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be carried out in the name of the strong public policy of free collective bargaining.

DOROTHY E. SCHUCHAT

SALES: EXTENSION OF IMPLIED WARRANTY OF MERCHANTABILITY TO USED GOODS

*Worthey v. Specialty Foam Products, Inc.*¹

Specialty Foam Products, Inc. (Specialty Foam) purchased a used truck from a used truck dealer in Springfield, Missouri. Within a week after the sale, the truck broke down and could not be driven. A mechanic found that extensive and costly repairs would be required. Specialty Foam stopped payment on its check following which the seller sued for the purchase price. Specialty Foam counterclaimed that the truck's condition constituted breach of an implied warranty of merchantability under section 2-314 of the Uniform Commercial Code. The trial court found against the seller on his claim and entered judgment for Specialty Foam on its counterclaim for damages.

The Missouri Court of Appeals for the Southern District affirmed and held that an implied warranty of merchantability arises in a sale of used or secondhand goods. The court also held that a breach of warranty may be proven by circumstantial evidence that the goods are not merchantable. Proof of a specific defect is not required.

In extending the implied warranty of merchantability to sales of used goods, the court relied on decisions from other jurisdictions and on paragraph 3 of the Official Comments to section 2-314 of the Code.² While a cursory examination of these authorities would seem to reveal virtual unanimity, a more detailed study discloses some differences of opinion; differences that the *Worthey* court ignored.

The text of Article 2 of the Uniform Commercial Code does not make a distinction between sales of new and of used goods.³ This has engendered a

1. 591 S.W.2d 145 (Mo. App., S.D. 1979).

2. *Id.* at 148-49.

3. Article 2 applies to "transactions in goods." U.C.C. § 2-102. [Hereinafter, citations will be made only to the 1962 Official Text of the Uniform Commercial Code.] "Goods means all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action." U.C.C. § 2-105(1).

three-way split among courts on the question of whether sales of used goods are covered by the implied warranty of merchantability. A slight majority apply a mandatory rule.⁴ These courts would agree with the holding of *Worthy* "that the sale of second-hand goods is covered by . . . [section 2-314] and carries an implied warranty of merchantability."⁵ A substantial number of courts, on the other hand, have adopted a permissive rule, holding that a sale of used goods *may* give rise to an implied warranty of merchantability.⁶ Finally, Texas courts stand alone in their view that there is no implied warranty when used goods are sold.⁷

This divergence appears to stem from a single sentence in paragraph 3 of the Official Comments to section 2-314. The sentence reads: "A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description."⁸

4. See, e.g., *Moore v. Burt Chevrolet, Inc.*, 39 Colo. App. 11, 563 P.2d 369 (1977); *Georgia Timberlands, Inc. v. Southern Airways Co.*, 125 Ga. App. 404, 188 S.E.2d 108 (1972); *Centennial Ins. Co. v. Vic Tanny Int'l, Inc.*, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975); *Testo v. Ross Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 554 P.2d 349 (1976).

5. 591 S.W.2d at 148.

6. See, e.g., *Chamberlain v. Bob Matick Chevrolet, Inc.*, 4 Conn. Cir. Ct. 685, 239 A.2d 42 (1967); *Knipp v. Weinbaum*, 351 So. 2d 1081 (Fla. Dist. Ct. App. 1977); *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972); *Roupp v. Acor*, 253 Pa. Super. Ct. 46, 384 A.2d 968 (1978).

Several other courts have extended the warranty to used goods without any indication as to which of the two rules they would follow. See, e.g., *Hensley v. Colonial Dodge, Inc.*, 69 Mich. App. 597, 245 N.W.2d 142 (1976); *Turner v. International Harvester Co.*, 133 N.J. Super. 277, 336 A.2d 62 (Law Div. 1975); *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975); *Tracy v. Vinton Motors, Inc.*, 130 Vt. 512, 296 A.2d 269 (1972).

New York's position is not clear. *Natale v. Martin Volkswagen, Inc.*, 92 Misc. 2d 1046, 402 N.Y.S.2d 156 (City Ct. 1978), and *Stream v. Sportscar Salon, Ltd.*, 91 Misc. 2d 99, 397 N.Y.S.2d 677 (Civ. Ct. 1977), both extended an implied warranty to used goods. But *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. 1972), indicated that the warranty might be implied only on a selective basis. See note 13 and accompanying text *infra*. The New York appellate courts have not addressed the question.

