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Sales

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SALES

Implied Warranty of Fitness—Partial Reliance. In *Fossum v. Timber Structures, Inc.*,[1] the Washington court adopted the rule that "an implied warranty of fitness may exist even though the buyer's reliance on the seller's skill and judgment is not a total reliance, and the buyer has relied on his own judgment as to some matters and on the seller as to other matters."[2]

It is necessary to look closely at the facts of the *Fossum* case to see exactly what the present effect of this rule is on Washington law. In 1955, respondents, fruit growers in the Yakima valley, decided to construct a fruit warehouse, the roof of which was to be supported by "bow string" trusses. The respondents selected a general designer to prepare plans for all parts of the building except the roof trusses. In February of 1955, one of the respondents contacted a sales representative of appellant, explained to him the nature of the building, and requested a price quotation for trusses which would meet their needs, particularly in that they would be capable of withstanding any snow load which could be expected in the Yakima area. At that time the representative estimated that the trusses should be designed to hold a "dead load" of seventeen pounds and a "live load" of twenty-five pounds. Subsequently, a sales order was prepared in which the loads were specified, the "dead load" figure being fifteen pounds. After respondents signed the order, appellant supplied plans for the trusses which specified a "dead load" of only ten pounds. Respondents then presented the plans to their general designer who, upon making certain corrections as to length and other suggestions, returned them to appellant. Upon receiving a sales change order which specified a "dead load" of ten pounds, respondents returned it to appellant, indicating their approval of the truss plans as corrected.[3] The "live load" remained fixed at twenty-five pounds throughout the negotiations. Appellant proceeded to build and erect in place the roof trusses according to the plans.

In January, 1956, several months after completion of the warehouse, the roof collapsed following a heavy snow fall. Respondents brought suit alleging, as one theory of recovery, breach of an implied warranty

[1] 154 Wash. Dec. 395, 341 P.2d 157 (1959).
[2] *Id.* at 413.
[3] Actually, this reduction in "dead load" should not have played a role in the collapse of the roof, for "dead load" is the permanent load or weight of the roof and anything suspended therefrom. The snow load would be considered "live load," which consists of any weight temporarily added to the roof.

of fitness for a particular purpose. The defendant appealed the unfavorable jury verdict, contending, among other things, that the trial court should have found, as a matter of law, respondents, by submitting the plans with the specified load factors to their designer for approval, did not rely on appellant's skill or judgment in making the purchase.

In reaching its decision on this issue, the court first said: "From the evidence, the jury could have believed that, in showing the truss plans to Sanford [respondent's general designer], respondents were merely assuring themselves that the trusses would fit in with the over-all construction of the warehouse."[4] The court then announced the partial versus total reliance rule set forth above and cited one Iowa case[5] as authority. Perhaps no severe criticism should be leveled at the summary adoption of this rule, since it overrules no prior Washington law. It is new law, however, at least to the extent it means that where a purchaser has his own expert inspect the specifications for the goods to be purchased, it is still possible for a jury to find that the purchaser relied on the seller's judgment that the goods would be suitable for the buyer's particular purpose. Viewed in the light of the facts of the *Fossum* case, the rule is not startling. For the roof trusses in question to have been reasonably suitable for the purpose described to appellant, it would have been necessary for them to fit, physically, the rest of the building. Secondly, the trusses must have been capable of supporting the roof when covered with snow. It is entirely reasonable that reliance by the purchaser on the skill or judgment of the appeallant as to the existence of either of these characteristics should give rise to an implied warranty of suitability, for the absence of either would mean that the trusses were in fact not suitable.

If the rule is applied only to cases which fit the fact pattern of the *Fossum* case, total reliance on the seller's skill or judgment as to the existence of at least one of the necessary qualities is still a prerequisite to the implied warranty. The wording of the rule itself indicates that it will be so limited. Such limitation would mean that the rule will not be extremely difficult for a jury to apply. It also would not introduce a factor which would make prediction of outcome entirely impossible for the attorney. However, the fact patterns of the Iowa case cited by the court and of other cases in which courts have stated the rule in exactly the same words, were such as to indicate that courts have

[4] 154 Wash. Dec. 395, 413, 341 P.2d 157, 168 (1959).
[5] Drager v. Carlson Hybrid Corn Co., 244 Iowa 78, 56 N.W.2d 18 (1952).

applied the rule where the reliance as to the existence of a single quality was divided. At least the facts of those cases as reported do not show that the desired qualities were susceptible of being broken down into several separate qualities with separate reliance on each quality, as are those of the *Fossum* case.[6] If this is the case, it is to be hoped that the Washington court has recognized and will maintain the distinction. If the rule is extended to the second type of fact situation, the finder of fact is faced with the very difficult decision as to when the reliance of the buyer on the skill or judgment of the seller sufficiently outweighs the buyer's reliance on his own judgment to give rise to the implied warranty.

