

OBSERVATIONS ON THE LAW OF IMPLIED WARRANTY OF QUALITY IN MISSOURI: 1960

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Certain Missouri cases on implied warranty of quality¹ have been unsatisfactory and behind the times. *McIntyre v. Kansas City Coca-Cola Bottling Co.*² and *Barton v. Dowis*³ are particularly difficult to accept. The *McIntyre* case held that a two-year old infant daughter of a parent buyer from a retailer could not recover damages in an action against the bottling company for serious injuries resulting from an explosion of the bottle while she was carrying it.⁴ The *Barton* case held that an implied warranty that hogs were fit for breeding purposes provided no warranty that the hogs would not communicate hog cholera to plaintiff's hogs. Plaintiff lost 113 of his 133 hogs by reason of contact with six of defendant seller's "fit" breeders.

In fairness to these courts, it may be said that there was at one time a doctrine of *caveat emptor* in such sales transactions. The Missouri Legislature has done nothing to correct the matter, having failed to enact even the Uniform Sales Act, which is deemed to have strengthened and extended the law of implied warranty of quality in some of the states which have enacted it.⁵ Also, the United States Court for the Western District of Missouri in the *McIntyre* case was forced to apply the law of Missouri as best it could determine that law under

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1. No attempt is made herein to consider express warranties as such. A leading case on the subject is *Turner v. Central Hardware Co.*, 353 Mo. 1182, 186 S.W.2d 603 (1945). Cf. *Froedtert Grain & Malting Co. v. Steelcote Mfg. Co.*, 110 F. Supp. 757 (E.D. Mo. 1953); *Green v. Cooke Sales & Serv.*, 284 S.W.2d 880 (Mo. Ct. App. 1955); *Witte v. Cooke Tractor Co.*, 261 S.W.2d 651 (Mo. Ct. App. 1953). Also, no attempt is made to consider the effect of disclaimer clauses. In that respect see *Davies v. Motor Radio Co.*, 236 S.W.2d 409 (Mo. Ct. App. 1951); *Laitner Plumbing & Heating Co. v. McThomas*, 61 S.W.2d 270 (Mo. Ct. App. 1933).

2. 85 F. Supp. 708 (W.D. Mo. 1949), appeal dismissed, 184 F.2d 671 (8th Cir. 1950).

3. 315 Mo. 226, 285 S.W. 988 (1926).

4. The plaintiffs were, however, permitted to recast their complaints so as to state a claim in tort. Of course, the proof is much tougher in a tort action even with the help of the doctrine of *res ipsa loquitur*. On virtually the same facts in *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953) the action on behalf of the infant was allowed on an implied warranty theory.

5. *The St. S. Angelo Toso*, 271 Fed. 245 (3d Cir. 1921); *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105 (1931); *Keenan v. Cherry & Webb*, 47 R.I. 125, 131 Atl. 309 (1925).

the *Erie* doctrine.⁶ The *McIntyre* court believed the result it reached was necessary under the Missouri Supreme Court's decision in *State ex rel. Jones Store Co. v. Shain*,⁷ at least as that case was interpreted by the late Professor Lee-Carl Overstreet⁸ in an article in the *Missouri Law Review*.⁹ In Professor Overstreet's view, the *Jones Store* case could have been interpreted as shattering the law of implied warranty of quality in Missouri, and he termed it "a shocking surprise."¹⁰ It has not had that result nor was it intended to do so; it has been over-emphasized and, at the most, is only one case among many. As will be shown below, it fits properly in the whole picture.

More recent cases indicate a strengthened and extended law of implied warranty of quality in Missouri. Two of these cases¹¹ deserve close consideration.

THE PHILIP MORRIS AND M.F.A. MILLING CO. CASES

Plaintiff John T. Ross, in an action against Philip Morris Co., which was removed to the United States Court for the Western District of Missouri by reason of diversity of citizenship, alleged that from 1948 to 1952, inclusive, he purchased cigarettes manufactured by defendant and smoked them, that because said cigarettes were not wholesome and fit, but contained "unwholesome, poisonous, deleterious, irritating, harmful and injurious" substances and ingredients, he sustained serious, permanent and progressive injuries and damages. In count one, he alleged that defendant sold cigarettes through retailers, in sealed packages designed for ultimate consumption and for the particular and only purpose that said cigarettes be smoked and consumed by human beings; that defendant knew and intended that they would be purchased and consumed by the general public and

6. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Angel v. Bullington*, 330 U.S. 183 (1947); applicable in diversity of citizenship cases.

