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Sections 2-725 and 2-318, of the Uniform Commercial Code--Their Implications in South Carolina

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COMMENTS

SECTIONS 2-725 AND 2-318, OF THE UNIFORM COMMERCIAL CODE—THEIR IMPLICATIONS IN SOUTH CAROLINA

INTRODUCTION

The purpose of this comment is to explain the function of, and resulting problems caused by, sections 2-725[1] (statute of limitation in contracts for sale) and 2-318[2] (third party beneficiaries of warranties), of the Uniform Commercial Code, South Carolina version. Section 2-725 as drafted in South Carolina is unique.[3] The consequence of this uniqueness is that actions sounding in contract or implied warranty, and even actions whose characteristics are more similar to tort, can be brought under the code provisions for an indefinite period of time.[4] The significance of this multi-suited statute becomes more meaningful when the distinction between contract and tort actions are considered.

In the typical contract action the parties to the contract have initially agreed to engage in some transaction as between themselves; in a tort action however, the parties have normally not consented to any dealings between themselves.[5] Moreover, the rights and duties flowing from a contract are expected and accepted by the parties to the contract, but the rights and duties in a tort action are normally imposed by law without regard to any notion of consent.[6] Comparing this with the hybrid nature of implied warranty, we find at the onset a buyer and seller who have agreed to contract, and who know that some rights and duties will attach to their conduct. As between the parties to the contract, implied warranty developed as a cause of action; liability being based on tort law.[7] Thereafter, implied warranty came to be part

1. S. C. CODE ANN. § 10.2-725 (Supp. 1966).
2. *Id.* § 10.2-318.
3. *See* 1 U.L.A.—U.C.C. § 2-725 for a summary of the various changes in this section made by the individual states adopting the U.C.C.
4. This point will be illustrated in the text following.
5. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 634 (3d ed. 1964) [hereinafter cited as PROSSER].
6. *Id.*
7. *Id.* at 651.

of the contract for sale, but liability on the seller's part is imposed by law and is not due to any idea of assent.[8] Tort actions can further be characterised as a legal effort to restore an aggrieved party, as best as is possible, to his original position before the occurrence of the event that gave rise to the action;[9] contract actions however, seek to recompense the aggrieved party by fulfilling his expectation of performance as defined and contemplated in the original contract between the parties.

An even more fundamental difference between contract and tort actions can be discovered by looking to the interests that the two fields of law seek to protect. Tort law is designed to protect the injured party's interest in his personal safety and property;[10] contract law endeavors to safeguard the interests of each party by insuring that the promises bargained for will be performed.[11] It is therefore, not surprising to find courts using different rules and standards in the several types of actions. Privity, as a prerequisite in a general contract action, is logically comprehensible due to the consensual nature of the agreement between the contracting parties, but, privity, as a requirement in an implied warranty action, has no place in that liability is not predicated upon consent. Tort actions, not being consensual in nature, are not easily adaptable to contract rules, and that problems, both practical and theoretical, will arise when such adaptation is attempted, should not be unexpected.

SECTION 2-725

The uniform version of section 2-725[12] appears in part as follows:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accured. By the original agreement he parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such

8. *Id.*
9. R. MCCORMICK, DAMAGES § 137 (1935).
10. PROSSER, at 634.
11. *Id.*
12. 1 U.L.A.—U.C.C. § 2-725.

> performance the cause of action accrues when the breach is or should have been discovered.[13]

As can be seen above, the uniform section gives a four year period reducible to one year. Also, the cause of action accrues when the breach occurs whether or not the other party to the contract is aware of the breach. It is to be noticed that the breach dates from tender of delivery unless the warranty explicitly looks to future performance. Thus, with the exception of explicit future warranties, the uniform section does not attempt to adapt the contract limitations period to a tort type period that would commence upon discovery of the breach, for example, an injury.

South Carolina's version of section 2-725[14] is a radical departure from the uniform version. Section 2-725, in part, reads as follows:

> (1) An action for breach of any contract for sale must be commenced within six years after the cause of action has accrued.
> (2) A cause of action accrues for breach of warranty when the breach is or should have been discovered.[15]

A comparison of South Carolina's version with the uniform provision accentuates the numerous differences. The South Carolina section does not allow the parties to reduce the period of limitations under any circumstances; this is consistent with pre-code statutory law in South Carolina.[16] Moreover, the length of the limitations period is six years in South Carolina[17] as compared to four in the uniform section, and a cause of action for breach of warranty accrues when the breach is or should have been discovered, apparently in all cases whether the warranties are present or prospective. The effects of these departures from the uniform version will be discussed below.

