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Warranties-Implied Warranties of Fitness and Merchantability Held Applicable to the Sale of Electricity as a Service

Warranties—IMPLIED WARRANTIES OF FITNESS AND MERCHANTABILITY HELD APPLICABLE TO THE SALE OF ELECTRICITY AS A SERVICE—*Buckeye Union Fire Insurance Co. v. Detroit Edison Co.*, 38 Mich. App. 325, 196 N.W.2d 316 (1972).

The Uniform Commercial Code has had a great influence on the development of the doctrine of implied warranties in the sale of goods.[1] However, where a transaction primarily involves the sale of services rather than products, the application of implied warranties under the Code is questionable. The technical requirement of a sale has been the principal obstacle to recovery for breach of implied warranty in the area of service contracts when the rendition of service predominates and the transfer of personal property is incidental to the transaction.[2] Although the sale of goods is not the only transaction in which implied warranties are applied,[3] courts have traditionally refused to apply them to service transactions.[4]

In the recent decision of *Buckeye Union Fire Insurance Co. v. Detroit Edison Co.*,[5] owners and insurers of a house destroyed by fire sought damages from an electric company. The complaint alleged that the fire was caused by the defendant's negligence in supplying electricity to the house, and further, that the fire resulted from the defendant's breach of implied warranties of fitness and merchantability of the electricity supplied.[6] The

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[1] *See* UNIFORM COMMERCIAL CODE § 2-314. In all but a few states, the plaintiff does not have to be in privity with the defendant seller to recover for injuries or damages caused by a defect in the defendant's product. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 650-52 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[2] Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957):

> A . . . transaction similar to the sale of goods is the contract for services or for work, labor, and materials. It is similar to a sale in that property in goods passes, but differs in that the element of the labor or services of the supplier bulks larger than in a sale. *Id.* at 660.

[3] 1 WILLISTON, SALES § 242b (rev. ed. 1948).

[4] *See, e.g.*, Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967); Payton v. Brooklyn Hosp., 19 N.Y.2d 610, 278 N.Y.S.2d 398, 224 N.E.2d 891 (1967); Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 140 N.Y.S.2d — (1954).

[5] 38 Mich. App. 325, 196 N.W.2d 316 (1972).

[6] Defendant's motion for a directed verdict was granted as to the implied warranty count and denied as to the negligence count. A verdict of no cause for action was returned by the jury as to the negligence count. Plaintiffs appealed from the decision of the trial court granting defendant's motion for a directed verdict on the count based upon the implied warranty theory *Id.* at —, 196 N.W.2d at 317.

Michigan Court of Appeals held that implied warranties should apply to the sale of services as well as to the sale of goods.[7]

Prior to the *Buckeye* decision, the most significant cases dealing with the sales-service distinction involved either food or blood. Today, the serving of food for value constitutes a sale of goods between the restaurant and its patron,[8] and an implied warranty of merchantability attaches to the transaction.[9] While only a few courts have held a blood transfusion to be a sale,[10] a blood transfusion, when construed as a service, has been held subject to an implied warranty of merchantability.[11]

The authority existed, therefore, upon which the court in *Buckeye* could base its decision to break away from the seemingly well-settled principle that the liability of electric companies is governed only by the laws of negligence,[12] and join a minority reflecting a trend to circumvent the traditional service immunity to implied warranties. The only questionable aspect of the decision is whether the court had to go so far as to subscribe to the minority view.

One important characteristic of the blood transfusion cases is that the courts have always recognized that a *product* is involved.[13] Most courts, ad-

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[7] *Id.* at —, 196 N.W.2d at 317-18. Plaintiff failed to prove a defect, however, and the lower court's decision was affirmed. *Id.* at —, 196 N.W.2d at 319.

[8] UNIFORM COMMERCIAL CODE § 2-314.

[9] *Id.* Comment 5.

[10] Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. 1966) limited its decision to the sale of blood by a blood bank but noted:

> It seems to us a distortion to take what is, at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision. *Id.* at 752.

See also Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960) which held that Salk polio vaccine is intended for human consumption just as food, and therefore is subject to an implied warranty of merchantability.

[11] Hoffman v. Misericordia Hosp., 439 Pa. 501, 267 A.2d 867 (1970). The Supreme Court of Pennsylvania held that even if the transfer of blood should ultimately be determined to be a service, recovery may be possible on the claim that the hospital, in giving a blood transfusion to a patient who subsequently contracted hepatitis, breached an implied warranty of merchantability.

[12] In Weissert v. Escanaba, 298 Mich. 443, 299 N.W. 139 (1941) the court stated:

> While . . . those engaged in generating and distributing electricity are held to a high degree of care for the protection of those liable to come in contact with this dangerous and subtle force, yet it is well established that the liability of electric light and power companies for damages for personal injuries . . . is governed, not by the principles of insurance of safety, nor of contracts, but, as in the case of personal injuries generally, by the simple rules of the law of negligence. . . . *Id.* at 447, 229 N.W. at 143.

Accord, Robbins v. Old Dominion Power Co., 204 Va. 390, 131 S.E.2d 274 (1963); 26 AM. JUR. 2d *Electricity, Gas & Steam* § 39 (1966).

