South Carolina Law Review

Volume 19
Issue 4 *Survey of South Carolina Law 1967*

Article 3

1967

Contracts

William B. Patrick Jr.

CONTRACTS

I. Implied Warranty

Perhaps the most interesting case in the field of contracts during the survey period was *Springfield v. Williams Plumbing Supply Co.*[1] This case concerned the necessity of privity of contract between the parties in order for the purchaser of a product to recover on an implied warranty from the manufacturer and the wholesaler.

The appeal was brought when the circuit court denied the motions to dismiss by the manufacturer and the wholesaler of an electric hot water heater which exploded and caused both personal injuries and property damage to the plaintiffs. The basis of both motions was that there was no privity of contract between the manufacturer and the wholesaler and the plaintiff purchasers and that a cause of action for breach of implied warranty could not be maintained in the absence of such privity.

The contention of the appellants was founded on the decision of *Odom v. Ford Motor Company*[2] and the general rule stated there "that privity of contract is required in an action for breach of an implied warranty and that there is no such privity between a manufacturer and one who has purchased the manufactured article from a dealer or is otherwise a remote vendee."[3] However, after stating this rule, the *Odom* court recognized an exception in cases involving products which are "inherently dangerous to human safety." Also a careful reading of the *Odom* case will reveal that it was not dealing with either personal injury or property damage but only with the alleged failure of a tractor to properly perform the farm tasks for which it was purchased. The court in *Springfield* recognized this and stated that they did not consider *Odom* to be controlling in the instant case.[4]

The court in *Springfield* acknowledged that the question of whether a remote vendee can maintain a personal and property damage action against the manufacturer and the wholesaler of a product on the theory of implied warranty in the absence of privity is one of novel impression in this jurisdiction but that it

1. 249 S.C. 130, 153 S.E.2d 184 (1967).
2. 230 S.C. 320, 95 S.E.2d 601 (1956).
3. *Id.* at 325, 95 S.E.2d at 603-04.
4. For a more complete discussion of *Odom* and its implications, *see,* Note 17 S.C.L. Rev. 259 (1965).

is far from novel in other jurisdictions.[5] The court recognized that the privity requirement has recently been abandoned altogether by many courts in products liability cases.[6] A case indicating this trend which also provides an excellent summary of the implied warranty theory is *Picker X-Ray Corp. v. G.M.C.*[7]

The court pointed out that "the whole field of products liability law is still in a state of flux and development"[8] and hinted that the plaintiffs in the instant case might well be entitled to recover on some theory other than breach of an implied warranty. The cases in this state which have held a manufacturer liable to a remote vendee have generally been based on negligence in tort.[9] Of course it is a great advantage to be able to recover in warranty without having to establish privity. Proof of negligence which is essential for a recovery in tort is not required in order to recover in warranty. Dean Prosser says that although warranty is recognized as both contract and tort, "[i]t would be far simpler if it were simply said that there is strict liability in tort . . . without an illusory contract mask."[10]

After a concise but admirable review of the implied warranty area, the court concluded that these questions of novel impression were of such importance to this jurisdiction and that they could have such far reaching effects that they should not be decided on a motion to dismiss or demurrer. The trial of this case and the appeal which is almost certain to follow should be interesting to observe, as its decision could indeed be far reaching in the development of South Carolina law in the area of products liability.

II. SPECIFIC PERFORMANCE

In *Bishop v. Tolbert*[11] the South Carolina Supreme Court followed well settled South Carolina law in holding that in a con-

5. For annotation on the subject *see* 75 A.L.R.2d 39 (1961).

6. *E.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Blanton v. Cudahy Packing Co., 154 Fla. 872, 19 So. 2d 313 (1944).

7. 185 A.2d 919 (D.C. 1962).

8. Springfield v. Williams Plumbing Supply Co., Inc., 249 S.C. 130, 153 S.E.2d 184 (1967).

9. *E.g.*, Salladin v. Tellis, 247 S.C. 267, 146 S.E.2d 875 (1966); Gantt v. Columbia Coca-Cola Bottling Co., 193 S.C. 51, 7 S.E.2d 641, 127 A.L.R. 1185 (1940); Hunter v. Allied Mills, Inc., 184 S.C. 330, 192 S.E. 356 (1937). The *Salladin* case, while extending liability to the manufacturer, also held the supplier of the defective part liable.

