

**95-LW-2741 (10th)**

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EBCO Manufacturing Company, Plaintiff-Appellant

v.

Eaton Corporation, Defendant-Appellee

No. 94APE08-1147.

10th District Court of Appeals of Ohio, Franklin County.

Decided on April 20, 1995.

APPEAL from the Franklin County Court of Common Pleas.

Ray, Todaro & Alton Co., L.P.A., Frank A. Ray and John M. Alton, for appellant.

Quarles & Brady, and Michael H. Schaalman; Benesch, Friedlander, Coplan & Aronoff, and John F. Stock, for appellee.

OPINION

DESHLER, J.

Appellant, EBCO Manufacturing Company ("EBCO"), appeals from a judgment of the Franklin County Court of Common Pleas in favor of appellee Eaton Corporation ("Eaton"). EBCO is a large manufacturer of drinking water dispensing equipment. Included among its many employees are product engineering and testing staff personnel. Among EBCO's products are drinking water dispensers which can, for purposes of this case, be categorized as "drinking fountains," which dispense water at a temperature dependent only upon the temperature of the water supply, and "water coolers," which incorporate a refrigeration unit to cool the water before dispensing it.

As of October 31, 1988, the material lead content of water coolers, but not drinking fountains, had been regulated by the Lead Contamination Control Act ("LCCA"), 42 U.S.C. Section 300j-21 *et seq.*, setting an allowable limit of 8 percent lead content in brass fittings and .2 percent lead content in solder which would come in contact with drinking water. Because of EBCO's leading position in the water cooler industry, EBCO representatives participated in comment and testimony before Congress on the proposed legislation.

In February 1990, EBCO's chief chemist, Gordon Wells, discovered that the source of lead leaching into the water of EBCO's wheelchair water cooler was the model S-30 solenoid (electrically actuated) valve manufactured and sold to EBCO by Eaton. Specifically, the filter screen assembly of the S-30 valve was assembled with 20 percent lead solder, far in excess of the .2 percent permitted under the LCCA. EBCO ultimately was subjected to a \$220,000 fine for LCCA violations due to sale of lead-leaching water coolers between the time of enactment of the LCCA and February 1990.

EBCO then brought suit on October 6, 1992, against Eaton alleging, *inter alia*, that Eaton had breached an implied warranty of fitness for a particular purpose by selling 12,700 model S-30 solenoid valves to EBCO between November 1, 1988 and February 1, 1990 which contained lead solder in violation of the LCCA. EBCO sought to recover the EPA civil penalty, attorneys' fees, warranty cost of aftermarket replacement of S-30 valves, labor and advertising costs incurred in the replacement program, and other damages, for total consequential damages in excess of \$602,000. Following extensive discovery and an eight-day bench trial, the trial court issued a decision adopting Eaton's proposed findings of fact and conclusions of law, concluding that no warranty of fitness for a particular purpose existed between the parties, no warranty of merchantability arose, that Eaton had in any event successfully disclaimed any implied warranties, and that Eaton had contractually limited its liability for consequential damages so that EBCO could not recover regardless of liability. The trial court entered judgment accordingly on July 19, 1994.

EBCO has timely appealed and brings the following four assignments of error:

"1. EATON'S SALE OF S-30 SOLENOID VALVES WHICH CONTAINED 20% LEAD IN THE SOLDER OF THE SCREEN ASSEMBLY, PLACING EBCO IN VIOLATION OF THE LCCA, BREACHED THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE AS A MATTER OF LAW.

"2. ASSUMING THAT ASSIGNMENT OF ERROR NO. 1 IS SUSTAINED, THE TRIAL COURT'S CONCLUSION THAT EATON EFFECTIVELY DISCLAIMED THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE IS CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

"3. ASSUMING THAT ASSIGNMENT OF ERROR NO. 1 IS SUSTAINED, THE TRIAL COURT'S CONCLUSION THAT EATON EFFECTIVELY DISCLAIMED LIABILITY FOR CONSEQUENTIAL DAMAGES IS CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

"4. COURT COSTS ORDERED BY THE TRIAL COURT DO NOT INCLUDE THE COST OF THE TRIAL TRANSCRIPT TO ENABLE THE PREVAILING PARTY TO RESPOND TO AN APPEAL."