[6] The rule seems to have originated in Kurriss v. Conrad & Co., 312 Mass. 670, 46 N.E.2d 12 (1942). The Massachusetts court discussed Flynn v. Bedell Co., 242 Mass. 450, 136 N.E. 252 (1922), a case in which the buyer had participated to some extent in selecting a coat with a fur collar. Since the court had said that there was sufficient evidence to warrant a jury finding that the buyer relied on the seller's skill and judgment that the fur was natural rather than dyed, the court in the *Kurriss* case concluded the earlier court meant that reliance under the Uniform Sales Act need not be total reliance and that the buyer may rely on his own judgment as to some matters and on the skill or judgment of the seller as to others. The *Flynn* case had the same type of fact pattern as the *Fossum* case in that the qualities on which there was a different source of reliance were easily separated. In the *Kurriss* case itself, the buyer purchased a dress selected by the seller. The reliance was not total in that the buyer tried the the dress on and, therefore, to some extent, participated in the selection. However, trying the dress on only indicated reliance on the buyer's own judgment as to matters pertaining to the fit of the dress and not as to whether the dress was unsafe for any reason. The court allowed a recovery for skin irritation caused by some latent defect in the dress.

In Drager v. Carlson Hybrid Corn Co., *supra* note 5, the purchaser bought hybrid seed corn from the seller. The Iowa court said that the trial court granted a directed verdict for the seller on the bases of lack of proof as to (1) the measure of damages and (2) reliance by the buyer on the seller's skill or judgment. The appellant had bought such seed corn from the same seller for several years and, therefore, to some extent, relied on his own judgment that corn purchased from the seller would be suitable. Also, the sales contract reserved to the buyer the right to reject any or all of the crop if it did not qualify, further indicating that the buyer was relying on his own judgment. Without specifying as to what matters the buyer relied on his own judgment and as to what matters he relied on the skill or judgment of the seller, the Iowa appellate court, in reversing the lower court, applied the same partial versus total reliance rule stated by the Washington court in the *Fossum* case.

In Rasmus v. A. O. Smith Corp., 158 F. Supp. 70 (W.D. Iowa 1958), the federal court quoted the rule from the *Drager* case. The buyer had purchased a corn storage bin after making known to the seller the exact purposes for which he wished to use it. However, he had, prior to the purchase, visited a neighboring farm where such a bin was installed, in an attempt to ascertain whether the product was what he wanted. The court applied the partial reliance rule and allowed recovery for breach of warranty even though the buyer had partially relied on his own judgment on the very matters which the court found gave rise to the implied warranty.

Himmelstein v. Budner, 93 F. Supp. 946 (D.C. D.C. 1950), was another case in which the matters for which the buyer relied on his own judgment were clearly distinguishable from those for which the seller's skill or judgment were relied on. This case was cited for the partial reliance rule in Hagedorn v. Taggart, 114 A.2d 430 (Munic. Ct. of Appeals D.C. 1955). There, a lady who had worn hearing aids for several years purchased a new one, partially relying on her own experience and judgment and partially relying on the skill and judgment of the seller. Once again the rule was applied to the fact situation in which it is difficult to see a separation of reliance corresponding to a separation of necessary characteristics of the merchandise.

