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CONTRACTS

I. ORAL MISREPRESENTATIONS OF MATERIAL FACT

The South Carolina Supreme Court ruled in *South v. Sherwood Chevrolet, Inc.*,¹ that no error was committed by the lower court in allowing a jury to decide if an automobile dealer acted fraudulently when he misrepresented the model year of a 1978 truck by putting a 1979 window sticker on it. The court held that even though the purchaser had signed a written instrument which stated the correct model information, he was not, as a matter of law, precluded from bringing an action for fraud and deceit. Thus, *Sherwood Chevrolet* further refines the court's interpretation of the role of written documents in cases of fraud.²

The action against Sherwood Chevrolet arose from a sales transaction with plaintiff, South, in January 1979. South visited the dealership and specifically asked to see a 1979 truck. A salesman directed him to the vehicle he subsequently purchased.³ The window sticker on the truck stated it was a 1979 model, and South purchased the truck apparently believing it to be a 1979 truck.⁴ Three months later when South attempted to sell the truck, he discovered that it was actually a 1978 model. At the time of the purchase, South had signed a sales agreement which described the truck as a 1978 model. A 1978 owner's manual was in the glove compartment, and the EPA sticker on the window listed the estimated gas mileage for a 1978 truck.⁵ South had also acquired a South Carolina registration card for a 1978

1. 277 S.C. 372, 287 S.E.2d 490 (1982).

2. See, e.g., *Hutto v. Southern Farm Bureau Life Ins. Co.*, 259 S.C. 170, 191 S.E.2d 7 (1972)(written agreement held not to preclude an action for fraud where agreement was not made available to the plaintiff until four months after misrepresentation and the plaintiff had made payments and incurred substantial damages); *Moye v. Wilson Motors, Inc.*, 254 S.C. 471, 176 S.E.2d (1970)(written agreement binding where no representation made to customer as to contents of contract); *Jones v. Cooper*, 234 S.C. 477, 109 S.E.2d 5 (1959)(written agreement upheld where salesman's representations were "puffing," no material representations were made which differed from the terms of the contract, and the plaintiff could have ascertained the truth by reading the document he signed).

3. 277 S.C. at 373, 287 S.E.2d at 491.

4. *Id.* at 375, 287 S.E.2d at 492.

5. *Id.* at 373, 287 S.E.2d at 491.

model truck.⁶

South brought suit against Sherwood Chevrolet seeking damages for fraud. The trial court found in favor of the plaintiff and awarded South \$1,750 in actual and punitive damages. Sherwood Chevrolet appealed and the South Carolina Supreme Court, in a three to two decision, affirmed.

On appeal, the supreme court directly addressed only two of the nine elements necessary to prove fraud: the speaker's knowledge of the falsity of the representation or reckless disregard of its truth or falsity, and the hearer's right to rely on the representation. The majority found the central issue to be whether Sherwood Chevrolet's representation that the truck was a 1979 model was made in reckless disregard of the truth. There was conflicting testimony on what the salesman had actually said to South and on how the 1978 truck had been marked with a 1979 sticker. The court held that these factual determinations were properly put to the jury, thus affirming the lower court's denial of defendant's motions for nonsuit, directed verdict and judgment n.o.v.⁷

The supreme court based its decision on *Carroll Motors, Inc. v. Purcell*,⁸ which it found to be analogous to *South*. In *Carroll Motors*, a sales agent represented that a mileage odometer was correct to the best of his knowledge. He had not checked the odometer, and the court held that whether the statement was made in reckless disregard of the truth was for the jury to determine.⁹ The court concluded that fraud may be inferred when one recklessly makes a false material representation without any knowledge of its truth and as a positive assertion.¹⁰

The court rejected Sherwood's argument that South was precluded from recovery for fraud because the sales agreement that he had signed clearly stated the truck was a 1978 model. Sherwood claimed South had no right to rely on the representa-

6. *Id.* at 375, 287 S.E.2d at 492.

7. *Id.* at 374, 287 S.E.2d at 491-92.

8. 273 S.C. 745, 259 S.E.2d 604 (1979).

9. *Id.* at 748, 259 S.E.2d at 606.

