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AVOIDANCE OF DISCLAIMER BY ACTION FOR FRAUDULENT MISREPRESENTATION

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The recent Washington Supreme Court decision in the case of *Nyquist v. Foster*[1] dealt with the troublesome problem of a chattel vendee's right to rescind upon proof of the vendor's fraudulent misrepresentation in a sales situation where the contract of sale contains a disclaimer clause. The purpose of the disclaimer clause is to prevent a suit by the purchaser upon a theory of either express or implied warranty. The common practice of inserting such a clause in a contract of sale makes any ruling upon its effective scope in limiting a vendee's possible right of action a matter of importance to lawyers and businessmen.

A disclaimer clause limiting the liability of the vendor is well-rooted in the freedom-of-contract concept. If a vendee desires to purchase a chattel, and in so doing agrees to limit his possible right of action arising out of the sale, he is free to do so. Most controversies involving an alleged breach of warranty where the vendor has included a disclaimer clause in the agreement of sale turn, not upon the fairness of the provision, but rather upon the issue of whether the disclaimer was broad enough in scope to negative any and all express or implied warranties.

Effective as a disclaimer clause may be to limit a contract right of action, it will not bar actions sounding in tort.[2] The underlying principle behind this rule might well be one of public policy. Courts have been reluctant to allow a party to a contract to completely disclaim all responsibility under any theory which the other party might advance. Consequently it has long been the rule that although a vendor could bar a warranty action by disclaimer, an action based upon a fraudulent misrepresentation could not be so disclaimed.[3]

[1] 44 Wn.2d 45, 268 P.2d 442 (1954).

[2] Schroeder v. Hotel Commercial Co., 84 Wash. 685, 147 Pac. 417 (1915); Wells v. Walker, 109 Wash. 332, 186 Pac. 857 (1920).

[3] Wells v. Walker, *supra*, note 2. The Wells case involved a disclaimer broad enough to cover all warranties whether express or implied. Where the disclaimer clause is so broad as to cover all warranties, a parol evidence problem is presented. A disclaimer clause which does not have sufficient scope to negate all warranties will have no effect upon the question of whether parol evidence is admissable to show a warranty not included within the disclaimer, but if the disclaimer clause includes all warranties, then evidence of a warranty other than those contained in the writing would not be admissable. Note, however, that if fraud can be shown, no provision of the contract can bar the admission of evidence of a fraudulent misrepresentation. VOLD SALES § 151 (1931).

The rule of nondisclaimer of fraud has given rise to a good number of difficult cases. At early common law when *scienter* was an indispensible element in a fraud action, the question was not so perplexing. If the vendee could not show that the vendor possessed a fraudulent intent at the time of sale, then his remedy must be founded upon a breach of warranty theory. If the vendor had taken the precaution of disclaiming liability, the vendee was in a rather difficult position.

Once the element of *scienter* disappeared as an element of fraud, the requirements for an action based upon a breach of warranty, and the requirements for an action based upon a fraudulent misrepresentation began to merge. As the disclaimer clause could not affect an action for fraudulent misrepresentation, its value as a limiting factor upon the liability of a vendor for statements made to a vendee diminished.

Scienter is not an element in a fraud action in the State of Washington.[4] The elements which must be shown are: a representation of an existing fact; its falsity; its materiality; the speaker's knowledge of its falsity or ignorance of its truth; intent that it should be acted upon by the person to whom it was made; the latter's reliance on the truth of the representation; his right to rely on it; and his consequent damage.[5] Each of these elements must be proved with clear and cogent proof,[6] and the existence of fraud will never be presumed.[7]

There appears to be a rather close parallel between the requirements for a fraudulent misrepresentation and the requirements of an express warranty. Section 12 of the Uniform Sales Act[8] defines an express warranty as: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

A comparison of the quoted section of the Uniform Sales Act with the requirements of a fraud action in the State of Washington would indicate that in many situations the representations of the seller would

[4] Pratt v. Thompson, 133 Wash. 218, 233 Pac. 637 (1925); McDaniel v. Crabtree, 143 Wash. 168, 254 Pac. 1091 (1927).

[5] Graft v. Geisel, 39 Wn.2d 131, 234 P.2d 884 (1951); Andrews v. Standard Lumber Co., 2 Wn.2d 294, 97 P.2d 1062 (1940).

[6] Tecklenburg v. Washington Gas Co., 40 Wn.2d 141, 241 P.2d 1172 (1952); Marion v. Grand Coulee Dam Hotel, 35 Wn.2d 589, 214 P.2d 204 (1950).

