defendant's farm and there kept segregated

by defendant in one of four weather tight two ton capacity storage bins (Tr. at 18). Defendant's rate of feed consumption averaged somewhat in excess of two tons of feed for each two weeks (Tr. at 18).

Whenever changes were made to any of the three feed formulae, defendant met with the Orem feed mill employees and there solicited their opinion of the formulae's suitability and th price at which the feed could be accordingly processed (Tr. at 16, 77). Throughout all transactions between plaintiff and defendant there was an agreement that the grains supplied by plaintiff were of good quality and that the processed hog feed was of similar good quality (Tr. at 77).

A written mixing order was prepared by plaintiff's Orem feed mill personnel in response to each order for hog feed made by defendant (Tr. at 16, 77). The ingredients and blending proportions written on each mixing order were made to always confo to the hog feed formulaes submitted by defendant (Tr. at 16, 77; plaintiff's exhibit 59).

On June 25, 1973 defendant placed with the Orem feed mil an order for five tons of hog feed, which order included one ton of the 16% lactation ration (Tr. at 21 - 22; plaintiff's exhibits 59, 60). The hog feed formulae governing this order were the same as had been followed by the feed mill during the preceding three to four months (Tr. at 22). As done since 1971, defendant delivered to the mill the required number of 50 pound sacks of Mr. Meaty Mix (Tr. at 21). Written mixing orders were accordingl prepared by the feed mill conforming to the directives of the submitted feed formulae (Tr. at 21; plaintiff's exhibit 60).

The Orem feed mill made delivery of the five ton bulk load to defendant's farm on June 27, 1975 and placed the bulk load into defendant's storage bins (Tr. at 22). -Paul Haderlie visually examined the hog feed upon its delivery to the farm and while the load was still in plaintiff's bulk delivery trucks (Tr. at 84). Defendant began feeding from this bulk load on either the 27th or 28th day of June, 1973 (Tr. at 23). On June 29, 1973 Paul Haderlie observed that the weaner and feeder hogs in the nursery (20 pounds to 60 pounds) were "rooting" the 16% lactation ration pellets out of the self-feeders and onto the floor (Tr. at 23). Believing the cause to be some contamination in the self-feeders, the hopper units on the feeders were emptied of feed, cleaned, and refilled with more 16% lactation ration (Tr. at 23). Haderlie checked these same hogs the next day and once again observed that the feed was being rooted out of the self-feeders rather than being eaten (Tr. at 23). Egbert and Haderlie advised the manager of plaintiff's Orem mill on June 29, 1973 that something was wrong with the feed delivered. The feed was inspected July 2, 1973 directly from defendant's storage bins by the field representative from the Orem mill together with Haderlie (Tr. at 40). Haderlie accordingly advised this employee that the hog feed pellets were of a dark, off-color appearance and emitted an odor rather than the fresh smell customarily emitted from the grains composing this pellet feed (Tr. at 41). The agreement from this July 2, 1973 meeting was that the involved five tons of pellet hog feed would be picked up and replaced by the Orem feed mill (Tr. at 43).

By July 3, 1973 approximately 20% of defendant's hog herd had developed scours (diarrhea) (Tr. at 46). On this same day Haderlie ordered from Leland Milling Company, Spanish Fork, Utah, two tons of hog feed in 100 pound bags as partial replacemei for the five ton delivery from plaintiff, which load continued to remain in defendant's feed bins (Tr. at 45, 64). An additional two tons of replacement feed was ordered and delivered from Leland Mills on July 7, 1973 (Tr. at 45, 64). This latter order was delivered in bulk to defendant's farm. Defendant creat storage space for this delivery by emptying from one bin the approximate 1,300 pounds of 16% lactation feed remaining from the plaintiff's initial two ton delivery of this ration (Tr. at 44, 118 - 119). The feed processed by plaintiff was sold by it to a third party and removed from defendant's farm by this person on the afternoon of July 7, 1973 (Tr. at 45). This person reported no adverse consequences from feeding this feed to his hogs.

The hog feed ordered from Leland Milling Company was processed under the same feed formula as the hog feed processed by plaintiff's Orem feed mill (Tr. at 119). Fifty pound bags of Mr. Meaty Mix were similarly supplied by defendant to Leland Milling Company as had been done with the Orem mill (Tr. at 119). The Mr. Meaty Mix bags delivered to Leland Milling Company bore the same lot number identification as those delivered to the Orem feed mill on June 25, 1973 (Tr. at 201). The hog feed processed by Leland Milling Company was accepted and consumed by defendant's hogs (Tr. at 203).