7. 352 Mo. 630, 179 S.W.2d 19 (1944), quashing *Marra v. Jones Store Co.*, 170 S.W.2d 441 (Mo. Ct. App. 1943). A buyer of a colored satin blouse could not maintain a damages action against the retail seller for skin injuries allegedly caused by some substance in the blouse, for the reason that a blouse has no special or particular purpose, thus rendering inapplicable an implied warranty of fitness for a particular purpose. The case is discussed broadly at notes 45-55, *infra*.

8. The author now has the honor of teaching the courses at Missouri University that Professor Overstreet taught prior to his death in 1955.

9. Overstreet, *Some Aspects of Implied Warranties in the Supreme Court of Missouri*, 10 Mo. L. Rev. 147 (1945). This is the most comprehensive article published on the matter of implied warranties in Missouri.

10. *Id.* at 148.

11. *Ross v. Philip Morris Co.*, 164 F. Supp. 683 (W.D. Mo. 1958), modified, No. 9494, W.D. Mo., Oct. 22, 1959; *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547 (Mo. 1959).

thereby warranted and represented to the general public, and particularly to the ultimate purchaser-consumer, that said cigarettes were wholesome and fit for human consumption when, in fact, such cigarettes when smoked and consumed were not wholesome and fit, but were dangerous and unsafe. Thus Ross proceeded on a theory of breach of an implied warranty of fitness or wholesomeness of the cigarettes for human consumption. The United States District Court sustained defendant's motion for summary judgment on this implied warranty count.¹² The court felt bound so to rule by the *Jones Store* and *McIntyre* cases,¹³ despite intermediate Missouri courts of appeals decisions recognizing liability in the absence of privity in cases involving defective products manufactured and sold for human consumption.¹⁴ The court stated:

The only difference between the situation considered in the McIntyre case, supra, and the case at bar is that plaintiff here undertakes to bring cigarettes within the food and drink cases, supra. As to this, we only say that if a lady's blouse containing a deleterious dye, injurious to health, is not a particular object that is the subject matter of a contract, as to which the doctrine of implied warranty is applicable, then plaintiff's attempt to bring cigarettes within the food and drink cases as distinguished from an object of ordinary retail sale, is futile.¹⁵

In *Midwest Game Co. v. M.F.A. Milling Co.*,¹⁶ plaintiffs¹⁷ alleged they were owners of trout farms and in the business of raising trout for commercial purposes; that defendant sold them prepared "dry" fish food packaged, labeled and similar in appearance to available "complete" fish foods manufactured by others; that by established and prevailing trade custom, manufacturers of such "dry" fish foods were, and for some time prior to plaintiffs' use of defendant's product had been, marketing only "complete" fish foods, all of which was known to defendant or in the exercise of ordinary prudence should have been

12. *Ross v. Philip Morris Co.*, supra note 11. The court overruled defendant's motion for summary judgment as to count two (a claim in tort for negligence) and count three (a claim for fraud and deceit).

13. *Id.* at 691.

14. Representative of such cases are: *Williams v. Coca-Cola Bottling Co.*, 285 S.W.2d 53 (Mo. Ct. App. 1955); *Foley v. Coca-Cola Bottling Co.*, 215 S.W.2d 314 (Mo. Ct. App. 1948); *Helms v. General Baking Co.*, 164 S.W.2d 150 (Mo. Ct. App. 1942); *Carter v. St. Louis Dairy Co.*, 139 S.W.2d 1025 (Mo. Ct. App. 1940); *McNicholas v. Continental Baking Co.*, 112 S.W.2d 849 (Mo. Ct. App. 1938); *Nemela v. Coca-Cola Bottling Co.*, 104 S.W.2d 773 (Mo. Ct. App. 1937); *Madouros v. Kansas City Coca-Cola Bottling Co.*, 230 Mo. App. 275, 90 S.W.2d 445 (1936).

15. 164 F. Supp. at 691.

16. 320 S.W.2d 547 (Mo. 1959).