[13] *See* note 11 *supra.*

mittedly, have relegated the product, blood, to an inferior position so that the service, transfusing the blood, predominates. The most frequent explanation relies upon the public policy of protecting charitable organizations from liability.[14] Doubtless, the supplying of electricity by a utility company is a service,[15] but there is no apparent public policy of protecting electric companies from liability. Considering this analogy, it would seem then that the product characteristic of electric service, the electricity itself, could have been given more consideration by the court in *Buckeye*.

Electricity made by artificial means is a product of manufacture,[16] and the court in *Buckeye* implied that it was cognizant that a product was involved.[17] Nevertheless, it flatly rejected the notion that it be considered as goods under the Code,[18] offering no reason for its rejection other than that "electricity" fails to meet the Code's definitional requirements.[19]

Electricity is personal property capable of a sale.[20] It is suggested that the concept of movability rather than that of being personal property is employed in the Code.[21] Movables are things movable,[22] and connote tangible and corporeal things as opposed to choses in action. Electricity is a current of electrons, protons, and neutrons. As has been pointed out, blood, a fluid of living cells, has been considered goods by some courts.[23] Furnishing water through a system of water works by a water corporation to private consumers at a fixed compensation has been held a sale of goods.[24] Moreover,

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[14] *See* Balkowitsch v. Minneapolis War Memorial Blood Bank, 270 Minn. 151, 132 N.W.2d 805 (1965). *See also* IND. STAT. § 35-4811 (Cum. Supp. 1972); MD. CODE ANN. art. 43, § 136(b) (Supp. 1971); N.C. GEN. STAT. § 90-220.10 (Cum. Supp. 1971); VA. CODE ANN. § 32-104.5 (Cum. Supp. 1972).

[15] VA. CODE ANN. § 56-233 (1969).

[16] Minnesota Power & Light Co. v. Personal Prop. Tax, 289 Minn. 64, —, 182 N.W.2d 685, 691 (1970).

[17] While stating that electricity was not goods as defined by the Uniform Commercial Code, the court noted that "[t]he *product* liability of sellers is not restricted to those situations covered in the Code" (emphasis added). Buckeye Union Fire Ins. Co. v. Detroit Edison Co., 38 Mich. App. 325, —, 196 N.W.2d 316, 317 (1972).

[18] *Id.*

[19] For the Code's definition, see UNIFORM COMMERCIAL CODE § 2-105.

[20] Fickeisen v. Wheeling Elec. Co., 67 W.Va. 335, 67 S.E. 788 (1910); 26 AM. JUR. 2d *Electricity, Gas & Steam* § 1:

> So far as the law is concerned, electricity made by artificial means, or electric current, is property capable of ownership and of sale, and it may be the subject of larceny. With regard to the kind of property, electric current has been characterized as personal property, or a commodity, and it has been said that the owner thereof may use it as he will, subject only to the lawful exercise of the police power.

[21] UNIFORM COMMERCIAL CODE § 2-105, Comment 1.

[22] BLACK'S LAW DICTIONARY 1165 (rev. 4th ed. 1968).

[23] Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. 1966).

[24] Canavan v. Mechanicville, 229 N.Y. 473, 128 N.E. 882 (1920).

since electricity is subject to larceny and is included within the category "goods" in larceny statutes,[25] certainly there is some merit to the argument in favor of including it within the definition of goods in the implied warranty section of the Code.[26]

Should the above argument prove unsuccessful, it is urged that the court had yet another alternative to applying an implied warranty to a service. Again, given the court's cognizance that a *product* was involved, this was a splendid opportunity to apply the doctrine of strict products liability in tort[27] without having to resort at all to warranty. The facts in the case substantiate the rationale for utilizing such a doctrine. The court obviously desired to afford the plaintiff-consumer another avenue of recovery beyond proof of negligence. Not only did the plaintiff lack the capacity to inspect or determine the fitness of the electricity, but the defendant-electric company had superior opportunity to inspect and know the condition and safety of the product, and could distribute the loss more easily.

In conclusion, the *Buckeye* decision, although laudable in opening new avenues of recovery against electric companies, may be unsound in that substantially the same result could have been reached by attacking the product rather than the service. It is questionable that the decision should be followed in similar cases where both a product and a service are involved, indeed unthinkable that it should apply to *all* cases involving services,[28] regardless of whether a product is involved.

P. F. G.

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[25] Selman v. State, 406 P.2d 181, 187 (Alas. 1965); People v. Menagas, 367 Ill. 330, 11 N.E.2d 403 (1937).

[26] *See also* NORDSTROM, HANDBOOK OF THE LAW OF SALES 47 (1970) where the author states:

> The Section 2-105 (1) definition should not be used to deny Code application simply because an added service is required to inject or apply the product. There will be cases in which it will be important to determine whether what was sold was goods or services; however, this decision ought to be made on the basis of the impact of the Code and the policies involved—such as disclaimers and charitable immunity—and not on a sterile reading of a definition.

[27] *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[28] *See* Buckeye Union Fire Insurance Co. v. Detroit Edison Co., 38 Mich. App. 325, —, 196 N.W.2d 316, 318 (1972).