[7] Melton v. United Retail Merchants, 24 Wn.2d 145, 163 P.2d 619 (1945); Schanno v. Pangle, 19 Wn.2d 539, 143 P.2d 540 (1943).

[8] RCW 63.04.

present the buyer with an election as to which remedy to pursue. Obviously, if a disclaimer clause is in the contract, the remedy would be in an action for fraud. But not all statements which will give rise to a warranty action will support an action for fraud.[9] This raises the problem of whether a given representation will merely give rise to a warranty which can be disclaimed, or whether it will give rise to a misrepresentation which cannot.

It might appear that it is the element of intent which would differentiate between warranty and misrepresentation. Such a distinction is doubtful in view of the doctrine of "constructive fraud."[10] The intent required in fraud is that the speaker have knowledge of the falsity of the representation, or *ignorance of its truth.*[11] It is the "ignorance of its truth" provision that prompted the court in the case of *Thompson v. Huston*[12] to remark: "Untrue statements amount to constructive fraud, although made in entire good faith."[13]

The apparent lack of distinction in the intent element between a warranty and misrepresentation has had at least two effects in the sale situation. It first deprives the vendor of a defense based upon good faith where the vendee's action is for fraud. It also encourages the vendee to avoid the operation of a disclaimer clause by bringing his action in tort.

When an action for rescission due to fraud has been brought by the vendee, the vendor in the majority of cases has based his defense upon the theory that his statements were not representations at all, but were merely statements of opinion.[14] It might be noted that this is also one of the defenses which the vendor could rely upon if the action were based upon breach of warranty.[15]

The "statement of opinion" versus "representation of an existing fact" distinction is far from clear. In the case of *Western Farquhar Machinery Co. v. Pierce,*[16] the court held that an oral statement by the vendor that a given engine would develop a certain horsepower was an oral representation barred by the insertion in the contract of a dis-

[9] Western Farquhar Machinery Co. v. Pierce, 108 Wash. 621, 185 Pac. 570 (1919).
[10] Thompson v. Huston, 17 Wn.2d 457, 135 P.2d 834 (1943).
[11] Grant v. Huschke, 74 Wash. 257, 133 Pac. 447 (1913).
[12] *Supra,* note 10.
[13] *Accord,* Starwich v. Ernst, 100 Wash. 198, at 201, 170 Pac. 584, at 585 (1918). "True, there was no showing that the representation was wilfully false or made with intent to deceive, but it is not the rule in this jurisdiction that . . . the representation must be wilfully made with intent to deceive in order to give rise to liability."
[14] *See* Getty v. Jett Ross Mines, 23 Wn.2d 45, 159 P.2d 379 (1945).
[15] RCW 63.04.130.
[16] *Supra,* note 9.

claimer clause. In that case, the vendee did not allege fraud on the part of the vendor. In the later case of *Peoples Bank and Trust Co. v. L. Romano Engineering Co.*,[17] the vendee tried a different tack when faced with a disclaimer, and prevailed by alleging that a statement by the vendor that a diesel engine would develop more horsepower than a gasoline engine was a fraudulent misrepresentation. Whether the vendee in the *Western Machinery* case could have prevailed upon a theory of fraud is of course a moot question, but viewed in retrospect, the facts would have merited its allegation.

The decision in the *Peoples Bank and Trust* case was destined to have a considerable impact upon the law of misrepresentation in the State of Washington. A previous case of *Webster v. L. Romano Engineering Co.*[18] had rejected an argument of fraud based upon a statement that the vendor's road grader would operate successfully in wet earth and gravel. The court held that the statement was merely one of opinion, and not the statement of an existing fact. The court in the *Peoples Bank and Trust* case was divided, and the report contains three opinions. The majority distinguished the *Webster* case on the grounds that the statement by the vendor in that case was a matter of opinion. A concurring opinion applauded the majority for not following the *Webster* case, but maintained that it should have been expressly overruled. The dissent claimed that the *Webster* decision should have been followed, and that the plaintiff's action for misrepresentation should have been dismissed! These three opinions serve to illustrate the lack of unanimity which has marked the history of the problem.