17. *Midwest Game Co., Inc.*, owner of the Troutdale Ranch at Gravois Mills, Mo., and *Ozark Trout Farm*, a corporation, of Fayetteville, Ark., each filing suit in the Circuit Court of Greene County, Mo.

known; that in violation of said trade custom defendant's fish food was and is not a "complete" fish food, adequate without supplementation to sustain and promote the normal health and growth of fish; that defendant thereby impliedly warranted that its product was a "complete" fish food; that as a result of defendant's breach of trade custom and usage, and in reliance on said trade custom and the defendant's superior knowledge as to its product, plaintiffs purchased and fed defendant's fish food to their trout and as a further result thereof plaintiffs' fish became sickly, afflicted and died. Thus plaintiffs proceeded on a theory of breach of an implied warranty of fitness for the purpose sold, i.e., that the fish food was a "complete" fish food. The trial court sustained M.F.A. Milling Co.'s motions to dismiss the petitions on the ground of failure to state a claim upon which relief could be granted. The Supreme Court of Missouri reversed and remanded the cases for trial, holding "that an implied warranty of fitness may be annexed to a transaction by reason of a trade custom or usage."¹⁸ The court further recognized that an implied warranty of fitness can attach to the sale of food for animals, at least "in cases like the instant one where the food is not in its raw state but has been processed and packaged by the manufacturer."¹⁹ Apparently, unlike in the *Philip Morris* case, there was no absence of privity.²⁰ The court stated however:

It is an established rule that in a sale of food for immediate human consumption there is generally an implied warranty that the food is wholesome, is fit for the purpose, and is of merchantable quality. And a buyer of packaged food products may recover from the manufacturer upon an implied warranty of fitness even though there is no express privity of contract between the manufacturer and buyer. *Carter v. St. Louis Dairy Co., Mo. App.*, 139 S.W.2d 1025.²¹

This statement, while not obiter dictum, was not essential to the decision. This was the first time the Supreme Court of Missouri had given approval or even positive recognition to the holdings of a line of Missouri courts of appeals decisions recognizing actions in food and drink cases despite absence of privity.²²

The *M.F.A. Milling Co.* case had a rapid effect. The United States Court for the Western District of Missouri entertained plaintiff Ross' motion to set aside the order sustaining defendant's motion for sum-

18. 320 S.W.2d at 550.

19. *Ibid.* The court also recognized a cause of action on a negligence theory. *Id.* at 552.

20. The problem of privity was neither considered by the court nor covered by the facts in the case.

21. 320 S.W.2d at 550.

22. See note 14 *supra*.

mary judgment on the implied warranty count in the *Philip Morris* case. The ruling and memorandum opinion on that motion were issued on October 22, 1959. The former opinion was vacated, and Philip Morris Co.'s motion for summary judgment on the implied warranty count was denied.²³ The court quoted the above language from the *M.F.A. Milling Co.* case. The court observed that "the Supreme Court of Missouri has now expressly ruled . . . that an implied warranty of fitness should attach, absent privity, in a case where food is sold for human consumption 'not in its raw state but has been processed by the manufacturer'."²⁴ The court then stated:

Thus, the latest decision of the Supreme Court of the State of Missouri, in *Midwest Game Co. v. M.F.A. Milling Co.*, supra, seemingly can only be considered as stating a rule of law as to implied warranty which covers the sale of goods for human consumption, not previously announced by the Supreme Court of Missouri but specifically approved and applied by the several intermediate appellate courts of Missouri, and as to which doctrine there can now be no question as to the binding effect thereof on this Court in a removed action such as the instant case.

Therefore, the opinion in *Midwest Game Co. v. M.F.A. Milling Co.*, supra, expressly supports plaintiff's position here made, namely, that a claim of breach of implied warranty of wholesomeness and fitness may be asserted under Missouri law in the absence of privity, in that class of cases where products are sold in original packages for human consumption, not in their raw state, but after being processed by the manufacturer.²⁵

This decision on implied warranty of quality may well be the first such ruling on a cigarette case anywhere to date.²⁶ But, be that as it may, the decision cannot be justified under existing Missouri law. And of course, the United States Court for the Western District of Missouri is bound to apply Missouri law in this diversity case under the *Erie* doctrine.²⁷

23. No. 9494, W.D. Mo., Oct. 22, 1959. The court may have been influenced by a well-reasoned analysis of its prior ruling by Mr. John E. Burruss, Jr., which subsequently appeared in the *Missouri Law Review. Recent Cases*, 24 Mo. L. Rev. 554 (1959). A simulated case on essentially the same facts was also argued in the finals of Junior Case Club on Law Day, April 25, 1959 at Missouri University Law School, so the matter was well aired.