On July 6, 1973 the outbreak of scours in defendant's hogs was examined and initially treated by Dr. Jon F. Hunter,

a Spanish Fork veterinarian (Tr. at 155). Hunter himself confirmed the off-color appearance of the hog feed processed by plaintiff and the hog's rejection of it (Tr. at 155 - 156). The hogs were placed on a broad spectrum medication to treat Hunter's preliminary diagnosis of severe diarrhea (Tr. at 156). Feed samples and fecal samples were taken by Dr. Hunter on his initial July 6, 1973 visit (Tr. at 157). Two feed samples were taken by Hunter from each of defendant's three hog feed rations then present in the steel storage bins (Tr. at 94 - 95, 158). Each feed sample was taken in plastic, sterile whirl pack bags and each fecal sample was taken with a sterile swab stick and placed within a sterile transport media (Tr. at 157). The fecal samples and one set of feed samples taken on July 6, 1973 were mailed by Dr. Hunter to the U. S. Department of Agriculture Research Laboratory (Tr. at 161). These laboratory tests reported no salmonella detected in any of the feed samples and the presence of salmonella enteriditis in all fecal samples (Tr. at 161). The results were utilized by Hunter to conclude that the scours in the hogs were caused by the salmonella pathogen. Hunter's medication schedule was changed accordingly (Tr. at 162, 179). Within this same span of time, feed samples were similarly sent by defendant to the Office of the State Chemist, Utah State Department of Agriculture and to Omaha Testing Laboratories, Inc., Omaha, Nebraska (Tr. at 90, 121; plaintiff's exhibit 85). The Office of the State Chemist detected no salmonella in the feed samples tested by it (plaintiff's exhibit 85). The Omaha, Nebraska laboratory reported salmonella present in the 16% lactation ration sample and no salmonella present in the remaining two grain

samples (Tr. at 121). Unlike the grain sample taken by Dr. Hunter, the grain samples sent to Omaha, Nebraska were taken by Paul Haderlie and mailed by him alone. These samples were taken from burlap bags which had been stored for some two weeks in Egbert's Provo, Utah garage subsequent to being filled from the feed storage bins by Haderlie on July 6, 1973 (Tr. at 91 - 9[illegible] On August 14, 1973 Hunter mailed the second set of grain samples taken by him on July 6, 1973, together with recently taken fecal samples to Intermountain Laboratories, Inc., Salt Lake City, Utah (Tr. at 162 - 163). The testing results of Intermountain Laboratories, Inc., identified salmonella enteriditis (group E) in six of the seven submitted pig fecal samples (defendant's exhibits 62 - 65; Tr. at 134 - 137). Of the three feed samples submitted, the laboratory reported abundant enterococci group D strep present in the fattening ration sample, and moderate salmonella (group E) together with a few enterococci group D strep present in the 16% lactation ration sample (Tr. at 136 - 137). Normal flora was reported for the gestation ration sample. With the results from Intermountain Laboratories, Inc., Hunter once again changed his medication schedule (Tr. at 179). From July 6, 1973, and into the first week of August, 42 of defendant's hogs, ranging in size from 20 pounds to 60 pounds, died from scours (Tr. at 58). The scours in defendant's hogs was brought largely under control by the first week of August but continued to be present into September, 1973 (Tr. at 46, 62). The presence of scours in defendant's hogs required defendant to hold 175 hogs 45 days beyond the time in which these hogs would have been customarily marketed. The presence of scours disrupted the

weight gain regimen of defendant's feeding program so that these hogs had not achieved their 200 pound marketing size within the customary 5 1/2 month fattening period (Tr. at 49 - 54). On September 5, 1973, defendant evacuated the farrowing and nursery hog house upon the medical recommendation of Dr. Hunter so that the building and equipment could be chemically disinfected and steam cleaned (Tr. at 169). Eight sows with their litters were moved outside. The absence of outside farrowing facilities of the type within the farrowing house resulted in the death of 24 suckling pigs (Tr. at 62 - 63, 105).

ARGUMENT

Defendant's arguments in this brief are confined to the law governing a trial court in ruling upon a party's motion for directed verdict under URCP 50(a)(as amended 1965). The controlling principle is that the court must examine the evidence in the light most favorable to the party against whom the motion is made and must resolve every controverted fact in its favor., Vernon v. Lake Motors, 26 Utah 2d 269, 488 P2d 302 (1971). In ruling upon a directed verdict, the court is vested with no discretion to weigh or determine the preponderance of the evidence., Finlayson v. Brady, 121 Utah 204, 240 P2d 491 (1952).

Defendant urges that the elements of the strict liability warranty action measured against the evidence within its case in chief preclude the award of a directed verdict against it upon its Counterclaim.

The following statements are directed to the elements of the strict liability breach of warranty action. These statements are organized at this point in the brief to facilitate

organization and to avoid repetition.

A breach of warranty action commenced under the Utah Uniform Commercial Code is premised upon strict liability. This form of liability focuses solely upon the condition of the product and makes immaterial the quality of care utilized by the supplier in the design, manufacture and disbribution of the product. White & Summers, Uniform Commercial Code, 271-2 (1972). E. R. Squibb & Sons, Inc. v. Jordan, 254 So2d 17 (Fla App 1971)(10 UCC Rep 982). The converse of this statement is that concepts of fault and negligence as defined by negligence standards have no place in warranty cases. 2 Frumer & Friedman, Products Liability. §16.01 (1)(1974).