10. *Id.* at 748, 259 S.E.2d at 606 (quoting *Gary v. Jordan*, 236 S.C. 144, 158, 113 S.E.2d 730, 737 (1960)). *Gary* was an action for fraud and deceit on the ground that six of twenty cows bought by Gary from Jordan were positive reactors to brucellosis. Outbreaks of the disease in Gary's herd necessitated slaughter of thirty cows and quarantine of the remainder. At the time of the purchase, Jordan had assured Gary that the cows were "clean."

tion since the truth could have been ascertained by reading the sales agreement. Sherwood based its argument on *Moye v. Wilson Motors, Inc.*¹¹ The court, however, distinguished *Moye* by pointing out that there the defendant made no direct representation to the purchaser on the contents of the contract before he signed it. Sherwood, however, directly misrepresented the truck model to South and then recorded that information differently on the sales agreement.¹²

In deciding *South*, the court made no reference to *Woodward v. Todd*.¹³ In a situation similar to that in *South*, the *Woodward* court unanimously decided to bar a charge of fraud because of a written document signed by the purchasers. The Woodwards purchased a home from Todd's Mobile Homes. During the course of negotiations a salesman asserted that the total purchase price would be \$8,734. The Woodwards signed an assumption of liability agreement in which the total purchase price of the home was listed as \$10,004.49,¹⁴ but they did not read the agreement when they signed it. The court held that they could not complain of fraud in the misrepresentation of the price because they could have learned the truth by reading the document they signed.¹⁵

While *Woodward* appears to be analogous to *South*, there are some factual differences. The only representation made to the Woodwards was oral, while the representations made to South were both oral (the salesman's statement) and written (the sticker on the truck). Furthermore, another avenue of relief was available to the Woodwards. They could have brought a contract action for the failure of Todd's Mobile Homes to fulfill promises relating to the delivery and set-up of the mobile home.¹⁶

The court stated in *South* that the buyer had no recourse

11. 254 S.C. 471, 176 S.E.2d 147 (1970). *Moye* was an action for fraud and deceit on the ground that a salesman for Wilson Motors had misrepresented a comprehensive-collision insurance policy that he had obtained for Moye. Moye complained that the salesman had not called attention to his cancellation provision in the policy.

12. 277 S.C. at 373, 287 S.E.2d at 491.

13. 270 S.C. 82, 240 S.E.2d 641 (1978).

14. *Id.* at 84-85, 240 S.E.2d at 642.

15. *Id.* at 86, 240 S.E.2d at 643.

16. *Id.*, 240 S.E.2d at 643.

other than an action for fraud and deceit.¹⁷ However, this conclusion may not have been entirely accurate. South might have brought an action for breach of express warranty. In an action for breach of express warranty no showing of reckless disregard is necessary, and attorney's fees may be recovered under the Magnuson-Moss Act.¹⁸ On the other hand, an express warranty action, unlike a suit for fraud, does not allow for recovery of punitive damages. This advantage of a fraud action did not seem to greatly benefit South in light of the limited recovery he received for both actual and punitive damages. In addition, there may be a question of whether South could have won an express warranty action since the court could have denied the admission of parol evidence if it had determined the written agreement was intended as a final expression of the agreement of both parties.¹⁹

Regardless of the cause of action a purchaser in South's position chooses, the written document plays a significant role in the outcome of the case. As it applies to an action in fraud, the court's decision in *South* will not negate the doctrine that one who has signed a written instrument cannot complain of fraud in the misrepresentation of its contents when the truth could have been ascertained by reading it. While the court does indicate that this doctrine will not automatically preclude consumers from alleging fraud, the opinion does not make clear exactly what factors the court will examine to determine one's right to rely on misrepresentations of material fact when those material facts are correctly represented in a subsequently signed writing. In *South* it appears that one can complain of fraud if a material misrepresentation concerning the contents of the written instrument is made, but the decision in *Woodward* casts some doubt on this assumption. Since *Woodward* was not discussed in *South*, it is unknown how the court would have distinguished it or if it would have been overturned. As a result, the court's reaction in the future when faced with a similar situation is uncertain.

Despite the lack of distinct guidelines, *South v. Sherwood Chevrolet, Inc.* does have an important message. It serves to warn sellers that their representations of material fact concern-

17. 277 S.C. at 373, 287 S.E.2d at 491.

18. 15 U.S.C. § 2310(d)(2) (1976).

19. S.C. CODE ANN. § 36-2-202, -316(1) (1976).

ing consumer products should be made with careful regard for the truth. Sellers cannot always rely on a subsequent written instrument signed by the consumer to protect themselves from charges of fraud.

II. DISCLAIMER OF IMPLIED WARRANTY OF MERCHANTABILITY

In *Hartman v. Jensen's, Inc.*,²⁰ the South Carolina Supreme Court held that a disclaimer in a contract was ineffective to exclude an implied warranty of merchantability. Applying the consumer-oriented disclaimer provision of the South Carolina Uniform Commercial Code, the court found that the location of disclaimers under the bold heading "TERMS OF WARRANTY" created an ambiguity which made it unlikely that a consumer would be alerted to the exclusion of warranties appearing below. In so holding, the court followed the trend of denying merchants the opportunity to protect themselves from breach of warranty actions with disclaimers placed in a contract in such a way that a consumer would not realize they are disclaimers.