24. Citing *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547, 550 (Mo. 1959).

25. No. 9494, W.D. Mo., Oct. 22, 1959.

26. The only other case involving injuries (death) caused by cigarettes that has been found considering an implied warranty theory is *Cooper v. R. J. Reynolds Tobacco Co.*, 158 F. Supp. 22 (D. Mass. 1957), aff'd, 256 F.2d 464 (1st Cir.), cert. denied, 358 U.S. 875 (1958), which denied the warranty action under Massachusetts law.

27. See note 6 supra. Cf. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), applicable at the time of the rulings in the *Philip Morris* case.

DECISIONS OF INTERMEDIATE MISSOURI COURTS OF APPEALS
RECOGNIZING LIABILITY IN THE ABSENCE OF PRIVACY IN CASES
INVOLVING DEFECTIVE PRODUCTS MANUFACTURED AND SOLD
FOR HUMAN CONSUMPTION

The Supreme Court of Missouri in the *M.F.A. Milling Co.* case cited *Carter v. St. Louis Dairy Co.*²⁸ as authority for the "established rule" that there was an implied warranty of fitness applicable to the sale of packaged food products for immediate human consumption despite the absence of privity between the defendant manufacturer and plaintiff buyer. The *Carter* case so held, merely purporting to follow prior cases. The St. Louis Court of Appeals in that case quoted from *McNicholas v. Continental Baking Co.*,²⁹ an earlier decision by the same court. *McNicholas* also merely purported to apply existing case law. Though not strong cases themselves, *Carter* and *McNicholas* suggest that the rule is "established." A number of other courts of appeals decisions apply this "established rule" with little or no analysis of the privity problem.³⁰ In none of these decisions is there expressed any concern about whether the Supreme Court of Missouri would approve or recognize the rule applied.

The Kansas City Court of Appeals in 1936 met the privity problem in two cases.³¹ In the *Madouros* case, the court held a consumer of a beverage in a closed container could maintain an action for breach of an implied warranty that the contents were good and wholesome and fit for human consumption in an action against the remote bottling company. Liability was based upon "the demands of social justice" and not "alone on privity of contract." These products are prepared under the exclusive supervision of the manufacturer and the ultimate consumer must take them as they are. Liability is dependent upon

28. 139 S.W.2d 1025 (Mo. Ct. App. 1940) (particles of glass in a bottle of buttermilk swallowed by plaintiff).

29. 112 S.W.2d 849 (Mo. Ct. App. 1938) (particles of glass in a packaged loaf of bread partially eaten by plaintiff).

30. Representative cases are: *Leathers v. Sikeston Coca-Cola Bottling Co.*, 286 S.W.2d 393 (Mo. Ct. App. 1956) (photographic film and silver nitrate therefrom in sealed bottle of coca-cola swallowed by plaintiff); *Strawn v. Coca-Cola Bottling Co.*, 234 S.W.2d 223 (Mo. Ct. App. 1950) (mushy things in sealed bottle of coca-cola swallowed by plaintiff); *Helms v. General Baking Co.*, 164 S.W.2d 150 (Mo. Ct. App. 1942) (particles of steel or wire in a packaged loaf of bread partially eaten by plaintiff).

31. *De Gouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S.W.2d 336 (1936) (large black fly in sealed can of salmon partially consumed by plaintiff); *Madouros v. Kansas City Coca-Cola Bottling Co.*, 230 Mo. App. 275, 90 S.W.2d 445 (1936) (decomposed mouse in sealed bottle of coca-cola partially swallowed by plaintiff). The *Madouros* case is commented on in 2 Mo. L. Rev. 73 (1937); cf. 25 Wash. U.L.Q. 293 (1940). The *De Gouveia* case is noted at 2 Mo. L. Rev. 235 and 370 (1937); cf. Comment, 1953 Wash. U.L.Q. 327.

privity is not defeated: "privity of contract exists in the consciousness and understanding of all right-thinking persons."³² In the *De Gouveia* case, the court refused to hold liable a wholesaler under an implied warranty. The retailer, from whom plaintiff purchased the food product, could be so held. The court distinguished *Madouros* since there the defendant had manufactured the product. In *De Gouveia*, the wholesaler had received the sealed can with no opportunity to inspect it and thus was not responsible for its contents, even though it bore a label reading "packed for" the wholesaler.