7. E.g., *Valley Datsun v. Martinez*, 578 S.W.2d 485 (Tex. Civ. App. 1979); *Hovenden v. Tenbush*, 529 S.W.2d 302 (Tex. Civ. App. 1975); *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877 (Tex. Civ. App. 1973). The Texas position has not gone uncriticized. See Comment, *UCC Implied Warranty of Merchantability and Used Goods*, 26 BAYLOR L. REV. 630, 641 (1974); Comment, *Implied Warranties of Quality on Used Motor Vehicles in Texas*, 9 ST. MARY'S L.J. 308, 322 (1977).

8. The Official Comments were prepared by the Conference of Commissioners on Uniform State Laws and the American Law Institute. The Comments are designed to explain the intent and purpose of the Code sections. See *Preface* to U.C.C. The Comments, however, have not been adopted by the Missouri legislature.

Proponents of each of the three rules have relied on this sentence in support of their stance, each declaring that the implied warranty is or is not appropriate to the goods in question.⁹ The resolution of a particular case turns, then, on what the court finds to be "appropriate to such goods." While the permissive rule seems to require a finding of fact in each case as to whether or not the warranty is appropriate, the Texas rule and the mandatory rule declare as a matter of law that the warranty is always or is never appropriate for such goods.

Although the *Worthey* court recognized the uniqueness of the Texas rule,¹⁰ it failed to distinguish between those courts which merely permit implied warranties and those which appear to require them. This failure is evident from the court's citation of permissive warranty cases in support of its holding that the warranty is mandatory.¹¹ A distinction between the two rules could be significant. It is not difficult to imagine a sale of used goods, where the purchaser knows full well what he is getting, and where the purchase price accurately reflects the uncertain quality of the merchandise. Under the mandatory rule, unless the parties had validly disclaimed the implied warranty of merchantability, the warranty might be automatically and arbitrarily implied in the sale, even though the parties were aware of and bargained on the basis of the possible defective quality of the goods.¹² The permissive rule, however, would allow the trier of fact to take those circumstances into account and decide on all of the facts whether or not the warranty arose.¹³ Thus, while the mandatory rule

9. See, e.g., *Roupp v. Acor*, 253 Pa. Super. Ct. 46, ____ , 384 A.2d 968, 969-70 (1978) (permissive rule); *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877, 878 (Tex. Civ. App. 1973) (implied warranty not applicable); *Testo v. Ross Dunmire Oldsmobile, Inc.*, 16 Wash. App. 39, 43, 554 P.2d 349, 354 (1970) (mandatory rule).

10. 591 S.W.2d at 147 n.3.

11. *Id.* at 148-49. The court cited *Roupp* and *Overland Bond* as authority for its mandatory application of the warranty. Both are in fact permissive warranty cases.

12. In *Natale v. Martin Volkswagen, Inc.*, 92 Misc. 2d 1046, 402 N.Y.S.2d 156 (City Ct. 1978), plaintiff paid \$416 for an eight-year-old car, yet the warranty of merchantability was implied by the court.

13. See, e.g., *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858, 328 N.Y.S.2d 490 (Civ. Ct. 1972), where the court stated:

What we are concerned with here are two pieces of restaurant equipment — a dishwasher and an ice-maker — undoubtedly larger and more complex than similar equipment intended for home use — both of which had undergone the heavy wear and tear normal in the operation of a restaurant. The possibility that individual components might be worn out or otherwise defective, requiring replacement or repair, is surely implicit in such a transaction.

Id. at 860, 328 N.Y.S.2d at 492-93. One way to look at the permissive warranty rule is that the trier of fact may infer a waiver or modification of the implied warranty of merchantability. See U.C.C. § 2-316 (exclusion or modification of war-

would guarantee greater consistency, the permissive rule seems better designed to reach a fair and just result.¹⁴

Worthey further held that breach of an implied warranty of merchantability may be proven solely by circumstantial evidence that the goods were not merchantable at the time of their sale. It is not necessary for the purchaser to prove the existence of any specific defect.¹⁵ This approach goes a step beyond the position of a great majority of jurisdictions and may help clarify some confusing Missouri case law.