EBCO's first assignment of error is phrased as a conclusion of law and must be addressed as a manifest weight argument because of the factual context in which an implied warranty may arise. Upon reviewing a decision of a trial court under manifest weight arguments, our standard of review is that "judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." C.E. Morris Co. v. Foley Const. Co. (1978), 54 Ohio St.2d 279, syllabus. Because the trial court is best situated to observe the demeanor and voice inflections of witnesses, due deference must be granted to the trial court's determination of the weight given and the credibility of proffered testimony. Seasons Coal Co., Inc. v. City of Cleveland (1984), 10 Ohio St.3d 77. The Uniform Commercial Code implied warranty of fitness for a particular purpose (UCC Section 2-315) is codified in Ohio at R.C. 1302.28:

"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 section 1302.29 of the Revised Code [exclusion or modification of warranties] an implied warranty that the goods shall be fit for such purpose.

Ohio courts have set forth the following test in determining whether an implied warranty of fitness for a particular purpose exists:

"1. the seller must have reason to know the buyer's particular purpose;

"2. the seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods;

"3. the buyer must, in fact, rely upon the seller's skill or judgment." Richardson v. Thomas (Mar. 29, 1994), Butler App. No. CA93-06-112, unreported, citing Hollingsworth v. The Software House (1986), 32 Ohio App.3d 61. See, also, Delorise Brown, M.D., Inc. v. Allio (1993), 86 Ohio App.3d 359.

Initially we note that all of EBCO's damages in this case stem from a violation of the LCCA. If a relevant warranty of fitness for a particular purpose is to be found, it is restricted to a warranty that any components supplied by Eaton would conform to LCCA requirements. For that reason, we find inapplicable much of the argument generally advanced by EBCO to the effect that an industry standard of lead-free solder existed for all drinking water applications and that Eaton, by analogy to products liability law, has an obligation to indemnify EBCO because Eaton is the manufacturer of a defective component which has led to liability for the ultimate assembler. In the case before us, liability for EBCO does not arise because of any injury to a consumer due to the lead content of the water dispensed from the wheelchair water cooler. The actual potable quality of the water dispensed by the water cooler is not at issue, except in strict relation to the component lead content requirements established under the LCCA. The soldered screen assemblies employed in similar 5-36 valves in drinking fountains, as opposed to water coolers, produced by EBCO have not given rise to damages, either in tort or in the form of LCCA penalties.

Because the existence of an implied warranty must be addressed with an eye only towards LCCA violations, the three necessary elements in order for a warranty of fitness of a particular purpose to arise will be rephrased in this factual context: 1. Was Eaton aware that EBCO intended to incorporate the S-30 valve into a water cooler subject to the lead content restrictions of the LCCA; and

2. Did Eaton have reason to know that EBCO was relying on Eaton's skill or judgment to furnish components in compliance with the LCCA;

3. Did EBCO, in fact, rely upon Eaton's skill or judgment.

There is conflicting testimony in the record on whether Eaton was aware of the water-cooler application of some of the S-30 valves sold to EBCO and whether LCCA restrictions might apply. Eaton's salesman for the EBCO account over part of the period in question, James Kaumheimer, testified that he may have been aware of the LCCA lead restrictions as early as 1988 or 1989. Kaumheimer was more clearly certain that he was aware that some of the S-30 valves ordered by EBCO were intended for drinking water coolers. Eaton's sales manager, James Schiesser, was similarly aware that the S-30 valves in question were intended for water cooler applications. Schiesser also testified, however, that he was not aware of the LCCA until he was contacted by EBCO's chemist, Gordon Wells, in February 1990. Schiesser's testimony was that neither he nor Eaton's engineering department had ever been told about potential application of the LCCA to valves sold to EBCO prior to February 1990. Schiesser would have expected his sales representative, Kaumheimer, to convey this information once informed of it by a customer.

Edward Nowak, Eaton's former Environmental Health and Safety Manager testified that he became aware of the impending passage of the LCCA in late 1988 or early 1989 through trade publications, and had discussions with a legal department representative of Eaton's in Washington D.C. to obtain more information about the LCCA. Nowak obtained a copy of the preliminary draft of the LCCA and discussed its potential impact upon some of Eaton's products with other Eaton officials. Nowak testified that he did not follow up by obtaining a final copy of the bill although he was aware that it had passed in some form.