The defendant's burden in this warranty action is to establish:

1. The existence of a warranty; and

2. That the warranty was breached by the defective or nonconforming condition of the product; and

3. That the defendant suffered loss as a proximate result of the breach., see, Official Comment 13 to UCC §2-314.

Proof that the warranty was breached requires defendant to affirmatively establish that the product was in a defective condition at the time it left plaintiff's possession and control. Hagenbuck v. Snap-On Tools Corp., 339 FSupp 676, 10 UCC Rep 1005 (NH 1972); Lucchesi v. H. C. Bohack Co., Inc., 8 UCC Rep 326 (NY Sup Ct 1970).

The Utah Supreme Court has held that the question of the existence of a warranty, whether it was breached, and whether the breach was the proximate cause of the alleged losses are issues

of fact for jury determination.

Pacific Marine Schwabacher, Inc. v. Hydroswift,
525 P2d 615, 15 UCC Rep 354 (Utah 1974). This holding by the Utah Supreme Court delineating the function between the Court and jury in a warranty action applies the majority rule. see, McCarthy v. Florida Ladder Co.,
295 So2d 707 (Fla App 1974) 15 UCC Rep 375; Guardian Insurance Co. v. Anacostia, 320 A2d 315, 14 UCC Rep 1125 (DC App 1974); Judd Construction Co. v. Bob Post, Inc.,
516 P2d 449, 13 UCC Rep 800 (Colo App 1973); Paglia v. Chrysler Corp., 327 NYS2d 978, 10 UCC Rep 304 (1972); Sinka v. Northern Commercial Co., 491 P2d 116, 9 UCC Rep 1350 (Alaska 1971); Speed Fasteners, Inc. v. Newsom,
382 F2d 395, 4 UCC Rep 681 (10th Cir 1967).

The exclusive use of circumstantial evidence to establish both breach of warranty and that the breach was the proximate cause of the plaintiff's losses has been expressly approved by the Utah Supreme Court. Vernon v. Lake Motors,
26 Utah 279, 488 P2d 302, 9 UCC Rep 777 (1971); accord, Paglia v. Chrysler Corp., 327 NYS2d 978, 10 UCC Rep 304 (1972); Colorado Serum Co. v. Arp, 504 P2d 801, 11 UCC Rep 1152 (Wyo 1972); General Supply & Equipment Co. v. Phillips,
490 SW2d 913, 12 UCC Rep 35 (Tex Civ App 1972); Guardian Insurance Co v. Anacostia Chrysler,
320 A2d 315, 14 UCC Rep 1125 (DC App 1974); McCarthy v. Florida Ladder Co., 295 So2d 707, 15 UCC Rep 375 (Fla App 1974).

The use of circumstantial evidence to establish a breac of warranty proximately causing loss does not require that the plaintiff exclude every other possible cause. McMiller Feeds, Inc. v. Dale Harlow, 405 SW2d 123 (Tex Civ App 1966). Circumstantial evidence is sufficient to show a product causally defective if the probative facts allow the jury to logically and reasonably conclude that the greater probability of truth lies with the conclusion sought by plaintiff. Vernon v. Lake Motors, 26 Utah2d 269, 488 P2d 302, 9 UCC Rep 777 (1971).

The standard against which the quality of circumstantial evidence is measured in a breach of warranty case is defined in Holokwa v. York Farm Bureau, 81 York LR 118, CCH Prod Liab Rptr Par 5855 (Penn 1967).

> We have said many times that the jury may not be permitted to reach its verdict on the basis of speculation or conjecture but that there must be evidence upon which its conclusion may be based. . . . It means only that the evidence presented must be such that by reasoning from it, without resort to prejudice or guess a jury can reach the conclusion sought by plaintiff, and not that the conclusions must be the ONLY one which can be logically reached. . . . It is not necessary that . . . every fact or circumstance point unerringly to liability; it is enough that there be sufficient facts for the jury to say reasonably that the preponderance favors liability. (Emphasis theirs)
> CCH Prod Liab Rptr Par 5855 at 7992.

The law in Utah is that contributory negligence is not a defense to liability in a breach of warranty case in the sense of failing to discover or failing to guard against the defect in the product. The Utah Supreme Court, however, has expressly held that the form of contributory negligence which consists of voluntarily and unreasonably proceeding to encounter a known and

appreciated danger is a defense in a strict liability warranty action. Vernon v. Lake Motors, 26 Utah2d 269, 488 P2d 302, 488 P2d 302, 9 UCC Rep 777 (1971). Hence, if the buyer is fully aware of the dangers of the product and nonetheless proceeds voluntarily to make use of the product and suffers loss from its use, he is barred from recovery. 9 UCC Rep at 781. The Utah Court has accordingly held that this form of improper conduct against the plaintiff is one which must be affirmatively proved. 9 UCC Rep. at 781.

POINT I

THE COURT HELD ERRONEOUSLY THAT NO EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY AND QUALITY WERE IMPOSED UPON PLAINTIFF BY ITS SALE OF PROCESSED HOG FEED TO DEFENDANT.