SECTION 2-318

As section 2-725 relates to a contract for sale, its outer scope must be considered in light of section 2-318[18] (third party beneficiaries of

13. *Id.* subsections (3) and (4) are omitted.
14. S. C. CODE ANN. § 10.2-725 (Supp. 1966).
15. *Id.* The South Carolina Comments to this section were written before the existing changes were made; thus, the comments are of no assistance in interpretation.
16. S. C. CODE ANN. § 10-166 (1962), provides that any effort to reduce the limitations period in any contract for the sale of goods is wholly without effect for that purpose.
17. S. C. CODE ANN. § 10-143 (1962), which provides a six year limitations period.
18. S. C. CODE ANN. § 10.2-318 (Supp. 1966).

warranties). Again, South Carolina's version varies from the uniform provision,[19] and provides that:

> A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of warranty. A seller may not exclude or limit the operation of this section.[20]

Thus, the scope of section 2-318, and therefore the scope of section 2-725, is extensive, but it is to be remembered that section 2-316[21] could well operate so as to destroy the effectiveness of section 2-318.[22]

Section 2-316 allows a seller to effectively exclude all warranties, not only against the buyer, but as against innocent third party beneficiaries under section 2-318 as well. This allowance of waiver or exclusion does not seem to be a desirable result if only negligence actions remain to vindicate those third party claims. An implied warranty action in favor of the injured party is imposed by law as a policy matter; its existence, as discussed before, is not premised on the idea of consent. Thus, to allow an expressed policy to be so easily circumvented, does not appear consistent with the purpose and policy expressed by section 2-318. The efficacy of a negligence action against a wholesaler or retailer may be negligible, because these persons may not

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19. 1 U.L.A.-U.C.C. § 2-318 provides for three alternatives. South Carolina adopted alternative B which was modified to the extent that its effects seem more akin to alternative C.

20. South Carolina's version is unique in its wording. *See* 1 U.L.A.—U.C.C. § 2-318 for other state variations.

21. S. C. CODE ANN. § 10.2-316 (Supp. 1966) provides in part:

> *Exclusion or Modification of Warranties*
>
> (3) Notwithstanding subsection (2)
>
> (a) Unless the circumstances indicate otherwise, all implied warranties are excluded by specific language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
>
> (b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
>
> (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or, between merchants, by usage of trade.

22. *See Id.* § 10.2-318, Official Comment 1.

be guilty of any culpable act.[23] What then, is the result where the manufacturer is not within the jurisdiction nor can be forced within it by use of a "long-arm" statute? It is noted that South Carolina does have a "long-arm" statute;[24] this provision is curiously found in the uniform commercial code section and is entitled "Further Remedies." As the provision applies to jurisdiction in general, and not solely to the Uniform Commercial Code, it is hoped that the 1972 codification will relocate the statute to a more appropriate title. Aside from the matter of determining the full reach of the "long-arm" statute, there would still be cases where the manufacturer, for one reason or another, cannot be forced within jurisdiction of the state. For example, if the manufacturer operated through mail orders and had no property within the state, then obtaining jurisdiction would be very difficult without the manufacturer's voluntary appearance.

Assuming there is no effective elimination of warranties,[25] sections 2-725 and 2-318 may interact in such fashion as to allow actions to be brought under their provisions which are tort, as well as contract and warranty, in nature. To illustrate the above point, assume that a simple purchase of an automobile is transacted by purchaser, P. Assume further, that P's new car has defective brakes upon delivery. If a subsequent collision, due to the bad brakes, causes injury to P and his guest, G, then actions in favor of P and G against the seller and/or manufacturer would lie in negligence[26] and warranty. If we now include bystander, B, who is also injured, it seems that section 2-318 can accommodate B's seemingly negligence action against the seller and manufacturer on the theory of breach of implied warranty. B is a person, under section 2-318, who may be expected to be affected by an automobile with defective brakes.

In South Carolina, B's warranty action will be further assisted by

23. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1117 (1960).

24. S. C. CODE ANN. §§ 10.2-801 *et seq.* (Supp. 1966); *see* Research Corp. v. Textured Fibers, Inc., 310 F. Supp. 491 (D.S.C. 1970) holding that the including of South Carolina's long arm statute in the U.C.C. does not violate the South Carolina Constitution, art. 3, § 17 which provides that every act having force of law shall relate to but one subject, and that shall be expressed in the title.

25. *See, supra* note 21.