In contrast, numerous current and retired Eaton executives, including Robert Ajax, former business unit manager of the specialty products line, James Pick, manager of engineering, and Robert Cooper, control division engineering manager, all testified that they were not aware of the LCCA until February 1990 or later.

Because of the above conflicting testimony, and in particular because of James Kaumheimer's rather ambiguous recollection of his LCCA discussions with EBCO purchasing personnel, there is competent and credible evidence in the record to support a conclusion that, although Eaton had reason to know that the valves would be placed in the water coolers, Eaton did not have reason to know that these water coolers would be covered by the LCCA and thus require special attention to the lead content of components. The evidence supports a conclusion that EBCO failed to establish that the first prong of the test for an implied warranty of fitness for a particular purpose was met in this case, and the trial court's decision is not against the manifest weight of the evidence.

Furthermore, we must find that the second prong of the warranty test has not been established. EBCO enjoyed a more thorough knowledge of its own technical requirements for water cooler components than did Eaton, and certainly had a higher degree of knowledge regarding the requirements of the LCCA. [T]he implied warranty of fitness of UCC § 1302.28 [sic] is not readily applicable when the buyer enjoys skill or knowledge equal to that of the seller. Indeed, some courts have concluded that the implied warranty of fitness is unavailable when the skill and knowledge of the buyer is superior to that of the seller." Price Bros. Co. v. Philadelphia Gear Corp. (1981), 649 F.2d 416, 424. EBCO's employment of a substantial engineering staff, of its own staff chemist for water contamination analysis, and EBCO's extensive involvement with the drafting and enactment of the LCCA all militate against any expectation that Eaton should have spontaneously assumed responsibility for component compliance with the LCCA in the absence of any instruction from EBCO on the subject.

In November 1988, after the enactment of the LCCA, EBCO transmitted to Eaton a request for certification that all Eaton components would in the future comply with Food and Drug Administration and National Sanitation Foundation standards. While these standards did not address lead content in components, Eaton provided the requested certification compliance to EBCO. The relevant EBCO certification drawings contained no material specifications addressing lead content. Given at least the equal footing of the two parties with regard to the technical requirements of water coolers, the undeniably greater knowledge of EBCO with regard to the requirements imposed on its own products by the LCCA, and EBCO's failure to explicitly convey any LCCA concerns with respect to the S-30 valve when it had the opportunity to do so, the record does not support a finding that Eaton had reason to know that EBCO relied upon Eaton's skill or judgment to furnish components in compliance with the LCCA. The second prong of the implied warranty test is therefore not met.

Whether the third element of warranty creation, actual reliance by EBCO upon Eaton, is met is rendered irrelevant by EBCO's failure to demonstrate that Eaton had reason to know of that reliance, and the third prong of the test need not be addressed.

Based upon the foregoing, the trial court's determination that no implied warranty of fitness for a particular purpose arose in this case is supported by the record, and EBCO's first assignment of error is accordingly overruled.

EBCO's second and third assignments of error address disclaimer of warranties if, in fact, such warranties exist; since we have determined that no warranty existed, any discussion of disclaimer is unnecessary, and EBCO's second and third assignments of error are rendered moot.

Appellant's fourth assignment of error relates to an item included in bill of costs filed by appellees with the trial court. Appellant does not appear to assign as error the general language in the court's judgment entry providing that Eaton, as prevailing party, shall recover its costs from EBCO, but only the inclusion of certain expenses allegedly related to the defense of this appeal, which would not normally be taxable as costs in the trial court.

Eaton filed its "notification of its filing of costs bill" as a post-trial motion on October 4, 1994, nearly two months after EBCO filed the notice of appeal in this case. The record does not contain a judgment entry by the trial court approving or disapproving the contested cost item. Absent a specific determination by the trial court reflected by a judgment entry on this issue, the question is not properly before us on appeal. Since the trial court has not addressed the issue with any finality, the issue of the contested cost item should be addressed by the trial court upon further proceedings initiated by the parties.

In accordance with the foregoing, appellant's first assignment of error is overruled, appellant's second and third assignments of error are rendered moot, and appellant's fourth assignment is determined to be not properly before this court for consideration. The judgment of the Franklin County Court of Common Pleas in favor of Eaton Corporation is affirmed, and this cause is remanded for resolution of post-trial issues related to Eaton's recovery of costs from EBCO.

Judgment affirmed.

YOUNG and CLOSE, JJ., concur.