The express and implied warranties created by plaintiff's sale of processed hog feed to defendant will be considered in four parts. Part A will consider the creation of express warranties by plaintiff-seller. Part B will focus upon the creation of implied warranties within the June 25, 1973 sales transaction. Part C will evaluate the legal effect of buyer requirements and specifications upon the creation of express and implied warranties. Part D will examine plaintiff's argument that it cannot be liable under UCC warranty law if the original host for the salmonella was the Mr. Meaty Mix feed supplement.

Some preliminary clarification is required at this point to define properly defendant's warranty argument. Defendant urges that the written mixing order prepared by the plaintiff's Orem feed mill on June 25, 1973 created express and implied warranties that the hog feed processed by it would conform to the description contained therein. The warranties created necessarily

made nonconforming and unwholesome any hog feed contaminated by salmonella.

Part A. UCA §70A-2-313 defines when express warranties are created in the sale of goods.

The express warranty language of §70A-2-313(1)(b) provides in relevant part:

> Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description . . .

Official Comment 1 to UCC §2-313 clarifies when express warranties by description become part of the "basis of the bargain" as follows:

> "Express" warranties rest on "dickered" aspects of the individual bargain and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. (Quotation marks theirs)

When the seller gives a "description of the goods" is found in Official Comment 5:

> A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing . . .

The Utah Supreme Court expressly approved and applied the language of Official Comment 5 to UCC §2-313 in Pacific Marine Schwabacher v. Hydroswift, 525 P2d 615, 15 UCC Rep 354 (Utah 1974) The Hydroswift holding focused upon a small acrylic plastic boat manufactured and sold by the defendant. The defendant displayed acrylic pieces to the plaintiff-buyer as representative of the

construction processes. The Court cited UCA §70A-2-313 to conclude that defendant's display of these acrylic pieces created express warranties by both "description" and "sample". The Court held that the defendant breached its express warranties when the acrylic materials within the delivered boats did not conform to the molded acrylic pieces. 15 UCC Rep 359. The Utah Court similarly found a breach of an express warranty by description in Lamb v. Bangart, 525 P2d 602, 15 UCC Rep 1082 (Utah 1974). This Court held that a written livestock sale agreement identifying the breed, sex, and age of the cattle to be sold constituted "a description of the goods" and hence an express warranty within UCA §70A-2-313(1)(b), 15 UCC Rep at 1083. The Court found this express warranty was breached when the livestock delivered were not those described in the contract of sale.

Pacific Marine Schwabacher, supra., and Lamb, supra., follow the command of UCA §70A-2-313(2), that the creation of an express warranty does not require the seller's specific intent to make a warranty.

The holdings of the Utah Supreme Court in Pacific Marine Schwabacher, supra., and Lamb, supra., make clear that the June 25, 1973 written mixing order prepared by plaintiff's Orem feed mill was "a description of the goods" when measured by UCA §70A-2-313(1)(b). The mixing order similarly represented the "basis of the bargain" between the parties. Defendant's June 25, 1973 order for hog feed was made pursuant to a submitted ration formula as had been all orders by it since 1971. As with each purchase order transaction between the parties since 1971, the mixing order of June 25, 1973 was the feed mill's confirmation

that the processed hog feed would conform to the mixing order description.

The conclusion follows that the mixing order prepared by plaintiff's feed mill on June 23, 1973 created an express warranty that the hog feed would conform to its blending description.

Part B. Defendant urges that warranties of merchantability were implied within the June 25, 1973 hog feed transactior §70A-2-314(1) provides,

> . . . Unless excluded or modified (70A-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

The record is clear that the June 25, 1973 transaction was a contract for the sale of processed hog feed. The written mixing order contemplated the sale of a hog feed product only. Similarly, plaintiff imposed one price only for this product whicl price was that for a processed hog feed. There is likewise no dispute that the Orem feed mill made plaintiff a "merchant" with respect to the sale of grains, feed supplements, and processed livestock feeds. (see, Complaint, Answer and Counterclaim and Reply) Lastly, the only writings which evidenced the June 25, 19 transaction were plaintiff's written mixing order and its subsequent billing statements. None of these writings contained any language excluding or modifying the warranties implied in the sale of the involved hog feed. The standards of §70A-2-314(1) compel the conclusion that warranties of merchantability were implied in the June 25, 1973 hog feed transaction.

The meaning of the "merchantability" obligations impose

upon plaintiff are defined in §70A-2-314(2):

> . . . Goods to be merchantable must be at least such as
> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods, are of fair average quality within the the description; and
> (c) are fit for the ordinary purposes for which such goods are used; . . .

The implied warranties of merchantability within §70A-2-314 arise without regard to party intent and their creation is not dependent upon particular action or language. Comment 1 to UCC 2-315. The function of the implied warranty is to place the burden of loss on the seller when inferior goods do not conform to normal commercial standards of safety and effectiveness. Koellmer v. Chrysler Motors Corp., 6 Conn Cir Ct 478, 8 UCC Rep 668 (1970).

As with the creation of §70A-2-313 express warranties, the "contract description" and "description" language of §70A-2-314(2) was implemented by the terms and specifications of plaintiff's June 25, 1973 written mixing order.

