# IN THE SUPREME COURT OF TEXAS

NO. 05-1042

JCW ELECTRONICS, INC., PETITIONER,

v.

PEARL IRIZ GARZA, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF ROLANDO DOMINGO MONTEZ, DECEASED, AND BELINDA LEIGH CAMACHO, INDIVIDUALLY AND AS NEXT FRIEND OF ROLANDO KADRIC MONTEZ, A MINOR CHILD, RESPONDENTS

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

**Argued October 18, 2007**

CHIEF JUSTICE JEFFERSON, joined by JUSTICE O'NEILL, concurring.

I agree that chapter 33's proportionate responsibility scheme applies to a UCC-based implied warranty claim seeking damages for death or personal injury. I write separately to explore the proper submission of that issue.

This is not our first occasion to consider whether comparative responsibility principles apply to UCC-based implied warranty claims. In *Signal Oil & Gas Co. v. Universal Oil Products*, 545 S.W.2d 907, 910 (Tex. App.—Beaumont 1977, writ granted), the court of appeals held that, under

traditional contributory negligence principles, any negligence on the buyer's[1] part would bar all recovery on a UCC-based implied warranty claim. We disagreed, based on the statute's language:

> The draftsmen of the Code obviously felt that consideration should be given to the buyer's fault or negligence when determining recovery of consequential damages for a breach of implied warranty. Section 2.714 of the Code establishes the measure of damages for a breach of warranty. Section (c) thereunder states, "(i)n a proper case any incidental and consequential damages" may also be recovered. Section 2.715 defines "consequential damages" as including "injury to person or property proximately resulting from any breach of warranty." (Emphasis added.) In Comment 5 to Section 2.715 the draftsmen of the Code provided the following guidelines on proximate causation:
>
> > "(T)he question of 'proximate' cause turns on whether it was *reasonable* for the buyer to use the goods without such inspection as would have revealed the defects. If it was not *reasonable* for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty." (Emphasis added.)
>
> Comment 5 clearly indicates that the buyer's conduct may affect his recovery of consequential damages under an implied warranty cause of action. In addition, Comment 5 clearly speaks in terms of a "reasonable use" standard in examining the buyer's conduct. Such a reasonable use standard is normally associated with theories of negligence. *Rourke v. Garza*, 530 S.W.2d 794 (Tex.1975). However, the Code does not state that such buyer's negligence or fault will totally bar recovery as does contributory negligence under traditional tort principles. Rather, the Code and comments thereunder indicate that the buyer's negligence or fault is central to the issue of proximate causation in awarding consequential damages. *Dallison v. Sears, Roebuck and Co.*, 313 F.2d 343 (10th Cir. 1962); *Rasmus v. A. O. Smith Corporation*, 158 F. Supp. 70 (D.Iowa 1958).

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[1] For ease of reference, I refer to the "buyer" but recognize (as the parties do) the UCC's categorization of an implied warranty of fitness in "any transaction, regardless of form, that creates a lease of goods." TEX. BUS. & COM. CODE § 2A.102. The parties dispute whether the UCC applies to the implied warranty claim at issue here. We need not engage in that debate today, however. Assuming the agreement involves a lease of goods and that an end user has an implied warranty claim in the absence of privity, the jury's 60% negligence finding as to Montez bars that claim, as demonstrated below.

*Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 327-28 (Tex. 1978). We recognized that "[t]he seller should only be held liable for that portion of the consequential damages caused by the breach of implied warranty," and thus "the buyer may not recover consequential damages to the extent that the buyer's negligence or fault was a concurring proximate cause of such damages." *Id*. at 329. We distinguished the UCC scheme from the comparative negligence statute in effect at the time, noting that "[u]nlike comparative negligence, a buyer is entitled to recover that portion of the damages caused by the unsuitable product, even if the buyer's negligence or fault constitutes a greater cause of the damages than the seller's breach." *Id*. (citing TEX. REV. CIV. STAT. art. 2212a (repealed 1985)).

Nine years after *Signal Oil*, the Legislature amended the comparative negligence statute and incorporated a 60% comparative responsibility bar in personal injury, property damage, and death cases in which at least one defendant was liable under a UCC chapter 2 breach of warranty theory. *See* Act of Sept. 2, 1987, 70th Leg., 1st C.S., ch. 2, § 2.04, 1987 Tex. Gen. Laws 40, 40. While the 1995 statutory revisions removed this language, they included instead a 51% bar for all causes of action "based on tort." Act of Sept. 1, 1995, 74th Leg., ch. 136, § 1, 1995 Tex. Gen. Laws 855, 859, *amended by* Act of Sept. 1, 2003, 78th Leg., ch. 204, §§ 4.01, 4.10(1), 2003 Tex. Gen. Laws 855, 859. Leading commentators recognize that state comparative fault schemes generally have been applied to UCC-based implied warranty claims and that some sort of comparative fault system should apply:

> In the long run, we suspect that ideas of comparative fault will inevitably be the rule and not the exception—at least in personal injury cases. It probably makes little sense to apply comparative fault to the negligence claim and fail to do that in a

> warranty or strict tort claim tried before the same jury, in the same courtroom simultaneously.

JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 11-8, at 760 (5th ed. 2006). Moreover, while UCC section 2.715 discusses the buyer's negligence and its effect on an implied warranty recovery, the statute's provisions stand in contrast to the "comprehensive legislative fault scheme singularly applicable to claims involving negotiable instruments" in revised article 3 of the UCC. *See Sw. Bank v. Info. Support Concepts, Inc.*, 149 S.W.3d 104, 111 (Tex. 2004) (discussing revised article 3 and noting that it included detailed comparative negligence provisions that applied to some, but not all, conversion claims); *see also* TEX. BUS. & COM. CODE § 2A.520(b)(2) (applying section 2.715's definition of consequential damages to lease-based claims). Chapter 33's application here would not, therefore, "ignore the UCC itself and thwart its underlying purpose." *Sw. Bank*, 149 S.W.3d at 111. Nor does this case involve a vicarious-liability statute that removes from consideration the actual conduct of the alleged tortfeasor, making it difficult to harmonize with chapter 33. *See F.F.P. Operating Partners v. Duenez*, 237 S.W.3d 680, 695 (Tex. 2007) (Jefferson, C.J., dissenting). Thus, I agree with the Court that Garza's implied warranty claim qualifies as a cause of action based on tort and is therefore subject to Chapter 33's proportionate responsibility scheme.

But chapter 33 requires a finding of proportionate responsibility on each claim:

> The trier of fact, *as to each cause of action asserted*, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, *or by any combination of these* . . .."

TEX. CIV. PRAC. & REM. CODE § 33.003 (emphasis added).

Here, the apportionment question immediately followed the negligence question, and was directed only to it:

> If you have answered "YES" to Question No. 1 [the negligence question], for more than one of those named below, then answer the following question. . . .
> The percentages you find must total 100 percent. The negligence attributable to any one named below is not necessarily measured by the number of acts or omissions found.
>
> **QUESTION NO. 2**
>
> What percentage of the negligence that caused the death of Rolando Montez do your [sic] find to be attributable to each of those found by you, in your answer to Question No. 1?
>
> | | | |
> |---|---|---|
> | A. | J.C.W. Electronics, Inc. | 15% |
> | B. | The City of Port Isabel | 25% |
> | C. | Quadrum Telecommunications, Inc. | ----- |
> | D. | Rolando Montez | 60% |
> | TOTAL | | 100% |

The breach of implied warranty question was Question No. 9, and there was no apportionment question asking about percentages of responsibility regarding that claim. Nonetheless, the only way a buyer's fault may be compared with a seller's for such a claim is to examine the nature of the liability attributable to each. A seller will be liable if, as the jury here found, its product breaches an implied warranty and that breach proximately caused the buyer's damages. By contrast, the buyer's fault cannot be couched in terms of a breach of warranty. As we recognized in *Signal Oil*, it is the buyer's negligence that will impact his recovery in a UCC-based breach of implied warranty claim. *Signal Oil*, 572 S.W.2d at 328 (noting that "Comment 5 clearly

speaks in terms of a 'reasonable use' standard in examining the buyer's conduct" and "[s]uch a reasonable use standard is normally associated with theories of negligence"). A buyer has not breached an implied warranty, and a question inquiring about the buyer's breach would be nonsensical. Instead, a buyer's negligence is the relevant inquiry when apportioning fault for such a claim. While the jury found that JCW breached an implied warranty, it also found Rolando Montez negligent and apportioned sixty percent of the negligence to him. Under chapter 33, Montez's comparative negligence bars Garza's claim. TEX. CIV. PRAC. & REM. CODE § 33.001.

I would hold that a UCC-based implied warranty claim seeking personal injury damages should be submitted to the jury with an apportionment question inquiring about each actor's "percentage of responsibility," rather than negligence, because that would include both the seller's breach of warranty and the buyer's negligence.[2] *See Brown v. Edwards Transfer Co.*, 764 S.W.2d 220, 224 n.2 (Tex. 1988). Because the jury was asked about Montez's negligence, however, and because its finding bars Montez's claim, JCW's percentage of responsibility for damages caused by the breach of implied warranty is immaterial. For these reasons, I concur in the Court's judgment.

Wallace B. Jefferson
Chief Justice

**OPINION DELIVERED:** June 27, 2008

[2] Additionally, it seems to me that, in most cases, the parties could agree to submit a single apportionment question to cover multiple theories of liability, provided that each theory has a common factual basis to which the questions refer.