26. *See, e.g.*, Salladin v. Tellis, 247 S.C. 267, 146 S.E.2d 875 (1960), which adopted *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

another change from the uniform act in section 2-607.[27] South Carolina's version of this section does not require the injured party to notify the seller in case of personal injury arising from a sale of consumer goods. Using another illustration, and assuming the automobile above had defective steering when sold, but that the defect was not discoverable by due care and maintenance, we can observe a situation in which the seller or manufacturer can be sued for breach of warranty, five, ten or even fifteen years after the initial sale. As the statute of limitation does not commence until the defect is or should have been discovered, the steering defect which caused the accident might not be discovered until a subsequent accident some years after the sale. The plaintiff, from the time of such accident, would have six years in which to commence his action against the seller, and/or, manufacturer. Some might say that it would be all but impossible to convince a jury that a car possessed a latent defect, undiscoverable for ten years by due care and maintenance, but those who are in doubt should consider the following case.

In *Mickle v. Blackmon*,[28] an accident occurring in 1962 resulted in the plaintiff being impaled on the gearshift level of a 1949 Ford automobile, thereby causing plaintiff to be paralyzed from the breast downwards. The cause of action against Ford Motor Company alleged negligence in the design and composition of the gearshift lever as well as the ball attached to the lever for purposes of shifting. The jury found Ford negligent, awarded $312,000 actual damages, and the trial court granted Ford's motion for judgment notwithstanding the verdict from which plaintiff appealed. The state supreme court adopted, as a statement of law, a passage in PROSSER ON TORTS[29] which reads as follows:

> If the chattel is in good condition when it is sold, the seller is not responsible when it undergoes subsequent changes, or wears out. The mere lapse of time since the sale by the defendant, during which there has been continued safe use of the product, is always

27. S. C. CODE ANN. § 10.2-607 (Supp. 1966) provides in part:
(3) Where a tender has been accepted
(a) The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; however, no notice of injury to the person in the case of consumer goods shall be required; and . . . .

28. 252 S.C. 202, 166 S.E.2d 173 (1969).

29. PROSSER, at 667.

> relevant, as indicating that the seller was not responsible for the defect . . . . It is, however, quite certain that *neither long continued lapse of time nor changes in ownership will be sufficient in themselves to defeat recovery when there is clear evidence of an original defect in the thing sold.*[30]

Later in the *Mickle* opinion, the court noted that a lapse of thirteen years between the sale and injury is a "formidable obstacle to fastening liability upon the manufacturer. However, it may reasonably be inferred in this case that the advanced age of the ball was coincidental with its failure rather than the cause of it . . . ."[31] The court then ruled that it was error to grant the judgment *non obstante veredicto,* but allowed Ford a new trial due to error in instructing the jury. It should be noted that if a case similar to *Mickle* arose today, it could be maintained under the provisions of sections 2-725 and 2-318.

PRACTICAL PROBLEMS

As discussed above, South Carolina's variations in sections 2-725 and 2-318 will allow tort type actions under the warranty provisions. What problems will be encountered with these deviations will now be considered. Procedural problems, that are likely to have grave effects on substantive results, are bound to occur. For example, certain rules of evidence, such as *res ipsa loquitur* or its equivalent,[32] are applicable to negligence actions;[33] indeed, they may allow a plaintiff to prevail in many products liability cases where he would otherwise not reach the jury.[34] In theory at least, *res ipsa loquitur,* as a doctrine, is not applicable to general contract actions, nor warranty actions, but a realistic approach would offer good reason to believe that the doctrine will be utilized in warranty actions.[35] When a given court attempts to determine the rules applicable to a particular case, such rules normally are considered in light of the nature of that case, either contract or tort. It would appear that in a tort type warranty action, a court must, of

30. 252 S.C. at 237, 166 S.E.2d at 189 [Emphasis added by court].

31. *Id.* at 240, 166 S.E.2d at 190; for other cases upholding a verdict after a long lapse of time between sale and injury *see* Holifield v. Setco Indus. Inc., 42 Wis. 2d 750, 168 N.W.2d 177 (1969), Ulmer v. Ford Motor Co., 452 P.2d 729 (1969).

32. *See* Merchants v. Columbia Coca-Cola Bottling Co., 214 S.C. 206, 51 S.E.2d 749 (1949), for an example of South Carolina's use of circumstantial evidence in this area.

33. PROSSER at 684.

34. *Supra* note 23 at 1114-15.