Part C. Plaintiff argued at trial that defendant's feed formulae constituted buyer requirements and specifications which excluded the creation of any express and implied warranties. This argument mistates the law.

Comment 3 to UCC 2-314 defines the legal relationship between buyer requirements and the warranty of merchantability implied in a contract for the sale of goods. This Comment states,

> A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. . . .

Comment 9 to UCC §2-316 further defines the relationship between buyer requirements and the attachment of express and implied warranties to a contract for the sale of goods:

> The situation in which the buyer gives precise and complete specifications to the seller is . . . a frequent circumstance by which the implied warranties may be excluded. . . . The (implied) warranty of merchantability in such a transaction . . . must be considered in connection with the next section (e.g., UCC 2-317) on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transactions unless consistent with the specifications. (Deletions and emphasis mine)

The quoted Comments make clear that a buyer's precise and complete specifications to the seller do not exclude an expres warranty by the seller that the goods will conform to the specifications where such specifications are made part of the basi of the bargain between the parties. The result follows that who provides the specifications and why is not a material inquiry with a §70A-2-313 express warranty action. Part A of this Argument has established that plaintiff's written mixing order was a "description of the goods" which was "made a part of the basis of the bargain" between the parties. An express warranty was accordingly created.

The quoted Comments likewise establish that warranties of merchantability are implied in buyer requirement sales transactions consistent with those specifications made part of th basis of the bargain. UCA §70A-2-317 confirms this result by

making warranties cumulative and by

subordinating inconsistent implied warranties to the terms of the express warranty. The implied warranty of merchantability provisions of UCA §70A-2-314(2)(a),(b),(c) have been demonstrated to apply to this action. Their application is both cumulative to and consistent with the express warranty by description created from the specifications of plaintiff's mixing order.

Case law confirms that implied warranties of merchantability are created in those situations where the buyer has given precise and complete specifications to the seller.

In Kasab v. Central Soya, 432 Pa 217 246 A2d 848, 5 UCC Rep 925 (1968), plaintiffs were engaged in the business of breeding purebred cattle. The plaintiffs placed an order for cattle feed with the defendant feed mill, Pritts. The purchase order contained a ration formula previously blended by the defendant. The court concluded without extensive analysis that the specifications of the plaintiff-buyer did not displace or modify the implied warranties of merchantability. The court found that the livestock feed was contaminated and that the implied warranties had been breached for the reason that the feed as mixed did not conform to the mixture ordered.

In Neville Chemical Co. v. Union Carbide Corp., 294 F Supp 649, 5 UCC Rep 1219 (Pa 1968), the plaintiff had entered into a contract of sale for a sophisticated oil compound to be utilized within its manufacturing program. The product was developed by the defendant to meet the requirements and specifications designated by plaintiff. A delivery of this oil product to plaintiff was found by the court to be nonconforming.

The court held that the specifications and requirements submitted by the plaintiff, when accepted by the defendant, created an express warranty that the oil product would accordingly conform. The court found that this express warranty created by the defendant was breached. The court further found that implied warranties of merchantability were created consistent with the creation of the express warranties. In holding that the implied warranties of merchantability had been breached the court rejected the defendant's arguments that the specifications submitted by the plaintiff excluded the imposition of implied warranties of merchantability to the sales transaction.

The case of Falcon Tankers, Inc. v. Litton Systems, Inc. v. Worthington Corp., 300 A2d 231, 11 UCC Rep 963 (Del Super 1972) involved sales transactions in which the defendants contracted to build and design a boat in accordance with specifications and plans submitted by the plaintiff buyer. The court rejected the defendant's argument that no express warranties and implied warranties of merchantability could attach to the sale. In holding that express warranties by description and consistent implied warranties of merchantability were created in the sales transaction, the Court expressly acknowledged that the specifications and plans submitted by the plaintiff-buyer did not per se exclude warranty merchantability.

In Brickman-Joy Corp. v. National Annealing Box Co., 459 F2d 133, 10 UCC Rep 539 (2d Cir 1972), the court found implied warranties of merchantability to have been created and breached as a matter of law when a large galvanizing kettle cracked and collapsed. The galvanizing kettle had been manufact

by the defendant in accordance with inside dimensions specified by the plaintiff buyer.

The result follows that the feed formulas submitted by the defendant to plaintiff's Orem feed mill did not exclude an express warranty that the processed hog feed would confrom to the specifications of the June 25, 1973 mixing order. Consistent with this express warranty, a cumulative implied warranty of merchantability attached to the June 25, 1973 sales transaction.