In *Dotson v. International Harvester Co.*,¹⁶ the Missouri Supreme Court held that with certain types of goods "some evidence of faulty design or defect in parts and specific functions" would be required to prove breach of warranty.¹⁷ The plaintiffs showed that they had properly used a corn planter and that the corn had grown in an irregular pattern. Although the court found that this evidence might be sufficient to support the inference that the planter was "defective in some respect or wholly worthless for the purpose for which it was manufactured," it rejected the plaintiff's claim because there was no evidence of a specific defect.¹⁸

This question was not addressed again by a Missouri court until *Williams v. Ford Motor Co.*¹⁹ There, the plaintiff offered evidence that any one of four proposed defects could have caused a particular malfunction.²⁰ There was no evidence, other than the occurrence of the malfunc-

ranties). Although no court has couched its analysis in such terms, it could be a useful approach. The fact-finder would be free to consider overtly those factors which might make the implication of a warranty unjust. The net effect would be a greater degree of intellectual honesty, as well as to give the advocate a more consistent basis for argument.

14. The extension of an implied warranty of merchantability to the sale of used goods raises some interesting questions when compared with recent Missouri case law on implied warranties in the sale of houses. *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. En Banc 1972), held that an implied warranty of habitability arose in the sale of a new house by the vendor-builder to a first purchaser. The court ruled out implied warranties in the sale of a used house. *O'Dell v. Custom Builders Corp.*, 560 S.W.2d 862 (Mo. En Banc 1978), pointed out that the warranty implied in *Old Warson* was closely analogous to the implied warranty of merchantability found in U.C.C. § 2-314. *Id.* at 870. In light of these two cases, *Worthey* could make critical the determination whether a particular item was personal property or a fixture. In the sale of a used house, fixtures might be immune from implied warranties while personal property could be covered.

15. 591 S.W.2d at 149.

16. 365 Mo. 625, 285 S.W.2d 585 (1955).

17. *Id.* at 639, 285 S.W.2d at 593. The holding applies to goods "so comparatively simple . . . as a corn planter." *Id.* This qualification of comparative simplicity is not explained further by the court, but merely stated and applied.

18. *Id.*

19. 411 S.W.2d 443 (Mo. App., St. L. 1966).

20. In *Williams*, the steering mechanism in plaintiff's car had failed to work

tion, that any one of those four defects had actually existed at the time of the sale. The St. Louis Court of Appeals held that "the existence of a defect may be inferred, just as negligence may be inferred, from circumstantial evidence."²¹ It is not clear, however, whether the court meant that the circumstantial evidence must point toward some specifically named defect, or merely toward a defect of some sort. The fact that four specific defects had been offered by the plaintiff as potential causes of the malfunction would seem to limit the holding of the case to those situations where a plaintiff had suggested at least one specific defect and offered evidence of its existence.

The uncertainty of the *Williams* decision is representative of the uncertainty on this issue in numerous states. While almost no jurisdiction requires direct evidence of a specific defect,²² there is confusion over whether or not a specific defect at least need be suggested.²³ In *Jacobson v. Broadway Motors, Inc.*,²⁴ the Kansas City Court of Appeals apparently held that no reference to a specific defect is needed. Instead, the court ap-

properly, causing her to lose control of the car. She presented expert testimony that any one of four specific defects could have caused the problem. *Id.* at 447. The court relied on that evidence as a step toward its conclusion that a defect existed. *Id.* at 448.

21. *Id.* at 447.

22. Only two cases other than *Dotson* appear to have upheld such a requirement. *United States Rubber Co. v. Bauer*, 319 F.2d 463 (8th Cir. 1963), applied North Dakota law to hold that proof of the existence of a defect is required to prove breach of an implied warranty. The court did not, however, rule out the possibility of using only circumstantial evidence to establish that proof. In *Ballou v. Trahan*, 133 Vt. 185, 334 A.2d 409 (1975), the vendor was not a merchant, so no warranty of merchantability was implied. The court indicated in dicta that plaintiff's failure to prove the existence of the claimed defect would have barred the claim anyway, although there was ample circumstantial evidence to infer a defect. *Id.* at 187, 334 A.2d at 410. *But see Vermont Food Indus., Inc. v. Ralston Purina Co.*, 514 F.2d 456 (2d Cir. 1975) (applying Vermont law); *Patton v. Ballam & Knights*, 115 Vt. 308, 58 A.2d 817 (1948).