In *Williams v. Coca-Cola Bottling Co.*,³³ Houser, C.³⁴ for the St. Louis Court of Appeals, although reversing a recovery for failure of proof, reaffirmed the liability of manufacturers to remote consumers of packaged food products established in the numerous Missouri courts of appeals decisions. The opinion stated:

We have re-examined the underlying reasons which support this body of decisions. We find them sound, salutary and responsive to the realities and demands of modern society. Considerations of public policy, modern methods of manufacturing, packaging and merchandising and the protection of the health of the consuming public require that an obligation be placed upon the manufacturer of Coca-Cola to see to it, at his peril, that the product he offers the general public is fit for the purpose for which it is intended, namely, human consumption. The "demands of social justice" require that his liability should be made absolute. Only the manufacturer or bottler can know of the contents of the bottle. Intermediate handlers have no way of knowing of adulteration. The product is designed for ultimate consumption in its original container by an individual consumer. . . . The consumer's remedy should not be made to depend upon the "intricacies of the law of sales," the doctrine of privity of contract, or the proof of negligence. . . .³⁵

In *Worley v. Procter & Gamble Mfg. Co.*,³⁶ Anderson, J. for the St. Louis Court of Appeals, although also reversing a recovery for failure of proof, stated that an action could be maintained by a user of washing detergent, causing skin injuries, against the manufacturer despite absence of privity. This strong opinion attacks the contractual basis of a warranty action upon which the requirement of privity is grounded, observing that the action originally sounded in tort.³⁷ The case is, however, based upon an express warranty ("And,

32. 230 Mo. App. at 283, 90 S.W.2d at 450.

33. 285 S.W.2d 53 (Mo. Ct. App. 1955), noted in 4 St. Louis U.L.J. 207 (1956).

34. Judge Norwin D. Houser is now a Commissioner for the Supreme Court of Missouri.

35. 285 S.W.2d at 55-56.

36. 241 Mo. App. 1114, 253 S.W.2d 532 (1952).

37. *Id.* at 1120, 253 S.W.2d at 536. Cf. *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

of course, Tide is kind to hands, too") and not upon an implied warranty of fitness as were the other cases. "The alleged warranty was printed on the box of Tide purchased."³⁸ Thus the *Worley* case cannot be considered as having extended the implied warranty principle allowing recovery in the packaged food products cases to washing compounds for human use. In fact *Reed v. Swift & Co.*,³⁹ decided shortly after the *Worley* case apparently recognized its inapplicability in an implied warranty action absent privity.⁴⁰

None of the cases allowing an implied warranty action has any bearing upon cigarettes for they have involved only packaged food products. The "realities and demands of modern society" and "considerations of public policy" support these decisions. Such factors should not support a similar action for injuries caused by cigarettes. The use or consumption of cigarettes sold in sealed packages is neither demanded by modern society nor encouraged by considerations of public policy. If, as *Worley* and *Reed* demonstrate, washing compounds for human use are not within the packaged food products-implied warranty doctrine, neither are cigarettes. The recent ruling in the *Philip Morris* case cannot be grounded upon this line of decisions of the intermediate Missouri courts of appeals.

But the principle of these cases does support recovery in the bursting bottle situation of the *McIntyre*⁴¹ case; the infant-plaintiff there should have been entitled to maintain an action against the bottling company-manufacturer despite the absence of privity, unless an exploding bottle is to be treated differently from unfit contents in the bottle. Such a differentiation is clearly behind the times.⁴² The *McIntyre* court apparently made no such differentiation.⁴³ Therefore, under the Missouri courts of appeals decisions neither *McIntyre* nor *Philip Morris* were correctly decided. If they are to stand at all, some other basis in Missouri law must be found to support them.

38. *Id.* at 1122, 253 S.W.2d at 537-38. Houser, C. for the same court in *Williams v. Coca-Cola Bottling Co.*, 285 S.W.2d at 55, referred to the *Worley* case as "a recent case involving express warranty."

39. 14 F.R.D. 145 (W.D. Mo. 1953).