35. PROSSER at 684.

necessity, do the illogical and cumbersome task of borrowing rules and standards it feels appropriate.[36] But, the question is *which* rules and standards to borrow? It necessarily follows that these *ad hoc* decisions will, in some instances, cause confusion and even bewilderment to the parties. Some of those decisions will include the proper measure of damages, whether or not the action is one that survives, does immunity exist, is recovery for wrongful death allowed, is the claim assignable, what remedies are available, and which statute of limitation is to be applied.[37]

The above problems are by no means exhaustive; consider further the problem of deciding which defenses are to be utilized in a tort type warranty action. In a given case should assumption of risk, or contributory negligence, be a defense? The case of *Guarino v. Mine Safety Appliance Co.*,[38] points to yet another perplexity. In *Guarino* the surviving plaintiffs and administrators of decedents' estates sued the seller-manufacturer of an oxygen mask for wrongful death and injury on the theory that breach of implied warranty can function as a basis for the application of the "danger invites rescue" doctrine. The seller had manufactured a defective oxygen producing mask which was utilized by a co-worker of the plaintiffs[39] while he was working in the New York sewer system. During work, the mask malfunctioned and a plaintiff co-worker removed his mask to summon aid; other plaintiff co-workers paid heed to the call and entered the sewer, without masks, to assist. As a result of the rescue effort three plaintiffs were killed and the others were seriously injured due to the presence of poisonous gases permeating the sewer complex. The trial court held for all the plaintiffs upon the theory presented, and the New York Court of Appeals affirmed while noting that the rescue doctrine traditionally applied to negligence actions. But, in a case where one person's wrongful act, whether characterised as negligent or breach of implied warranty, causes another's life to be placed in peril, and as a result thereof, rescue efforts are undertaken, then the doctrine should be applied.

36. *Id.*

37. *Supra* note 23 at 1126, *see also* PROSSER at 684.

38. 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969).

39. The estate of the victim with the malfunctioning mask recovered against the seller in *Rooney v. Healy Co.*, 20 N.Y.2d 42, 228 N.E.2d 383, 281 N.Y.S.2d 321 (1967); the *Guarino* court held the seller bound by the trial court finding in *Rooney*, that there was a breach of implied warranty.

It is important to note that *Guarino* did apply the rescue doctrine to a contract action,[40] and that liability for breach of implied warranty was extended to a non-user of the product who was not directly injured by the defective product. It is fortunate for the plaintiffs that the New York court arrived at what appears to be a fair solution. One wonders how many other courts would have been able to unshackle themselves from the confines of contract law; one wonders further whether or not there is a need for courts to face such problems as those caused by the forced interaction of contract and tort prinicples.

Separation of tort and contract actions would give adequate notice to plaintiffs and defendants as to the applicable rules and standards that would govern their actions; and, therefore, there would not be a need to await a strained, but appropriate, application of a doctrine, rule, standard, or procedure. It is submitted that the trial court is neither designed for, nor suited to making decisions which greater legislative foresight would have avoided.

South Carolina's variations from the uniform model of the U.C.C. have resulted in expanding the plaintiff's power under the code provisions.[41] The policy itself, to offer more protection to consumers, is laudable. What is questioned is the means chosen to achieve that end; that is, alteration of a contract limitation period and use of an often fictitious theory such as the third party beneficiary, does not resolve many problems that will inevitably arise due to the hybrid nature of a warranty action. The above problem is somewhat mitigated if no legislative intent is presumed with reference to remedies available.

Does the code, in fact, express the intent that Article II shall be the plaintiff's exclusive remedy when its provisions concerning the sale of goods can be applied? At least one court has indicated that such intent was to be found. In *Mendel v. Pittsburg Plateglass Co.*,[42] the New York Court of Appeals decided an action brought on the theories of negligence, strict tort liability, and breach of implied warranty. At the time of the accident the contract limitations period was six years[43] and

40. Mendel v. Pittsburg Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969), established that breach of implied warranty was a contract action.

41. This expansion was caused by §§ 2-725 and 2-318.

42. 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

43. N.Y.CIV. PRAC. § 213 (McKinney 1963).

the code was not yet in effect.[44] The court indicated, however, that the code would control a similar accident since its effective date, and that the legislature, through sections 2-725 and 2-318, had expressed an intention to have the code provisions applied exclusively to the U.C.C.'s area of law. As a result of this interpretation the court rejected any implication that after *Goldberg v. Kollsman Instrument Corp.*,[45] strict liability in tort existed in New York. That decision reduced plaintiff's theories by one, and as it turned out, plaintiff finished the day with but one theory, that of negligence. It seems that the applicable six year statute on contracts, which applied to the breach of warranty action, had commenced to run on the sale of the product—here, a plateglass door. As the accident occurred more than six years after sale, the plaintiff's cause of action was barred by the limitations period, even before the injury, and thus the accrual of the cause of action. Although a case such as *Mendel* could not occur in South Carolina due to the design of section 2-725, it does serve to illustrate a court's sensitivity to legislative intent, whether actual or implied.

