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BREACH OF WARRANTY — PUNITIVE DAMAGES

Plaintiff Craig claimed compensatory and punitive damages in a breach of warranty action against Spitzer Motors of Columbus for misrepresenting the condition of a 1957 Dodge.¹ The salesman claimed the car was a demonstrator's model with only 51 miles on it, when in fact he knew that the automobile had been repossessed after the first owner had used it to haul a house trailer from Ohio to Florida. After forcing the plaintiff to elect to rescind or to affirm the contract of sale, the trial court granted defendant's motion to strike plaintiff's allegation of malicious fraud and a prayer for punitive damages. To justify its action, the court relied on the rule that in a suit for fraud the measure of damages is the difference between the value of the car as represented and the actual value received. When the claim for punitive damages was stricken, plaintiff suffered final judgment and appealed to the Franklin County Court of Appeals, where the case was reversed and remanded to the trial court. The higher court refused to recognize defendant's contention that punitive damages could not be awarded in a breach of warranty action. It held that the obligation of express warranty is one imposed by law, and an action for its breach was originally considered to be a tort action. Thus, plaintiff's petition was declared sufficient to sustain claims of punitive as well as compensatory damages.

Although the technical common-law forms of action have been abolished in states where code pleading exists, the inherent distinctions between actions *ex contractu* and actions *ex delicto* linger on.² The validity of these distinctions in actions for fraud in the sale of personal property is doubtful. A petition alleging the existence of a contract and a breach by the defendant for misrepresenting the consideration or the subject of the contract is usually held to sound in contract,³ while one that alleges the sale, the fraud, and the breach of duty owed to the plaintiff by the defendant is held to sound in tort,⁴ even though the fact situations are similar. An action *ex contractu* will preclude a plaintiff from recovering punitive damages,⁵ except in cases of breach of promise to marry,⁶ and those in which an independent wilful tort has been committed.⁷ An action in tort may include punitive damages. The issue as to whether a certain petition sounds in tort or contract is especially important in Ohio because of the rule that a pleading sounding in tort cannot be amended so as to

1. *Craig v. Spitzer Motors of Columbus, Inc.*, 160 N.E.2d 537 (Ohio Ct. App. 1959).
2. *De Fiore v. Peffers*, 124 N.E.2d 733 (Ohio Ct. App. 1955); OHIO JUR. 2d *Actions* § 16 (1953).
3. *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922).
4. *De Fiore v. Peffers*, 124 N.E.2d 733 (Ohio Ct. App. 1955).
5. *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922).
6. *Duvall v. Fuhrman*, 5 Ohio C.C.R. 305 (Cir. Ct. 1887).
7. *P., C., C. & St. L. Ry. v. Ensign*, 6 Ohio C.C. Dec. 616 (1894).

change the action into one sounding in contract and vice versa.⁸ A new development in this problem occurred in 1958 when the Ohio Supreme Court in *Rogers v. Toni Home Permanent Company*⁹ held that privity of contract was not necessary to recover for breach of an express warranty. The court did not state whether breach of warranty is a tort or a contract action. Thus, breach of warranty in Ohio now seems to be a separate action, which contains elements of both tort and contract.

A further problem is that any action involving the sale of personal property should be pleaded to conform to the provisions of the Ohio Sales Act.¹⁰ However, a breach of warranty action claiming fraud could be classified under three different sections of the Sales Act.¹¹ The remedy under each section is different. As would be expected, the cases in Ohio have been inconsistent because of the alternative remedies provided by the act. For example, in *Saberton v. Greenwald*,¹² an action for fraud in the sale of a watch was held to be *ex delicto* and not forbidden by Ohio Revised Code section 1315.70 or section 1315.74. The Ohio Supreme Court in that case held that had the action been in contract, section 1315.70 of the Ohio Revised Code would apply; but since it was a tort action, plaintiff's remedy must conform to section 1315.74 of the Ohio Revised Code. For this reason a verdict including punitive damages was upheld.