40. The injuries were suffered in Kansas so the court considered liability primarily with respect to Kansas law. Nevertheless, the court concluded that under either the *Worley* case in Missouri, or *Frier v. Procter & Gamble Distributing Co.*, 173 Kan. 733, 252 P.2d 850 (1953), the action could not be maintained on a warranty theory.

41. Note 2 *supra*.

42. *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953).

43. See 85 F. Supp. at 711.

A SURVEY OF THE RELEVANT LAW OF IMPLIED WARRANTY OF QUALITY IN MISSOURI AND ITS EFFECT

A cause of action based upon an implied warranty of fitness other than in food product cases generally has been hard to establish in Missouri.⁴⁴ It must be shown that the buyer made known to the seller his particular purpose for the goods and that he relied upon the ability of the seller to supply goods fit for that purpose.⁴⁵ The *Jones Store* case held that a woman's blouse could have no particular, i.e., special, purpose; it has only a general purpose, to be worn by a woman.⁴⁶ Thus there could be no implied warranty of fitness in such a situation. The court failed to consider an implied warranty that the blouse would be fit for its general purpose, to be worn by a woman. Likewise, saucepans for cooking have no particular purpose.⁴⁷ In *Zesch v. Abrasive Co.*,⁴⁸ it was ruled there could be no implied warranty of fitness since the evidence failed to show that the abrasive cutting-off wheel there involved had been furnished for any particular or special purpose. But the court did not say that abrasive wheels, like blouses and saucepans, could have no special purpose.

In the *Jones Store* case, the defendant was a retailer, not a manufacturer as in *Zesch* and some of the other cases.⁴⁹ Retailers generally have been protected against implied warranty liability in non-food cases, at least where they have no greater knowledge about the goods than the buyer;⁵⁰ this is the general common law view.⁵¹ Whether the claimed implied warranty involved be called fitness or merchantability, the result has been the same; the retailer is not held unless he had greater knowledge about the goods than the buyer, so that the buyer could justifiably rely upon the retailer's selection of fit goods.⁵² The

44. See, e.g., *Dotson v. International Harvester Co.*, 365 Mo. 625, 285 S.W.2d 585 (1955); *State ex rel. Jones Store Co. v. Shain*, 352 Mo. 630, 179 S.W.2d 19 (1944).

45. *London Guar. & Acc. Co. v. Strait Scale Co.*, 322 Mo. 502, 15 S.W.2d 766 (1929); *Busch & Latta Painting Co. v. Woermann Constr. Co.*, 310 Mo. 419, 276 S.W. 614 (1925); *Hunter v. Waterloo Gasoline Engine Co.*, 260 S.W. 970 (Mo. 1924); *Dubinsky v. Lindburg Cadillac Co.*, 250 S.W.2d 830 (Mo. Ct. App. 1952); *Davies v. Motor Radio Co.*, 236 S.W.2d 409 (Mo. Ct. App. 1951).

46. See note 7 supra.

47. 352 Mo. at 635, 179 S.W.2d at 21.

48. 353 Mo. 558, 183 S.W.2d 140 (1944).

49. See the *London Guar.* and *Busch & Latta* cases cited in note 45 supra.

50. *Dotson v. International Harvester Co.*, 365 Mo. 625, 285 S.W.2d 585 (1955). Cf. *De Gouveia v. H. D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S.W.2d 336 (1936) (packaged food product case holding a retailer liable).

51. *White v. Oakes*, 88 Me. 367, 34 Atl. 175 (1896); *Phares v. Sandia Lumber Co.*, 62 N.M. 90, 305 P.2d 367 (1956).

52. The Uniform Sales Act § 15(2) applicable to a seller "whether he be the grower or manufacturer or not" has changed the common law as far as actions

Jones Store case fits this picture perfectly, since the Jones Store had no greater knowledge about the blouse and its fitness for plaintiff-buyer's skin than she did. The Jones Store was not responsible for the blouse, at least as far as consequential tort-like damages are concerned. The court's language in the *Jones Store* case regarding special purposes may have been somewhat broad, but it means simply that the defendant retailer could impliedly warrant nothing about the blouse which could cover the buyer's skin injuries. The court did not imply that the manufacturer of the blouse would not be held. In the *Zesch* case, the court intimated that the manufacturer could have been held had there been evidence in fact that the abrasive wheel was furnished for a disclosed special purpose.