10. W. PROSSER, LAW OF TORTS 681 (3d ed. 1964).

11. 153 S.E.2d 912 (S.C. 1967).

tract for the sale of real estate, although time is not generally of the essence when the contract is originally executed, it may be made of the essence by the situation or conduct of the parties.[12] Or if the time of performance has passed, one party may make time of the essence by giving notice to the other party that he will insist on performance by a certain date, provided, of course, that the time allowed by the notice is reasonable.[13]

The court found that time was made of the essence in this case by the vendors and since the purchasers had not tendered or offered to tender the purchase price within the extended time, they were not entitled to compel the vendors to specifically perform. For it is an established South Carolina principle that the granting of specific performance is not a matter of absolute right but rests in the sound or judicial discretion of the court,[14] whether the contract be in writing or oral.[15] And he who demands the execution of a contract, in which the covenants are dependent and concurrent, as here, must show that there has been no default in performing all that was to be done on his part.[16]

Norton v. Matthews[17] was a suit for specific performance of an alleged oral contract to devise a tract of land in consideration of services rendered. The state supreme court relied on prior South Carolina cases in refusing to enforce the alleged contract. One of the requirements for specific performance of such a contract is that the promisee shall have rendered a complete performance[18] and, if this becomes impossible, that it shall have been through no fault of his own.[19] The promisee must prove this by evidence so unquestionable that there can be no reasonable doubt as to its truth.[20] The court ruled that the promisees in this case had failed to produce that high degree of proof and, therefore, denied specific performance.

---

12. Speed v. Speed, 213 S.C. 401, 49 S.E.2d 588 (1948).

13. 91 C.J.S. *Vendor & Purchaser* § 104c (1955).

14. *E.g.*, Flowers v. Roberts, 220 S.C. 110, 66 S.E.2d 612 (1951); Mitchum v. Mitchum, 183 S.C. 75, 190 S.E. 104 (1936); Mobley v. Quattlebaum, 101 S.C. 221, 85 S.E. 585 (1914).

15. Flowers v. Roberts, 220 S.C. 110, 66 S.E.2d 612 (1951).

16. Cureton v. Gilmore, 3 S.C. 46 (1871).

17. 249 S.C. 71, 152 S.E.2d 680 (1967).

18. Samuel v. Young, 214 S.C. 91, 51 S.E.2d 367 (1949); Young v. Levy, 206 S.C. 1, 32 S.E.2d 889 (1944).

19. Young v. Levy, 206 S.C. 1, 32 S.E.2d 889 (1944); Bruce v. Moon, 57 S.C. 60, 35 S.E. 415 (1899).

20. Samuel v. Young, 214 S.C. 91, 51 S.E.2d 367 (1949).

III. BOND FOR TITLE

The Supreme Court of South Carolina in *Wahl v. Hutto*[21] turned to Arkansas[22] and Georgia[23] law in holding that a bond for title is merely an agreement to make title in the future depend upon the happening of certain conditions and is therefore an incomplete sale. South Carolina real estate cases have long recognized the conditional delivery of papers,[24] and a promise to pay a broker's commission "when the sale is completed" has been held to be conditional.[25] Based on the testimony, the court concluded that the bond for title was not a binding contract of sale but was conditional, thereby precluding the brokers from recovering commissions for a sale when the condition was not met.

IV. UNSPECIFIED PAYMENT TO CREDITOR

The United States District Court in *Davis Meter and Supply Company v. Coastal Water Company*[26] cited Williston[27] and the Restatement of Contracts[28] and was in agreement with prior South Carolina cases[29] in holding that when a debtor makes payment to his creditor without specifying to which debt the payment is to be applied, the creditor may apply the money to any debt which is due. But until all the matured debts are satisfied, the creditor cannot apply the payment to debts which are not matured nor to advances for future orders, as the creditor attempted in this case.

V. INTERPRETATION OF A CONTRACT

Dibble v. Dibble[30] arose from a controversy over a family agreement. The disputed part of the agreement provided that the four children of Mrs. Annie L. W. Dibble should share equally all gifts received by any of them from their uncle,

21. 155 S.E.2d 1 (S.C. 1967).
22. White v. Stokes, 67 Ark. 184, 53 S.W. 1060 (1899).
23. Ingram v. Smith, 62 Ga. App. 335, 7 S.E.2d 922 (1940).
24. Epps v. King, 238 S.C. 75, 119 S.E.2d 229 (1961); Alexander v. Kerhulas, 151 S.C. 354, 149 S.E. 12 (1929).
25. Hamrick v. Cooper River Lumber Co., 223 S.C. 119, 74 S.E.2d 575 (1953).
26. 266 F. Supp. 887 (D.S.C. 1967).
27. 6 S. WILLISTON, CONTRACTS § 1795 (rev. ed. 1938).
28. RESTATEMENT OF CONTRACTS § 387(b) (1933).
29. *See* Brooks v. Central Baptist Church, 185 S.C. 200, 193 S.E. 326 (1937); Hopper v. Hopper, 61 S.C. 124, 39 S.E. 366 (1901).
30. 248 S.C. 165, 149 S.E.2d 355 (1966).