In June 1977, Carl and Wyetta Hartman purchased a mobile home through Jensen's, Inc. for \$33,741.76.²¹ Standard Coach Sales, Inc. agreed to manufacture the home according to certain floor plans and specifications chosen by the Hartmans.²² At the time of the purchase, the Hartmans signed a preprinted sales contract used by Jensen's. The warranty terms for the mobile home were printed in a block on the lower left hand portion of the front of the form. Only two terms were offered, and the one checked stated that the home was not guaranteed by Jensen's, but was subject to a limited warranty of Standard Coach Sales, Inc.²³ Also on the front page above the Hartmans' signa-

20. 277 S.C. 501, 289 S.E.2d 648 (1982).

21. Record at 3.

22. *Id.* at 13-14, 17.

23. The contract provided:

TERMS OF WARRANTY
THIS HOME NOT GUARANTEED.
NO GUARANTEE - NO SERVICE
THIS HOME NOT GUARANTEED BY
JENSEN'S, INC.
THIS HOME IS SUBJECT
TO A LIMITED WARRANTY OF

tures was a sentence written in bold print directing attention to the terms and conditions on the back of the form.²⁴ The first term on the back was a disclaimer printed in larger and darker print than the other terms.²⁵

After the Hartmans moved into the home, they discovered defects in its construction,²⁶ including structural problems and differences between the unit as constructed and the specifications agreed upon by the Hartmans, Jensen's, and Standard Coach Sales.²⁷ Jensen's and Standard agreed to repair the defects,²⁸ but in so doing caused additional damage to the home.²⁹ The Hartmans were forced to live elsewhere while the mobile home was being repaired.³⁰

The Hartmans brought an action for negligence and breach of warranties to recover for the defects in the home. A special referee heard the evidence. His findings, accepted by the trial judge, held that Jensen's and Standard Coach had breached express and implied warranties in the sale of the mobile home.³¹ A judgment of \$11,798.13 for actual and consequential damages was awarded to the Hartmans.³² The supreme court unanimously affirmed the decision.³³

The supreme court sustained Jensen's liability on the issue

STANDARD COACH SALES, INC.
FOR A PERIOD OF ONE YEAR, COPY
GIVEN TO PURCHASER.

Id. at 52.

24. The sentence stated: "THIS ORDER IS SUBJECT TO ALL THE TERMS AND CONDITIONS SPECIFIED ON THE BACK OF THIS FORM AND I HAVE READ THE MATTER ON THE BACK HEREOF AND AGREE TO IT AS A PART OF THIS ORDER AS IF IT WERE PRINTED ABOVE MY SIGNATURE." *Id.*

25. The disclaimer stated: "JENSEN'S, INC. HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND JENSEN'S, INC. NEITHER ASSUMES NOR AUTHORIZED ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF THE HOME." *Id.* at 53.

26. *Id.* at 3.

27. *Id.* at 14, 17, 19-20.

28. *Id.* at 3.

29. *Id.* at 40-42.

30. *Id.* at 3.

31. 277 S.C. 502, 289 S.E.2d at 648.

32. Record at 74.

33. 277 S.C. at 504, 289 S.E.2d at 649.

of implied warranty of merchantability.³⁴ Section 36-2-314(1) of the South Carolina Code states: “[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” The court found that Jensen’s, Inc. was a retailer of mobile homes and, as such, was a merchant with respect to goods of that kind. In the contract of sale to the Hartmans, Jensen’s had therefore implied that the goods would be merchantable. The mobile home did not meet the standards of merchantability as characterized in section 36-2-314(2) of the Code because it was not fit for the ordinary purposes for which it was bought.³⁵

An implied warranty of merchantability can be excluded or modified,³⁶ and Jensen’s contended at both the trial level and in the supreme court that it had effectively done so in its contract with the Hartmans. The court rejected this contention by applying the disclaimer requirements of the Code to the contract.³⁷ For an exclusion of an implied warranty of merchantability to be effective, the language of the disclaimer must include the word *merchantability*³⁸ and be conspicuous. South Carolina’s version

34. *Id.*, 289 S.E.2d at 649.

35. *Id.* The court at this point in its opinion cites S.C. CODE ANN. §36-2-315 (1976), the implied warranty of fitness for a particular purpose provision. The court’s wording in its analysis, however, clearly indicates it is applying §36-2-314, the implied warranty of merchantability provision.