In *Lucas v. Burt W. Kemmerling Company*,¹³ the same problem was viewed in a slightly different way. In that case plaintiff was defrauded in the sale of a truck and sued for breach of warranty. He claimed special damages under section 1315.71 of the Ohio Revised Code to recover for a loss incurred when he was forced to breach a contract with a third party because of the defective condition of the truck he had bought. The court held that the breach of this contract presented some evidence of damage, but that a better method to determine damages was to find the reasonable value of the loss suffered from plaintiff's inability to use the truck due to the seller's breach of warranty. Thus, the question of special damages was given to a jury for determination.

In each of these cases, there was a sale and a breach of a condi-

8. *De Fiore v. Peffers*, 124 N.E.2d 733 (Ohio Ct. App. 1955).

9. 167 Ohio St. 244, 147 N.E.2d 612 (1958).

10. OHIO REV. CODE §§ 1315.01-76.

11. OHIO REV. CODE § 1315.70(D): "The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events from the breach of warranty." § 1315.71: "Sections 1315.01 to 1315.76 inclusive, of the Revised Code do not affect the right of a buyer or a seller to recover interest or special damages in any case where interest or special damages may be recoverable, or to recover money paid when the consideration for the payment of it has failed." § 1315.74: "In any case not provided for . . . the rules of law and equity, including the law merchant, and in particular the rules relating to the law of . . . fraud, [and] misrepresentation . . . shall apply to contracts to sell and to sales of goods."

12. 146 Ohio St. 414, 66 N.E.2d 224 (1946).

13. 115 N.E.2d 17 (Ohio Ct. App. 1953).

tion of the sale. Yet, one court classified the action as a breach of warranty, and the other as fraud. Each classification gives rise to different remedies, both in common law and under the Sales Act.¹⁴ Logically, a pleading of similar facts in different cases should entitle the plaintiffs to similar remedies.

The court of appeals in the instant case, *Craig v. Spitzer Motors of Columbus, Incorporated*,¹⁵ met this problem head on by holding that (1) punitive damages may be awarded in a breach of warranty action, and (2) the Ohio Sales Act does not exclude the right to punitive damages. Although previous cases limited breach of warranty to an action *ex contractu*,¹⁶ this court refused to classify breach of warranty as a contract or a tort action. The decision seems to be in line with the *Toni* case,¹⁷ for both decisions indicate that breach of warranty is a separate action which requires elements of both tort and contract to state a cause of action. The *Craig* case¹⁸ extended the doctrine of the *Toni* case¹⁹ to allow recovery of punitive damages. It held that the defendant cannot, by motion to strike, choose the words plaintiff must use in his pleading in charging the defendant with fraud. This leads to the conclusion that regardless of whether the breach of warranty pleaded is *ex contractu* or *ex delicto*, an allegation of fraud could make it possible for an award of punitive damages where the facts so justify. This would seem to eliminate many technical stumbling blocks over which previous plaintiffs have fallen.

Although the Sales Act declares a specific remedy for breach of warranty,²⁰ this court disregarded the remedy and classified the action under Ohio Revised Code section 1315.71, which allows a buyer to recover special damages, and section 1315.74, which provides that ordinary rules of law apply to cases not provided for in the Sales Act. The *Craig* case²¹ seems to be a judicial adoption of the Uniform Commercial Code section which provides that incidental and consequential damages can be recovered under proper circumstances.²² However, the Uniform Commercial Code has not been adopted in Ohio.

Although the *Craig* decision engages in some "judicial legislation," it should save plaintiffs from being denied the right to certain remedies because they have pleaded in tort or contract. It is in line

14. OHIO REV. CODE § 1315.01-76.

15. 160 N.E.2d 537 (Ohio Ct. App. 1959).

16. *Rachlin v. Libby-Owens-Ford Glass Co.*, 96 F.2d 597 (2nd Cir. 1938); *Winterbottom v. Wright*, 10 M.&W. 109 (Ex. 1842).

17. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958).

18. *Craig v. Spitzer Motors of Columbus, Inc.*, 160 N.E.2d 537 (Ohio Ct. App. 1959).

19. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958).

20. OHIO REV. CODE § 1315.70.

21. *Craig v. Spitzer Motors of Columbus, Inc.*, 160 N.E.2d 537 (Ohio Ct. App. 1959).

22. UNIFORM COMMERCIAL CODE § 2-714.