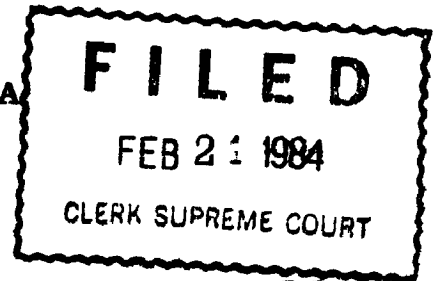


IN THE COURT OF APPEALS OF IOWA



BETTY SAMUELSON and)
MARVIN SAMUELSON,)

Plaintiffs-Appellants,)

vs.)

Filed February 21, 1984

389

RICHARD MILLER, d/b/a UNION)
PRESCRIPTION CENTER and)
MARY WHEELER,)

3-440
83-793

Defendants-Appellees.

Appeal from the Iowa District Court for Pottawattamie County - Leo F.
Connolly, Judge.

Plaintiffs appeal from judgment entered upon jury verdict for defendants in
their action for damages. AFFIRMED.

Michael G. Reilly, Perkins, Sacks & Hannan, Council Bluffs, Iowa, for
plaintiffs-appellants.

John D. Sens, Stuart, Tinley, Peters, Thorn, Smits & Sens, Council Bluffs,
Iowa, for defendants-appellees.

Heard by Donielson, P.J., Hayden and Sackett, JJ.

Plaintiffs, Betty and Marvin Samuelson, appeal from a judgment entered upon an adverse jury verdict and denying their motion for a new trial.

The Samuelsons instituted this action seeking damages from defendants Richard Miller, d/b/a/ Union Prescription Center, and Mary Wheeler, an employee, for injuries sustained by Betty when she ingested two ounces of cinnamon oil. Betty testified at trial that she went into the Union Prescription Center with instructions from her physician to purchase, among other things, castor oil. She contends that she gave her physician's written instructions to Richard Miller, who in turn gave them to Mary Wheeler. Wheeler, according to Samuelson's testimony, then gave Samuelson a bottle of cinnamon oil instead of castor oil. Samuelson later poured the contents of the bottle into a glass of cola, drank the mixture, and became ill. We note that Samuelson's testimony regarding the transaction was disputed by Miller and Wheeler, but we need not elaborate on their testimony because of our disposition of the case.

The Samuelson's action against defendants was based upon negligence and breach of implied warranty. The case was submitted under the negligence theory alone and a verdict was returned for the defendants. The trial court refused to submit an instruction on the implied warranty claim. The Samuelsons now allege that the trial court erred in failing to instruct the jury on breach of implied warranty.

Our review is on assigned error. Iowa R. App. P. 4. While there must be some substantial evidence on which to submit an instruction, all relevant and material evidence, including justifiable inferences favorable to plaintiff, must be accepted at face value in determining whether a jury issue is created. Jacobson v. Benson Motors, 216 N.W. 2d 396, 398 (Iowa 1974). Our function on review is not to weigh the testimony, but to determine whether substantial evidence was presented

upon which a jury could find for the plaintiffs. In that regard we view the evidence in a light most favorable to the party prevailing in trial court — in this case the defendants. Id.

The implied warranty theory upon which plaintiffs rely is codified at Iowa Code section 554.23.5 (1983) as follows:

Implied warranty — fitness for particular purpose. 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.

A "particular purpose" under this section has been defined as follows:

A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question. For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains.

35 Iowa Code Ann. §554.2315 U.C.C. Comment 2 (West 1967). See Jacobson v. Benson Motors, Inc., 216 N.W. 2d 396, 403 (Iowa 1974)(supreme court applies U.C.C. definition of "particular purpose").

The plaintiffs rely upon the following authority in support of their claim:

A druggist is held to impliedly warrant that he will deliver the drug called for and purchased by the customer, and he is liable on breach of warranty for injuries resulting from a mistake in giving the wrong article. The implied warranty of fitness is conditioned upon the buyer's reliance upon the skill and judgment of the druggist.

25 Am. Jur. 2d Drugs, Narcotics, and Poisons §53 (1966). It is important to distinguish between situations where the druggist fills a prescription or fills a container with the wrong product and the instant case. Here the product was clearly labeled cinnamon oil." The container unquestionably contained cinnamon oil. The product was available to the customer off the shelf without the druggist's

intervention. The "implied warranty of fitness" as set forth in Am. Jur. might have been applicable here had Mr. Miller or his employee made a mistake in formulating or labeling the product. That was not the case, however. Furthermore, had Betty Samuelson explained her particular physical problem and requested that Mr. Miller suggest a product, relying upon his expertise as a pharmacist, an implied warranty situation would have arisen. The actual facts of the case do not present an implied warranty situation. Betty Samuelson presented Mr. Miller with her physician's instructions regarding procedures which were to be followed by her in preparation for the taking of gall bladder X rays. The instructions made reference to the time she was to arrive at the hospital, diet, and medication. It also contained the following:

PROCTO AND BARIUM ENEMA OR LOWER G.I.:

Take two ounces of Castor Oil at 2:00 the day before.

Take one soapsuds enema at bedtime the night before and take soapsuds enema till clear in the early morning.

IVP: Take two ounces of Castor Oil at 2:00 PM the day before. Eat a light supper, fast (no food or drink) from midnight on. [emphasis added]

Samuelson testified that she asked Mary Wheeler, an employee, to help her find the castor oil. According to Samuelson's testimony Wheeler picked up the bottle of cinnamon oil and handed it to her, and she assumed that it was flavored castor oil.

Taking the facts in this case in the light most favorable to the plaintiffs, we will assume that Betty asked for castor oil and received cinnamon oil. We will also assume that Mr. Miller knew the purpose for which the castor oil was intended. Even assuming these facts, we find no substantial evidence in the record upon which a jury could have found for the plaintiffs on the theory of breach of implied warranty under section 554.2315. We find neither a "particular purpose" to which the goods were to be put, nor any reliance on the part of Betty Samuelson on the skill or judgment of Miller or Wheeler in selecting suitable goods. In interpreting section 554.2315, the Iowa Supreme Court has held fast to

the U.C.C.'s distinction between normal use and particular purpose. See Van Wyk v. Norden Laboratories, Inc., ____ N.W. 2d ____ (Iowa 1984)(filed February 15, 1984); and Farm Bureau Mutual Insurance Co. v. Sandbutte, 302 N.W. 2d 104, 111 (Iowa 1981)(to give rise to an implied warranty, the object bargained for must respond to a particular need; furnishing it for general purpose is not enough), and Jacobson v. Benson Motors, Inc., 216 N.W. 2d 396, 403-04 (Iowa 1974). We find no error on the part of the trial court in refusing to submit the case on an implied warranty theory.

AFFIRMED.