Part D. One of plaintiff's defenses at trial was that the salmonella present in the involved bulk load of hog feed originated in the feed supplement, Mr. Meaty Mix. Mr. Meaty Mix was the only ingredient in the hog feed that was not sold and supplied by plaintiff. Plaintiff urged that the warranty provisions of the Utah Uniform Commercial Code applied only to contracts for the sale of goods and that consequently it could incur no UCC warranty liability if the believable weight of evidence placed the origin of the salmonella in the Mr. Meaty Mix. Defendant submits that plaintiff's argument misapplies the law because it denies that the June 25, 1973 transaction was nothing more nor less than one contract for the sale of bulk load processed hog feed. Defendant argues that the strict liability warranty action requires only that it show by the believable weight of the evidence that the involved load of hog feed was contaminated with salmonella at the time the load left plaintiff's control for delivery to defendant. Conversely, defendant has no burden upon it to show which ingredient within the hog feed was the original host for the salmonella, to include the Mr. Meaty Mix supplement. Acceptance of plaintiff's argument would require this

court to sever the June 25, 1973 transaction into three distinct transactions -- plaintiff's sale of ingredients to plaintiff, defendant's supply of Mr. Meaty Mix to plaintiff, and plaintiff's processing for defendant of all the ingredients into a bulk load of pellet hog feed. Plaintiff's attempt to avoid warranty liability by breaking the subject commercial transaction into its sale and service elements is contrary to the law. The courts have uniformly refused to isolate and itemize the elements of a commercial transaction. In each instance, the courts have looked to the predominant feature of the commercial transaction in order to establish its legal identity. The courts determine the predominant feature of the transaction by looking to the intent of the parties and the circumstances in which they are dealing. Epstein v. Giammattasio, 197 A2d 342, 1 UCC Rep 114 (Conn C P 196 (defective hairdressing supplies part of beauty salon treatment held subject of contract was one for rendition of services and no one for sale of goods.) Cassina v. Morris M. Taylor & Sons, Inc. 2 UCC Rep 1148 (Conn Cir 1964)(beauty salon treatment essentially a transaction for services -- materials used in performance of such services incidental to predominant purpose of transaction.) The insistence of the courts to look only to the transaction as a whole and to identify it by its predominating feature is furthe evidenced in actions focusing upon building construction contrac In Busch v. Aluminum Metal Products,
8 UCC Rep 335 (NY Sup Ct 1970)., the court rejected plaintiff's argument that a kitchen remodeling contract was essentially one sale of the appliances, floor covering, cabinets and formica covering. The court looked to the controlling feature of the

transaction and found the contract to be one for services.

The Pennsylvania courts have similarly found that a contract to construct a home is not a contract for the sale of bricks, roofing, etc., used in construction. DeMatteo v. White, 16 UCC Rep 926 (Pa Super Ct 1975).

The most articulated body of case law representing the court's insistence to identify a transaction by its essential and primary objective is found in the blood transfusion cases. see, Dibblee v. D. H. Groves Latter Day Saints Hospital, 12 Utah2d 241, 364 P2d 1085 (1961). The results of these cases are split as to whether the supplying of blood for value incident to the medical treatment and hospitalization of the patient is a contract for the sale of goods or one for the rendition of services. The prevailing rationale of all of these cases is to the main object and purpose of the transaction incident to characterizing as one predicated upon service or sale. see, Perlmutter v. Beth David Hospital, 308 NY 100, 123 NE2d 792 (1954)(blood transfusion incident to rendition of services)., Cunningham v. MacNeal Memorial Hospital, 47 I112d 443, 266 NE2d 897 (19)(blood transfusion a sale).

The case law cited above supports defendant's argument that the June 25, 1973 hog feed transaction was one for the sale of processed hog feed only. The case law confirms defendant's argument that no obligation is imposed upon it by the strict warranty liability action to isolate which ingredient within the hog feed was the original host for the salmonella. This latter rule of law applies to the Mr. Meaty Mix supplement as well as to any other ingredient blended by plaintiff into the hog feed.

Vernon v. Lake Motors,

26 Utah2d 269, 488 P2d 302, 9 UCC Rep 777 (1971)(proof of specific defect not required in UCC warranty action).

In conclusion, the court erred in granting plaintiff's motion for a directed verdict for the reasons that the Utah Supreme Court has held that the existence of warranty is an issue of fact for jury determination. Pacific Marine Schwabacher, Inc. v. Hydroswift, 525 P2d 615, 15 UCC Rep 354 (Utah 1974). Plaintiff case in chief provided ample factual confirmation that an express warranty of description and consistent implied warranties of merchantability attached to the June 25, 1973 hog feed transaction.

POINT II

THE COURT HELD ERRONEOUSLY THAT PLAINTIFF BREACHED NO EXPRESS AND IMPLIED WARRANTIES OF MERCHANTABILITY AND QUALITY BY ITS SALE OF CONTAMINATED PROCESSED HOG FEED TO DEFENDANT.

Defendant contends that the presence of salmonella in the hog feed delivery of June 27, 1973 constituted a breach of plaintiff's express and implied warranties. Defendant's evidence at trial was, (A) that salmonella had contaminated the subject hog feed prior to plaintiff's delivery of the feed to defendant's farm, (B) that the salmonella was introduced int the feed because of fecal contamination in the feed, and (C) th the hog's consumption of this feed caused the scours epidemic in the hogs.

The evidence set forth below is that developed by defendant at trial to establish that plaintiff breached its express and implied warranties.