Another contention of appellant was that the specification of load factors in the plans constituted an express warranty that the trusses would withstand the specified loads, that such warranty would be inconsistent with an implied warranty that the trusses would withstand any greater load, and that therefore, under RCW 63.04.160 (6),[7] the latter warranty did not arise. In answering this argument, the Washington court quite correctly pointed out that such an express warranty was not inconsistent with an implied warranty that such load factors would produce trusses suitable for respondent's purpose, that is, trusses capable of withstanding any snow load which could be expected in the Yakima area. As authority for this proposition the court cited *Long v. The Five-Hundred Co.*[8] However, that case was not one in which a purchase order containing the specifications for the merchandise was signed by the purchaser. The facts of the *Fossum* case are more nearly like those of *United States Cast Iron Pipe & Foundry Co. v. Ellis,*[9] which was discussed and distinguished in the *Long* case. The sales contract in the *Long* case specified a particular Day-Elder auto truck. The contract signed by the parties in the *Ellis* case specified the type and size of cast iron pipe being purchased. In both cases the seller had been informed of the buyer's particular use for the goods being purchased. An implied warranty was held to arise in the former case but not in the latter. The cases may be distinguished by looking at the negotiations leading to the contract in each case. In the *Long* case the seller, upon hearing of the buyer's need, presented the particular truck and represented that it was suitable for the buyer's purpose. In the *Ellis* case the buyer himself had attached to the order the contract under which he was working, which contained detailed specifications as to the type of pipe to be used. Although the facts of the *Fossum* case seem to coincide more nearly with those of the *Ellis* case than with those of the *Long* case, the distinction made above, as to which party furnished the description or specifications, when applied to the facts of the *Fossum* case, clearly places the *Fossum* case in the *Long* case category. Actually, the rules stated in the *Ellis* case clearly require the decision reached in both the *Long* and *Fossum* cases.[10] In this respect the *Fossum* case does not alter any existing

[7] "An express warranty or condition does not negative a warranty or condition implied under this chapter unless inconsistent therewith."

[8] 123 Wash. 347, 212 Pac. 559 (1923).

[9] 117 Wash. 601, 201 Pac. 900 (1921).

[10] "[I]t is perhaps the general rule, that where a buyer orders a specific article from a dealer or manufacturer, stating the purpose for which the article is intended to be

law but does indicate the extent to which the *Ellis* rules will be applied. It is to be hoped that any future Washington decisions in this area will contain an analysis in terms of these rules.

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SECURITY TRANSACTIONS

Security Transactions — Purchase-money Mortgages, Mechanic's Lien — Priorities. On occasion, a real estate contract vendee will have a mechanic or materialman perform work or furnish materials prior to the vendee's receiving record title in the property. The vendee may also grant a purchase-money mortgage on the same property. The purpose of this Casenote is to consider the priorities between the purchase-money mortgage and the mechanic's or material-man's lien in Washington. The matter has again been raised in the recent decision of *Nelson v. Bailey*.[1]

The mechanic's lien attaches, at the time the work is performed, to the interest in the land of the person who caused the work to be done.[2] If the person for whom work is performed has less than the fee, the lien will not ordinarily attach to the fee. For example, in the case of a mechanic or materialman who performs services for a lessee who is authorized by the terms of the lease to build, the lien attaches only to the lessee's interest and does not attach to the lessor's fee.[3] The Washington court in the lease case rejected an argument that the lessee was the agent of the lessor.[4] In the case of *Newell v. Vervaeke*[5]

used, and trusts to the judgment of the seller the selection of the article which shall be suitable for the intended purpose, there is an implied warranty that the article furnished shall be reasonably fit for the intended purpose. . . . But the converse of the proposition is equally the rule, namely, that when the article ordered is to be manufactured according to certain prescribed specifications, or is an article well known and defined in current trade, the contract is complied with when an article is furnished which is manufactured in accordance with the designated specifications, or is an article of the standard kind known to the trade, even though the seller may know the purposes for which it is intended to be used and it afterwards proves to be unfit or unsitable for the intended purpose." *Id.* at 605-06.

[1] 154 Wash. Dec. 153, 333 P.2d 757 (1959).

[2] RCW 60.04.030.

[3] Stetson-Post Mill Co. v. Brown, 21 Wash. 619, 59 Pac. 507 (1899); Colby & Dickinson, Inc. v. Baker, 145 Wash. 584, 261 Pac. 161 (1927).

[4] See note 3, *supra;* however, in Seattle Lighting Fixture Co. v. Broadway Cent. Market, 156 Wash. 189, 286 Pac. 43 (1930), the court held that a mechanic's lien did attach to the fee of the lessor in a lease which by its terms *required* the lessee to build.

[5] 189 Wash. 144, 63 P.2d 488 (1937). See also, Baker v. Sinclaire, 22 Wash. 462, 61 Pac. 170 (1900). A recorded conditional sale contract with forfeiture clause will prevent the lien from attaching to the fee, Mentzer v. Peters, 64 Wash. 540, 33 Pac. 1078 (1893); Iliff v. Forssell, 7 Wash. 225, 34 Pac. 928 (1893), even if the conditional sale contract requires that work be performed, Northwest Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996 (1904).