23. *See, e.g., Kridler v. Ford Motor Co.*, 422 F.2d 1182 (3d Cir. 1970) (following Pennsylvania law); *Crystal Coca-Cola Bottling Co. v. Cathey*, 83 Ariz. 163, 317 P.2d 1094 (1957); *Drier v. Perfection, Inc.*, 259 N.W.2d 496 (S.D. 1977). In each of these cases the court declared that plaintiff could prove the existence of a defect by circumstantial evidence alone. In each case, however, a specific defect was suggested, and the circumstances indicated that that defect existed.

Clearly though, if the plaintiff is unable to suggest a possible defect and relies solely on supposition of a defective condition, he is more vulnerable to a finding that the evidence is insufficient to infer that a defect existed. *See, e.g., Holcomb v. Cessna Aircraft Co.*, 439 F.2d 1150 (5th Cir. 1971) (following Kansas law); *Klein v. Continental Emsco Co.*, 310 F. Supp. 413 (E.D. Tex. 1970); *Heil v. Standard Chem. Mfg. Co.*, 301 Minn. 315, 223 N.W.2d 37 (1974).

24. 430 S.W.2d 602 (Mo. App., K.C. 1968).

pears to have retained a requirement that the evidence give rise to an inference that a defect existed. In that case the plaintiff had not offered evidence of any defect, but only that an automobile caught fire while standing still. The court held this sufficient to draw an inference "that the fire was caused by a defect in material or workmanship."²⁵ Under *Jacobson*, a plaintiff could prove breach of warranty without proposing a specifically named defect as *the* defect which caused the damage. He need only prove circumstances creating the inference that some defect may have done so. The defect itself could remain unknown and unmentioned.²⁶

Worthey completed this evolution toward eliminating required proof of a specific defect. It is an improvement over *Jacobson* and *Williams* because it removes from the plaintiff's case any need to mention the word "defect." The distinction between a "defect" and a "specific defect" no longer need be addressed. Plaintiff's burden goes instead to the issue of merchantability.²⁷ While this is a significant intellectual development, its practical effect may be minimal, at least so far as it extends from *Jacobson*. Evidence sufficient to meet the *Worthey* test of "not merchantable" should rarely be insufficient to meet the *Jacobson* test of a "defect." When the evidence does meet both tests, the only practical difference between *Jacobson* and *Worthey* is one of pleading.

25. *Id.* at 606.

26. While these four Missouri cases, *Dotson*, *Williams*, *Jacobson*, and *Worthey*, seem to reflect a logical evolution of thought, some collateral questions remain unanswered. *Dotson*, a supreme court case, has never been overruled. Each of the three subsequent cases came from a different district of the court of appeals. Although they conflict with *Dotson*, they make no attempt to distinguish or reconcile the differences—in fact, none of the cases even cites *Dotson*. There are several possible explanations. *Dotson*, *Williams*, and *Jacobson* were pre-Code cases. The *Worthey* court could have justifiably ignored them on that basis. That does not, however, explain the failure of *Williams* and *Jacobson* to recognize the authority of *Dotson*. They may have seized on the distinction in *Dotson* between complicated and uncomplicated machinery. See note 17 *supra*. Alternatively, they may have recognized *Dotson* as being distinctly in the minority and chose to ignore it. See note 22 and accompanying text *supra*.

27. Although the holding in *Williams* is on the issue of defect, there is dicta in accord with *Worthey*:

[B]y this argument about a precise defect . . . the defendants overlook the gist of Mrs. Williams' complaint; . . . the fitness of the Thunderbird. True, she tried to show the car's unfitness by describing the steering mechanism and its probable defect; but her real complaint was that the . . . product was unfit for normal use.

411 S.W.2d at 448. *Accord*, *Community Television Serv., Inc. v. Dresser Indus., Inc.*, 586 F.2d 637 (8th Cir. 1978) (following South Dakota law); *Scheuler v. Aamco Transmissions, Inc.*, 1 Kan. App. 2d 525, 571 P.2d 48 (1977); *Piper v. Tensor Corp.*, 71 Mich. App. 658, 248 N.W.2d 659 (1976); *Brown v. Globe Labs., Inc.*, 165 Neb. 138, 84 N.W.2d 151 (1957); *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, 322 A.2d 440 (1974).