Defendant's farm is a modern operation which medically

borders on a pathogen free operation. This qualitative conclusion was made by Dr. Hunter and was supported by the testimony of Dr. Claire Accord, livestock specialist, Utah State University Extension Service. Prior to the June 25, 1973 transaction, defendant's experience with scours in its hogs had been minimal and in all instances had been confined to the suckling pigs (Tr. at 120 - 121; 153 - 154). The scours in these suckling hogs had in all instances been caused by nutritional changes in the milk of the sows (Tr. at 86 - 87). None of the defendant's hogs prior to June 25, 1973 had ever incurred scours resulting from the salmonella pathogen (Tr. at 153 - 154). Moreover, the number of suckling hogs affected at any given time with nutritional scours had always been less than 1% of defendant's hogs (Tr. at 86 - 87; 154). Defendant's experience with scours in its hogs following September, 1973 to the time of trial was identical to the events and circumstances prior to June, 1973 (Tr. 87, 172).

The events material to this action occurred from June 25, 1973 to the end of September, 1973. During this approximate three month interval, 20% of defendant's hogs became afflicted with scours (Tr. at 87). Unlike any time prior or since, the age group of the hogs affected were the weaner and feeder pigs -- 20 pounds to 60 pounds (Tr. at 87). Unlike any time prior or since, defendant sustained death losses from scours in this size group and the death losses were substantial (Tr. at 58, 87, 153 - 154). Unlike any time prior or since, this scour epidemic was caused by the salmonella pathogen (Tr. at 153 - 154).

Dr. Jon F. Hunter testified at trial that it was his expert medical opinion that the June through September scours epidemic in defendant's hogs was caused by the salmonella pathogen (Tr. at 162). Dr. Hunter's conclusion was derived preliminarily from the tests results of the U. S. Department of Agriculture Research Laboratory showing salmonella present in all fecal samples submitted to it by Dr. Hunter (Tr. at 161). Dr. Hunter's medical opinion was also that the salmonella pathogen originated in the bulk load of pellet hog feed delivered to defendant on June 27, 1973 and that the salmonella was already present in the feed upon delivery (Tr. at 168, 194). The hogs consequently contracted the salmonella and resulting scours epidemic after being fed from this bulk load of feed on either June 27 or 28, 1973 (Tr. at 23). Dr. Hunter's opinion that the subject load of hog feed was the source of the salmonella causing the scours epidemic was derived in part from the feed sample test results received by Dr. Hunter from Intermountain Laboratories (Tr. at 165 - 168). The feed sample test results confirmed salmonella present in one of the three feed samples submitted. (Tr. at 136 - 137; 163 - 165). Similarly, the fecal sample resul confirmed salmonella present in six of the seven submitted sample (Tr. at 134, 166). Dr. Hunter confirmed that all samples were taken pursuant to good medical procedure thereby eliminating cross-contamination between samples (Tr. at 166). Dr. Paul Derrick testified that he was the chief microbiologist at Intermountain Laboratories and was responsible for the accuracy of the feed sample and fecal sample test results described above (Tr. at 132 - 133, 137; defendant's exhibits 63 - 72).

Dr. Derrick reported the presence of the pathogen enterococci group D strep in two of the three submitted feed samples (Tr. at 136 - 137). The medical significance of the presence of this pathogen in two of the three feed samples was confirmed uniformly by Dr. Hunter and Dr. Derrick. Both men identified enterococci group D strip as an organism growing in the tract of man and animals (Tr. at 136 - 137). Both men confirmed that the presence of this organism in the hog feed demonstrated that the hog feed had been contaminated with fecal material (Tr. at 136, 168). The connection between fecal material in the hog feed with the salmonella pathogen was defined by both Dr. Derrick and Dr. Hunter. Their medical conclusion was that salmonella can exist in cereal based feed products only if the involved grain ingredients are first fecally contaminated (Tr. at 144, 147, 182). The presence of the enterococci group D strep organism in the feed samples was relied upon by Dr. Hunter to medically conclude that the salmonella contamination in the involved bulk load of pellet hog feed was the result of foreign fecal material in the feed (Tr. at 168, 193). Dr. Hunter's conclusion was likewise that this fecal material was present in the hog feed prior to its delivery to defendant (Tr. at 194).

Dr. Hunter's conclusion of fecal material in the hog feed as the host for the salmonella pathogen and that this condition was present prior to delivery was based upon evaluation criteria going beyond laboratory test results. Dr. Hunter's opinion was in part based upon his personal examination of defendant's farm and hogs on July 6, 1973. Dr. Hunter, as had

Paul Haderlie, examined on this day the subject hog feed and visually noted its off-color appearance (Tr. at 38 - 39, 155 - 156). At the same time, Dr. Hunter confirmed from Paul Haderlie that the feed emitted a bad odor and individually confirmed that the hogs were "rooting" this feed out of the feeder and onto the floor (Tr. at 39, 155 - 156). Dr. Hunter then eliminated, with reasonable medical certainty, the hogs' water supply, air contamination, and recently purchased hogs as contamination sources (Tr. at 168). As of July 6, 1973 Dr. Hunter had preliminarily isolated the involved bulk load of hog feed as the source of the scours epidemic and had done so independently of laboratory testing (Tr. at 174 - 178).