In the most recent decision involving the issue of representation of fact or statement of opinion, the court was forced to take another look at both the *Webster* and *Peoples Bank and Trust* decisions. In the case of *Nyquist v. Foster*,[19] the vendor assured the vendee that the masonite walls of a trailer would not warp. This representation was not placed in the contract of sale in the form of a warranty. The contract did contain a sweeping disclaimer clause which rendered all but impossible a recission based upon an express or implied warranty theory. Shortly after purchase, the walls of the trailer began to warp. The vendee returned the trailer and demanded the return of the payments which he had made. Upon the refusal of the vendor to take back the trailer and return the payments, the vendee brought suit for fraud.

[17] 188 Wash. 290, 62 P.2d 445 (1936).
[18] 178 Wash. 118, 34 P.2d 428 (1934).
[19] *Supra*, note 1.

The vendee claimed that the *Nyquist* facts fell within the rule of the *Peoples Bank and Trust* case, while the vendor urged that the rule of the *Webster* case should be applied. The distinction which the court drew between the two cases formed the crux of the decision. The court first pointed out that in the *Webster* case, the vendor had stated that the chattel would be satisfactory for a *particular purpose* of the vendee, and that this element of particular purpose was lacking in both the *Peoples Bank and Trust* and the *Nyquist* case. In answer to the argument of the vendee that the statement that the trailer walls would not warp related to a future event, the court stated that what the vendor was in fact saying was that at the time of the statement, the walls of the trailer possessed a then existing capacity to successfully resist moisture and other climatic conditions which tend to cause warping. By this line of reasoning, *a misrepresentation of a defect which inhered in the chattel at the time that the statement was made was a misrepresentation of an existing fact, and was not a matter of opinion.* Could it not be argued that in the *Webster* case the capacity of the road grader to perform in wet earth and gravel inhered in the chattel at the time that the vendor's statement was made? No, said the court, for that was a representation that the chattel would be satisfactory for a particular purpose of the vendee, and hence the rule was inapplicable. It is somewhat interesting to note in connection with the court's distinction of the *Webster* case that the clearest statement of the "inherent quality" rule, which was relied upon by the court in the *Nyquist* case, that can be found in any of the early cases is contained in the dissenting opinion to the *Webster* case itself![20]

The statement of opinion or representation of existing fact criterion announced in the *Nyquist* case is that if the statement concerned a quality which inhered in the chattel at the time that the statement was made, then this is a representation of an existing fact, unless such representation related to the ability of the chattel to serve a particular purpose of the vendee. The court then grafted another exception onto the rule. If the representation depended for satisfaction upon the performance of a future act, or the occurance of a future event, the

[20] *Supra,* note 18 at 123, 34 P.2d at 431. ". . . the majority opinion is based upon the false premise that there was no misrepresentation as to an existing fact. The existing fact alleged was that the grader was capable, adequate and sufficient for operating in hard and wet earth and gravel. . . . That was not a mere promise or representation of what the promissor would do in the future, but what its implement could and would do in the present."

representation was merely one of opinion, and would not give rise to an action for fraud.[21]

The statement of the court in the *Nyquist* case is probably the clearest definition of what the court considers a representation of an existing fact that can be found in any decision rendered by the Washington Supreme Court. The rule that a statement concerning a quality which inhered in the chattel at the time that the statement was made is a representation of an existing fact unless it relates to a particular use of the chattel by the vendee, or unless the satisfaction of the thing represented depends upon the performance of a future act or occurrence of a future event serves to distinguish the *Peoples Bank and Trust* case from the *Webster* case.

The impact of the announced rule upon the common law of the State of Washington is somewhat difficult to gauge. This is due chiefly to a lack of expression in the earlier cases as to just what constitutes a statement of fact or a statement of opinion. A reading of the earlier cases would seem to indicate that several vendees could have prevailed upon a theory of fraud, although they lost on a breach of warranty theory.[22] This fact would lead to the belief that the rule of the *Nyquist* case does represent somewhat of an innovation in the law of fraud in this state. Henceforth vendors should not place too much reliance upon the defense that their statements were merely opinion. Certainly it will be rather an unusual defect which does not inhere in the chattel at the time that the representation was made. To what extent, if any, the immunity of vendors for "sales puffing" has been

[21] An example of this exception can be found in the case of Andrews v. Standard Lumber Co., 2 Wn.2d 294, 97 P.2d 1062 (1940). In that case the vendor represented that by following a home construction plan contract the vendee could construct a house for a stated price. This could not give rise to an action for misrepresentation due to the fact that the satisfaction of the thing represented depended upon the future performance of the Lumber Company and the building contractor.

