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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STOCKMEN'S, INC.	)	Filed August 26, 1982
Plaintiff-Appellee,	)	431
vs.	)	2-91 2-66590
ERWIN WELLER CO.,	)	
Defendant-Appellant.	)	

Appeal from Woodbury District Court, Charles R. Wolle, Judge.

Defendant appeals from judgment on a verdict awarding plaintiff damages for breach of an implied warranty. REVERSED.

Steven A. Carter of Carter, Sar & Edmonds, Sioux City, for defendant-appellant.

William M. Alexander and Martha A. Heinicke, Laurens, for plaintiff-appellee.

Heard en banc.

Defendant appeals from judgment on a verdict awarding plaintiff damages for breach of an implied warranty. We reverse.

Plaintiff, Stockmen's, Inc., is a manufacturer of whips, halters, canes, cattle prods, and similar items used in the handling of livestock. Defendant, Erwin Weller Co., manufactures various plastic products and also manufactures the molds and dies for the production of plastic products.

In 1973 the parties entered into a contract, which provided for defendant to make molds and dies for the production of various components of plaintiff's products. Defendant manufactured the molds and dies, but plaintiff contends they did not meet the specifications required by plaintiff as a part of the contract.

Plaintiff filed its petition in 1979, alleging that defendant had failed to meet the specifications of the contract and had thereby breached (1) the contract itself, (2) an express warranty that the products would meet the specifications, and (3) an implied warranty that the products would be fit for the plaintiff's purposes and would be made with skill and expertise. The petition also alleged negligence by the defendant in the production of the molds and dies.

The jury returned a verdict in plaintiff's favor on the theory of implied warranty. In ruling on defendant's posttrial motions, the trial court held that there was sufficient evidence to support the verdict as to two classes of products, but not sufficient evidence to support the verdict as to a third class of products, wrist straps and wrist strap molds. The court then gave plaintiff the choice of facing a new trial on all issues or accepting a remittitur to reduce the damages by the amount attributable to the third class of products. Plaintiff chose to accept a reduction in damages, and the court then entered judgment against defendant for the reduced amount. The trial court directed that the judgment would draw interest from the date the petition was filed in 1979.

On appeal, defendant Weller has raised numerous issues, primarily challenging the sufficiency of evidence to prove the existence and breach of an implied warranty, and the sufficiency of evidence to prove that defendant's products were defective. Defendant also contests the trial court's instructions to the jury on implied warranty, award of damages to the plaintiff, and award of interest on the judgment.

Since this action is at law, our review is on assigned error only. Iowa R. App. P. 4.

I. We first consider the sufficiency of evidence to prove the existence of an implied warranty. Iowa Code § 554.2315 sets forth the circumstances under which an implied warranty of fitness for a particular purpose arises. This section provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Defendant Weller argues that these conditions were not met, and that there was insufficient evidence to instruct the jury on or support a verdict of implied warranty. The burden of proving all elements of an implied warranty is on the plaintiff. Madison Silos v. Wasson, 215 N.W.2d 494, 501 (Iowa 1974). In support of its theory, plaintiff Stockmen's alleges that its employees had informed defendant of the particular purpose for which the products were to be used, and that it relied on the defendant's skill and judgment.

In resolving this issue, we take note of the long-standing distinction between a case in which the seller impliedly warrants an item for a particular purpose, and one in which the buyer expressly specifies the characteristics which the item to be supplied shall possess. Rowe Manufacturing Co. v. Curtis-Straub Co., 223 Iowa 858, 863, 273 N.W. 895, 898 (1937); American Player Piano v. American Pneumatic

Action Co., 172 Iowa 139, 151, 154 N.W. 389, 393 (1915). In the latter instance, the buyer relies on his own knowledge or judgment, not on the knowledge or judgment of the seller. American Player Piano, 172 Iowa at 151, 154 N.W. at 393. Under such circumstances, the seller may not be held liable under an implied warranty of fitness theory even if the item was intended for a specific purpose, and even if that purpose was made known to the seller. Davenport Ladder Co. v. Edward Hines Lumber Co., 43 F.2d 63, 68 (8th Cir. 1930); Conkling v. Standard Oil Co., 138 Iowa 596, 606, 116 N.W. 822, 826 (1908). The rationale for this distinction, as stated by the Iowa Supreme Court in American Player Piano, 172 Iowa at 152, 154 N.W. at 393, is that a buyer has no legitimate complaint against a seller who supplies him with the precise item he bargained for, even if it is not fit for the purposes for which purchased.