Dr. Hunter's conclusions that the hog feed was contaminated with salmonella prior to delivery as the result of fecal material in the grain is corroborated by the expert opinion testimony of Paul Haderlie. Haderlie testified, without contradiction, to his former employment in the livestock feed processing business at plaintiff's Orem feed mill (Tr. at 37). Haderlie's expertise to evaluate livestock feed for composition and quality were accepted by the court without objection by plaintiff (Tr. at 37). see, 49 ALR2d 932 Admissability of Opinion Evidence of Lay Witnesses as to Diseases and Physical Condition of Animals (1956). Haderlie testified tha the color and smell of the involved hog feed established that foreign material "screenings" had been blended into the hog feed by plaintiff's Orem feed mill (Tr. at 40, 43). Haderlie define screenings as all residue and matter extracted from the grain in the feed mill's cleaning processes (Tr. at 43).

Plaintiff's argument that the salmonella contamination in the hog feed could have originated only in the meat base product, Mr. Meaty Mix, is not supported by the evidence. Defendant agrees with plaintiff that salmonella is found generally in meats and meat base products rather than in grains and cereal compounds (Tr. at 144, 182). This general rule, however, both ignores and is displaced by the particular facts of this case. Replacement feed was ordered by defendant from Leland Milling Company on July 3, 1973 and July 7, 1973 (Tr. at 45, 64). The Mr. Meaty Mix blended into this hog feed was from the same manufacturer's lot number as that which had been used by plaintiff in processing the June 25, 1973 hog feed order (Tr. at 201). Moreover, the hog feed processed by Leland Milling Company was readily accepted and consumed by defendent's hogs (Tr. at 203). Plaintiff's argument further ignores the rule of law that defendant's burden of proof does not require it to eliminate every possible cause. (see, cases cited infra.).

It is also not persuasive that the hog farm to which plaintiff sold the involved bulk load of hog feed experienced no scours outbreak in its hogs. Dr. Hunter testified that defendant's farm bordered on a pathogen free operation with the result that defendant's hog had probable low immunities. The environment of defendant's farm therefore distinguished it from other hog farms in Utah County which did not maintain such medical controls. Consequently, such farms would have hogs with higher immunity levels

and likely did not possess the controls to identify the pathogen as did defendant (Tr. at 192).

In conclusion, the motion for directed verdict granted to plaintiff was error as a matter of law. Both the existence of a warranty and its breach constitute issues of fact for jury determination. Pacific Marine Schwabacher, Inc., supra., and cases cited infra. Issues of fact for jury determination were properly created by the evidence from plaintiff's case in chief.

POINT III

THE COURT HELD ERRONEOUSLY THAT DEFENDANT INCURRED NO PROPERTY LOSS AND DAMAGE AS A RESULT OF PLAINTIFF'S SALE TO IT OF CONTAMINATED PROCESSED HOG FEED.

No determination was ever extended by the trial court to the damages issue. The trial court's attention, as was that of plaintiff's motion for directed verdict, was directed solely toward the liability elements of defendant's warranty action. As a matter of law and within the rules of a motion for directed verdict, defendant's evidence in chief was sufficient to establish an action for nominal damages. Jorritsma v. Farmer's Feed & Supply Co. Inc., 538 P2d 61, 17 UCC Rep 696 (Ore 1975).

Defendant established the following kinds of property damage and loss amounts:

(1) Loss of weight gain for 175 marketable hogs from July 7, 1973 to August 15, 1973; $2,205 (Tr. at 49 - 58)

(2) 42 hog deaths within feeder and weaner hog sizes from July to August, 1973; $1,260

(3) 28 suckling pig deaths resulting from sows with litters being evacuated from hog house to outside by direction of Dr. Hunter in September, 1973; $580

(4) Veterinarian billings for treatment of scours epidemic; $281

(5) Laboratory testing fees; $105

(6) Pharmaceutical; $287.58

(7) Employment of high school boys to assist defendant in housekeeping operations during scours epidemic; $848

All damages designated above are consistent with a warranty action under the Utah Uniform Commercial Code. UCA §70A-2-714., UCA §70A-2-715. It is to be noted that the basic breach of warranty damages formula within §70A-2-714(2) is not applicable to this action and must defer to §70A-2-715.

In conclusion, defendant established elements of damages creating issues of fact for jury determination. The court's directed verdict against defendant was therefore error as to damages.

CONCLUSION

The plaintiff's motion for directed verdict granted by the court constituted error. The existence of a warranty, its breach, and resulting damages constitutes issues for the trier of fact under Utah case law and the majority rule. Triable issues of fact were property created from the evidence of defendant's case in chief upon its Counterclaim.

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MAILING NOTICE

I hereby certify that I mailed a copy of the foregoing Brief of Appellant to Mr. Mark O. Van Wagoner of JONES, WALDO, HOLBROOK and MCDONOUGH, attorney for plaintiff, Utah Cooperative Association, 800 Walker Bank Building, Salt Lake City, Utah 84102, this 19th day of December, 1975.

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