[22] In Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932), the vendor represented that the windshield on the chattel was shatterproof. The vendee brought an action for damages resulting from the shattering of the windshield. The theory of the vendee's action, or rather the grounds upon which he prevailed against the manufacturer are not too clear. The retail dealer was joined with the manufacturer, and the court described the action as one for breach of warranty. Recovery was allowed against the manufacturer although there clearly was no privity of contract. The action against the retailer was dismissed upon the basis of a disclaimer clause. There was ample evidence of representations made to the vendee by both the manufacturer and the retailer to support a fraud action under the Nyquist rule. It would appear that the vendee might have been successful against the retail dealer had he chosen to bring the action for fraud, affirm the contract and sue for damages. In Winston Motor Carriage v. Blomberg, 84 Wash. 451, 147 Pac. 21 (1915), the vendee defended in an action for replevin of an automobile by relying upon a verbal warranty of the vendor that defective parts would be replaced. The vendee was defeated by the presence of an integration clause in the contract. No allegation of fraud was made, but certainly the defects in the automobile inhered in the chattel at the time of sale.

reduced remains to be determined by subsequent decisions. As a practical lesson, the case would indicate that in any situation where the vendee is confronted with the problem of escaping the action of a disclaimer clause, and wishes to sue for recission, an allegation of fraudulent misrepresentation should be included in the pleadings.

Another problem of the *Nyquist* case involves the reason behind the statement of the court that a representation by the vendor as to the fitness of the chattel for a particular use of the vendee cannot be a representation of an existing fact. This would seem to indicate that there is one class of representations which can be completely disclaimed to bar a warranty action, and which will not give rise to a suit for fraudulent misrepresentation. The implied or express warranty of fitness for use demands as one of its elements that the vendee make known to the vendor the particular purpose or use for which the chattel is being purchased.[23] If the vendee does make such purpose known to the vendor, and if the sales agreement contains a disclaimer clause, then the vendee cannot recover under either a theory of breach of warranty or a theory of misrepresentation. Just why a vendor cannot make a representation of an existing fact when the statement concerns a particular use to which the chattel will be put is not clear. If the chattel had the quality of either being fit or not fit for the purpose of the vendee, this quality in all probability inhered in the chattel at the time of sale. It might appear that the court did not care to disturb the *Webster* case, so built the rule around it. The persuasiveness of the *Webster* dissent seems enhanced, not diminished, in light of the rule of the *Nyquist* decision.[24] Of course in a great many sales situations the problem of the particular use to which the chattel will be put by the vendee will not arise due to the fact that the chattel is only intended for use in connection with one particular purpose.

The facts of the *Nyquist* case appear to present the middleground between two oft-conflicting and well-established principles of law. On the one hand is the policy of freedom of contract. On the other is the

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[23] RCW 63.04.160 (1).

[24] In Wells v. Walker, *supra*, note 3, the court allowed the vendee to rescind for fraud. The alleged misrepresentation was that a truck was capable of carrying a three-ton load over "ordinary" roads. Would this be a "particular use" to which the chattel would be put? It is a trifle difficult to distinguish a representation that a truck would perform capably under ordinary conditions from a representation that a road grader would perform capably under stated adverse conditions, yet the Wells and the Webster cases reach opposite results. One possible distinction, although not one advanced by the court, is that a vendor should be held to know what his chattel will do under ordinary conditions, but must speculate as to how it would operate under abnormal or adverse conditions.

public policy of forcing the vendor to stand behind his goods. Perhaps the comparative ease with which the modern courts find fraudulent misrepresentation can best be explained as an adjunct of the general shift in legal philosophy away from the older *caveat emptor* principle.[25] The absence of a fraud allegation in the earlier cases involving actions arising from the sale of defective chattels might well be evidence of the reception which such allegations were at that time receiving at the hands of the court. Faced in the *Nyquist* case with the problem of making the election between freedom of contract and public policy, the Washington Supreme Court chose public policy, and thereby placed itself in line with the current legal thought.

[25] " the more modern authorities have gradually recognized that it is not commercially expedient to impose upon the seller the burden of making good his representations about the goods. Accordingly the risk of the accuracy of the seller's statements about the goods is not thrown upon the seller who uses the language at his peril as an inducement to the buyer to buy, rather than the party who property relied thereon. In this respect *caveat emptor,* let the buyer beware, has given rise to caveat vendor, let the seller beware." VOLD SALES § 142 at 444 (1931). It should be noted that in the above quotation the author was speaking of warranties, not misrepresentations, but it is submitted that the same legal thought which prompted the courts to relax the rules of warranty has also prompted them to look with increasing favor upon an action for fraudulent misrepresentation.