Uniform Commerical Code Comment 9 to Iowa Code § 554.2316 addresses this distinction, and is persuasive authority in this court. It provides, in pertinent part:

> That situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer.

In this case the buyer, Stockmen's, did expressly specify the characteristics which the items were to possess. Plaintiff actually supplied defendant with metal cane models from which the plastic items were to be duplicated. Because plaintiff relied on its own skill and judgment in ordering and accepting the items, the criteria for proving implied warranty of fitness for a particular purpose were not met. The trial court therefore erroneously submitted the issue to the jury. See Isaacs v. Bruce, 218 Iowa 759, 762, 254 N.W. 57, 59 (1934).

II. Because we conclude that the requisite elements of an implied warranty were not met, plaintiff's argument that the warranty was breached must also fail. Defendant cannot be held liable for damages for breach of a warranty which never existed. Furthermore, plaintiff made no claim that defendant did not properly duplicate and furnish the items requested. The problem arose because plaintiff asked defendant merely to manufacture plastic items duplicated from the metal cane samples, yet represented to its purchasers that the items were composed of some sort of "super plastic." Plaintiff never requested that defendant use "super plastic" to manufacture the items.

Plaintiff proceeded to pay for the items after they had been inspected and the production run had been made. The president of the company testified that such action constituted acceptance in accordance with the custom and usage of trade with which he was familiar. We conclude that the plaintiff had accepted the items, and no evidence was offered that acceptance was ever revoked.

III. Finally, we address two remaining arguments asserted by defendant. In its brief defendant contends that the trial court erred by denying defendant's motion for a directed verdict with respect to the wrist straps and wrist strap mold. We agree. There was insufficient evidence to support the wrist strap issue, and it should not have been submitted to the jury. Baker v. General American Life Insurance Co., 222 Iowa 184. 188, 268 N.W. 556 (1936); Isaacs v. Bruce, 218 Iowa 759, 762, 254 N.W. 57, 59 (1934). We do not agree, however, that the submission of the issue "tainted" the entire proceedings. The jury instructions set up separate verdicts for each mold and part. Thus the jury could be expected to understand that they could award damages for certain items and not for others. The Iowa Supreme Court has held that a presumption exists that the jury followed the court's instructions and did not allow damages for items on which there was no

evidence. Doden v. Housh, 251 Iowa 1271, 1278, 105 N.W.2d 78, 82 (1960). In any event, a remittitur can cure an error by the trial court in denying a motion for a directed verdict on an issue. Duncanson v. Fort Dodge, 233 Iowa 1325, 1330, 11 N.W.2d 583, 586 (1943); Pugh v. Queal Lumber Co., 193 Iowa 924, 930, 188 N.W. 1, 3 (1922). We therefore conclude that while the trial court should have granted defendant's motion for a directed verdict with respect to the wrist strap issue, its subsequent remittitur in the amount of $4847.69 cured this defect.

We also dispose of defendant's argument that a mistrial should have been granted because of the trial court's refusal to allow defendant to use rebuttal evidence to show that the molds had been modified. The trial court is vested with broad discretion in ruling on such matters. Trachta v. Iowa State Highway Commission, 249 Iowa 374, 385, 86 N.W.2d 849, 856 (1957). Specifically, the admission of rebuttal evidence has been held to be within the sound discretion of the trial court, Luther v. Ullritch, 182 Iowa 745, 750-54, 166 N.W. 85, 87-88 (1918), and that discretion was not abused here.

Because we reverse the trial court's award of damages to plaintiff, we find it unnecessary to address the issue of interest on the judgment.

REVERSED.