Samuel Dibble, during his lifetime, with several exceptions which are irrelevant to this case. The agreement also contained the following provision:

> It is further agreed by all of the parties that nothing in this agreement shall relate to any bequest or devise the said Samuel Dibble shall make under and by virtue of his last will and testament and that none of the parties hereto, in connection with these agreements, shall be charged with any gift or bequest received from the said uncle through his last will and testament.[31]

The transaction which precipitated the dispute was the conveyance of two tracts of land on February 1, 1951, by Samuel Dibble to Wortham W. Dibble as Trustee for one of the children, Thomas W. Dibble. The land thus conveyed had been designated for Thomas in the will of Samuel Dibble that was in existence at the time that the family agreement was executed. The deed under seal recited that the conveyance was made "in consideration of the sum of Five ($5.00) Dollars, and partial appreciation of years of unselfish service by Tom W. Dibble in the management of my lands and other affairs." South Carolina documentary stamps were affixed to it in the amount of $30.00 and United States documentary stamps in the amount of $18.50, thus indicating that a substantial consideration was given for the land.

In overruling the decision of the circuit court, the South Carolina Supreme Court decided that this conveyance was not within the purview of the family agreement and therefore not required to be shared by Thomas with his brother and sisters. The lower court had ruled that this was not a case in which the court could consider the circumstances surrounding the execution of the agreement in order to interpret the above quoted proviso because the plain unambiguous language of the proviso shows that reference was to a future and not to an existing will.

The supreme court acknowledged that South Carolina cases have held that when a contract is clear and unequivocable its meaning must be determined by its content alone.[32] But they chose to rely on the cases that have held that the subject matter and purpose of the contract are to be considered in ascertaining

31. *Id.* at 170, 149 S.E.2d at 358.

32. Bruce v. Blalock, 241 S.C. 155, 127 S.E.2d 439 (1962); White v. White, 210 S.C. 336, 42 S.E.2d 537 (1947); McPherson v. J. E. Sirrine & Co., 206 S.C. 183, 33 S.E.2d 501 (1944).

the intention of the parties and the meaning of the terms they have used and that the dry meaning of the words of the contract should be so interpreted as to subserve, not subvert, such intentions.[33]

By its interpretation of the surrounding facts and the intention of the parties, the court concluded that at the time of the execution of the agreement there was in existence a will executed by Samuel Dibble containing a devise of the disputed land to Thomas W. Dibble; that the parties to the agreement knew of the will and intended to exclude that property from the agreement; that the property was conveyed in February, 1951, because of the probability that Samuel's marriage a few months earlier had revoked his prior will, and that his purpose was to convey to Thomas the property in accordance with the intention of the former will. They also concluded on the basis of the documentary stamps, the consideration recited in the deed and other evidence which it is not necessary to mention at this time that the conveyance was made for valuable consideration and not as a gift subject to the family agreement.

In *Dean v. American Fire and Casualty Company*[34] the South Carolina Supreme Court held that an insurance contract providing for payment of medical expenses for injuries resulting "through being struck by an automobile" would cover expenses incurred when the insured's automobile fell from a jack and crushed his finger. The court ruled that the quoted phrase was free from ambiguity and followed prior South Carolina cases[35] in holding that the words are to be taken and understood in their plain, ordinary and popular sense and that such construction is for the court.

VI. Arbitration Agreement

Derrick v. Compton[36] arose from an arbitration agreement and the report of the arbitration board on the three questions which had been submitted to it for determination. The board reported that one of the questions was not to be considered because the parties had mutually agreed that they had settled that question

33. Breedin v. Smith, 126 S.C. 346, 120 S.E. 64 (1923); Chatfield-Woods Co. v. Harley, 124 S.C. 280, 117 S.E. 539 (1923).

34. 249 S.C. 39, 152 S.E.2d 247 (1967).

35. Kingsman v. Nationwide Mut. Ins. Co., 243 S.C. 405, 134 S.E.2d 217 (1964); Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 128 S.E.2d 171 (1962); Quinn v. State Farm Mut. Auto. Ins. Co., 238 S.C. 301, 120 S.E.2d 15 (1961).

36. 154 S.E.2d 573 (S.C. 1967).

prior to the arbitration hearing. However, one of the parties contended that he had not agreed to a settlement.

The circuit court refused to examine the completeness of the arbitrators' report, but the state supreme court reversed, holding that when one of the parties to an arbitration agreement alleges that the arbitrators have not decided all of the issues submitted to them, the court has the power to determine whether the arbitrators have fully performed their duties. Therefore, the case was remanded to the circuit court for a review as to the completeness of the arbitrators' decision but not as to the merits of the decision.

VII. PLACE OF CONTRACTING

In *Arant v. First Southern Company*[37] the supreme court found no South Carolina cases which laid down any rules for determining where a contract was made. Therefore it followed the general rule of law that "a contract is considered as entered into at the place where the offer is accepted, or where the last act necessary to a meeting of the minds or to complete the contract . . . is performed."[38]

WILLIAM B. PATRICK, JR.

37. 153 S.E.2d 919 (S.C. 1967).
38. 17A C.J.S. *Contracts* § 356 (1963).