The *Jones Store* and *Zesch* cases could not command the result reached in *McIntyre*, an action against a manufacturer, in what should have been considered as a packaged food product case. The exploding bottle was defective, the particular purpose of human consumption was disclosed by the "realities and demands of modern society"⁵³ and recognized by the common law,⁵⁴ and the McIntyre family relied upon the Coca-Cola Bottling Co. to furnish a fit product. The line of Missouri courts of appeals decisions discussed above called for liability in the *McIntyre* case.

Similarly, the *Jones Store* and *Zesch* cases, even without the *M.F.A. Milling Co.* case, do not preclude an implied warranty in the *Philip Morris* case. Of course, they do not command one either.

The United States Court for the Western District of Missouri recognized an implied warranty against Philip Morris Co. based upon the Missouri Supreme Court's ruling in the *M.F.A. Milling Co.* case.⁵⁵ There is no more reason for the *M.F.A. Milling Co.* case to control the *Philip Morris* case than there was for the *Jones Store* case to control the *McIntyre* case. The *M.F.A. Milling Co.* case involved no apparent privity problem. It involved a package food product, albeit for fish. The court merely recognized that an implied warranty may be annexed by a trade custom or usage. There is no such trade custom or usage applicable to cigarettes; the general impression is that cigarettes per se are or may be harmful. True, the fish food was not sold in its raw state, but its failure as a "complete" fish food was the crucial factor. The case comes close to presenting a question of im-

against retailers are concerned. *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105 (1931).

53. *Williams v. Coca-Cola Bottling Co.*, 285 S.W.2d at 55. The quote is set out in context supra at note 35.

54. *Farrell v. Manhattan Mkt. Co.*, 198 Mass. 271, 84 N.E. 481 (1908); *Rinaldi v. Mohican Co.*, 225 N.Y. 70, 121 N.E. 471 (1918).

55. See discussion of the *Philip Morris* and *M.F.A. Milling Co.* cases supra at notes 16-27.

plied warranty of identity, i.e., whether the fish food sold under circumstances indicating it was a "complete" fish food met that standard. Such an implied warranty of identity is recognized in Missouri.⁵⁶

When the subject matter of the sale is something other than a food product, privity is required by the Missouri cases in an action on an implied warranty of quality.⁵⁷ In actions against manufacturers where privity is present, implied warranties of fitness once established are applied with little hesitation.⁵⁸ In actions against retailers, contract-type damages alone are recoverable in other than food product cases.⁵⁹ The *Philip Morris* case fits none of these categories.

CONCLUSION

The law of implied warranty of quality in Missouri today generally is satisfactory. Some improvements could be made. Kansas, also without the Uniform Sales Act, has extended the principle of the packaged food product cases to wholesalers and to hair dye for human use.⁶⁰ The *Philip Morris* decision, even though it cannot be supported under existing Missouri law, may be a desirable one. The United States Court for the Western District of Missouri is to be commended for its courage in rendering such a decision. Supposedly, a *McIntyre* result would not now be reached by this Court. The *M.F.A. Milling Co.* case shows that the Supreme Court of Missouri also is moving. Presumably, a *Barton v. Dows* result would not now be reached by that court. Such progress through the judicial system is the best that can be hoped for when the legislature fails to act upon the problem.

56. *Blackburn v. Carlson Seed Co.*, 321 S.W.2d 520 (Mo. Ct. App. 1959).

57. *Alexander v. Inland Steel Co.*, 263 F.2d 314 (8th Cir. 1958); *Smith v. Ford Motor Co.*, 327 S.W.2d 535 (Mo. Ct. App. 1959).

58. *Bankers Indemnity Ins. Co. v. Frigidaire Sales Corp.*, 113 F. Supp. 405 (E.D. Mo. 1953); cf. *Milprint v. Donaldson Chocolate Co.*, 222 F.2d 898 (8th Cir. 1955).

59. *Dubinsky v. Lindburg Cadillac Co.*, 250 S.W.2d 830 (Mo. Ct. App. 1952).

60. *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954) (an action by a customer of a beauty shop against a beauty supply distributor for injuries caused by the use of a "Miss Clairól" preparation). The case is noted at 3 Kan. L. Rev. 275 (1955). Allowance of actions against wholesalers may simplify service of process upon a responsible defendant.

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