It is urged that the Uniform Commercial Code itself is not sufficient to accomplish the desiderata; however, the legislature has attempted to protect the consumer and third parties by changes in sections 2-725 and 2-318. Such would seem to indicate sensitivity to a problem rather than any desire to impede or stunt the growth of outside law in a related area. Indeed, the South Carolina courts have become sensitive to the needs of the consumer.

In *Salladin v. Tellis Pharmacy*,[46] the South Carolina Supeme Court adopted the rule set out in *MacPherson v. Buick Motor Co.*[47] Later, in *Springfield v. Williams Plumbing Supply Co.*,[48] the state supreme court refused to sustain a demurrer to an action based on breach of implied warranty where no privity was existing between plaintiff and defendant. The *Springfield* opinion cited section 2-318 of the Uniform Commercial Code, which had not yet become effective, and said "[I]t is cited only to show recognition by the legislature of the

44. The Code's effective date in New York was September 27, 1964, MCKINNEY'S UNIFORM COMMERCIAL CODE, §§ 1-101 to 10-105.

45. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

46. 247 S.C. 267, 146 S.E.2d 875 (1966).

47. 217 N.Y. 382, 111 N.E. 1050 (1916).

48. 249 S.C. 130, 153 S.E.2d 184 (1967).

need for departure from a strict rule of privity in products liability cases."[49] In 1968, *Rogers v. Scyphers*[50] was decided by the supreme court. *Rogers* held that a builder-vendor of a new house is liable to the purchaser or his invitees for injuries sustained, if the builder-vendor negligently or willfully fails to reveal dangerously defective construction of which he has knowledge or should have knowledge in the exercise of due care.

In June of 1968, *Smith v. Regina Manufacturing Corp.*[51] was decided by the Fourth Circuit. In *Smith,* Sears Roebuck had put its own label on a floor polisher manufactured by Regina; the lower court held for the plaintiff against both parties in an action brought by Smith due to personal injuries sustained because the floor polisher was defective. No law on point existed in South Carolina at the time of the decision. The federal court reasoned that section 2-314[52] of the U.C.C., not effective at the date of injury, evidenced the state's willingness to accept the rationale of section 400, RESTATEMENT (SECOND) OF TORTS;[53] thus, the court affirmed the decision of the lower court. The latest South Carolina case in the area is *Rutledge v. Dodenhoff.*[54] *Rutledge* involved the sale of a new house, by the builder-vendor, with a faulty septic tank. The court held that in such a sale there was an implied warranty of habitability and that the house was build in a reasonably workmanlike manner. The cases above illustrate South Carolina's recognition that law must meet the changing times.

CONCLUSION

It is hoped that this recognition will not be thwarted by the variations in sections 2-725 and 2-318 of the U.C.C. It appears likely that our changes from the uniform section could result in needless confusion and some cases that are wrongly decided. Inasmuch as it is unlikely that section 2-318 will be repealed, or that section 2-725 will be made to conform with the uniform section, it is urged that the development of the law, outside the code, should be encouraged. The

49. *Id.* at 137, 153 S.E.2d at 187.
50. 251 S.C. 128, 161 S.E.2d 81 (1968).
51. 396 F.2d 826 (4th Cir. 1968).
52. S.C. CODE ANN. § 10.2-314 (Supp. 1966).
53. RESTATEMENT (SECOND) OF TORTS § 400, Comment *M* (1965).
54. 254 S.C. 407, 175 S.E.2d 792 (1970).

code remedy need not be exclusive,[55] and in cases where the code may not be applicable, such as leases and services,[56] there is also a good opportunity to develop sound law.[57]

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55. In *Greeman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697, (1962), California recognized that warranty actions arose not from the sale, nor was it dependent upon the existence of any contract, but was imposed by law, in tort, as a matter of public policy. Note also, that section 2-318 of the U.C.C. in California was not considered.

56. It seems that the liability imposed by warranty is limited to sellers of goods; *See* S.C. CODE ANN. §§ 10.2-103 (1)(d), 10.2-106 (1), 10.2-313 (1)(a), 10.2-314(1), 10.2-315; *but cf.* § 10.2-313, comment 2.

57. It is noted that the South Carolina Supreme Court in *Springfield, supra* note 48, at 136, recognized the trend toward adopting RESTATEMENT (SECOND) OF TORTS § 402 (A).