36. S.C. CODE ANN. § 36-2-314(1) (1976).

37. 277 S.C. at 503, 289 S.E.2d at 649.

38. Apart from the “TERMS OF WARRANTY” section, the Jensen’s contract also contained a disclaimer in the “TERMS AND CONDITIONS” section on the back. If the requirements of S.C. CODE ANN. § 36-2-316(2) (1976) are applied to this additional disclaimer, it would appear to be effective. It contains the word *merchantability*, attention is drawn to it by the statement above the Hartmans’ signatures on the front page, and its position and bold print make it conspicuous. Jensen’s argued this point in both its Brief, Brief for Appellant at 14, and Reply Brief, Reply Brief for Appellant at 8-9. The court, however, makes no reference to it. A possible reason for this omission is that the court could not reach the issue of the effectiveness of the second disclaimer. Under the standard of review articulated in the case, the court was bound by the lower court’s finding of fact if it was supported by any competent evidence. 277 S.C. at 502, 289 S.E.2d at 648. Since this case was an action at law rather than in equity, the supreme court did not use the Two Judge Rule whereby it is bound by the finding of fact decided by a special referee and concurred in by the trial judge. Both the appellant and respondents made reference to the rule in their briefs. Brief for Respondents at 10; Reply Brief for Appellant Jensen’s, Inc. at 9. A good explanation of the scope of review available upon appeal in civil cases is set out in *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). The court found that the record sustained the trial judge’s finding concerning the ambiguity created by placing the disclaimer under the heading “TERMS

of the Uniform Commercial Code additionally requires that the disclaimer be specific, and states that if the inclusion of such language creates an ambiguity in the contract as a whole it should be resolved against the seller.³⁹ The court upheld the trial court's finding that Jensen's disclaimer was confusing because it was placed under the bold heading of "TERMS OF WARRANTY." The court observed that the heading suggested a grant of warranty rather than a disclaimer. As a result, the plaintiff was not alerted that an exclusion of warranty was intended; Jensen's disclaimer was therefore ineffective.⁴⁰

Hartman v. Jensen's, Inc. warns merchants that the location and wording of a disclaimer of implied warranty will continue to determine its effectiveness. To meet the additional requirement of the South Carolina Code, a disclaimer should be

OF WARRANTY." 277 S.C. at 503, 289 S.E.2d at 649. The court, therefore, ended its inquiry.

If the court had reached the issue of the second disclaimer, it might nevertheless have found it ineffective. In South Carolina the additional requirement that the disclaimer be specific must be met. The meaning of this requirement is uncertain, but it may require that the disclaimer contain additional language that explains the effect of the disclaimer. See, *Crystal, Consumer Product Warranty Litigation in South Carolina*, S.C.L. REV. 293, 342-43 (1980). Jensen's second disclaimer would fail on this point.

39. S.C. CODE ANN. § 36-2-316(2) (1976).

40. 277 S.C. 503-04, 289 S.E.2d at 649.

In holding that the placement of the disclaimer under the heading "TERMS OF WARRANTY" negated the effectiveness of the disclaimer, the court found persuasive *Mack Trucks of Arkansas, Inc. v. Jet Asphalt and Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), and *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345 (1970). Although the court states that the circumstances of these cases are similar to the situation before it, there is little analysis of them in *Hartman*.

In *Mack Trucks*, an action for breach of express and implied warranties brought against the dealer and manufacturer of two diesel trucks, the Supreme Court of Arkansas held that limitations made by the defendants to an implied warranty of fitness for a particular purpose were ineffective. The limitations were placed within the body of general warranties under the headings "Vehicle Warranty" and "Supplement to Mack Standard Warranty Applicable to Mack Diesel Engines." The court found nothing in these titles suggested the content of exclusions or modifications of the implied warranty, and thus the disclaimer failed to meet the conspicuousness test. Placing a disclaimer under a general warranty heading did not insure that the attention of the buyer could reasonably be expected to be brought to it. 246 Ark. at 108-09, 437 S.W.2d at 463.

Gindy was an action involving a counterclaim for a breach of implied warranty of merchantability in which the New Jersey Superior Court held that an exclusion to the implied warranty asserted by the manufacturer was ineffective. The exclusion was under the heading "WARRANTIES." The court stated that this heading not only failed to make the exclusion conspicuous, but suggested to a buyer that warranties were included, not excluded. 111 N.J. Super. at 391-92, 268 A.2d at 350.

worded and placed in a way that alerts consumers to its presence and purpose.

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