

## ARTICLE H CASES

### Contract Formation

1. § 2-204. When has a contract been formed? What significance, if any, is attached to the parties intent to put their agreement in writing but do not? How does § 2-204 fit with §2-201, the statute of frauds?

In *Nebraska Buildings Products v. Industrial Erectors*, 239 Neb 744, 478 N.W.2d 257 (1992) the Supreme Court considered these questions. There, *Nebraska Builders* solicited bids from *Industrial* for the sale and installation of a crane system in the construction of an O.P.P.D. service center in Elkhorn. *Nebraska Builders* planned to use that bid as part of its bid to the general contractor.

*Industrial* made a proposal to *Builders*, which it used in its bid to the general contractor. After notification by the general contractor that it was low bidder, *Builder* (it alleges) telephoned *Industrial* to accept *Industrial's* offer. (*Industrial* denied that any such conversation occurred).

Between the time *Builder* received notice from the general contractor and *Industrial's* statement that it would not perform without a substantial price increase, the parties exchanged correspondence, telephone conversations, and met personally to discuss the crane proposal. However, no formal, written acceptance by *Builders* or contract signed by both parties were executed.

The Supreme Court concluded that even if *Builders* did not formally accept the *Industrial* offer as alleged, the parties continued meetings and discussions after *Builder* was awarded the bid was conduct which recognized the existence of a contract under §2-204.

The Court also dismissed *Industrial's* claim that the parties did not intend to be bound until a formal written contract had been signed. It also rejected *Industrial's* statute of frauds claim, noting that the various proposals and letters sent by *Industrial* could be "pieced together" to satisfy §2-201. Moreover, the Court found that *Industrial* had admitted the contract existed in testimony at the trial of the case, making §2-201(3)(b) applicable.

## 2. §2-102. When is a contract one for the "sale of goods"?

In *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992) the Supreme Court was called upon to construe §2-102 and §2-105(1), the definition of goods, so as to determine the applicable statute of limitations.

*Murphy* contracted with *Lumber Co.* for the purchase of roof trusses to be used in a new residence. *Lumber Co.* also agreed to provide "custom design services" for the new home. The trusses were delivered to the construction site on March 9, 1977, and were installed by the *Murphy's* contractor.

In late 1978 *Murphy* noticed leaking in the roof, which was subsequently found to be caused by non-conformances in the roof trusses. After demands on *Lumber Co.* for payment of damages caused by the roof trusses failure, *Murphy* sued on May 21, 1981.

The trial court dismissed the case, holding that "the applicable statute of limitations" had run on the cause of action, but did not designate which statute applied.

The Supreme Court concluded that the predominant purpose of the contract was the sale of the trusses, not the design services, since no part of the contracts' consideration was allocated to the design services. Therefore, §2-725 was the "applicable" statute of limitations.

Since the breach alleged was for the implied warranty of fitness for a particular purpose, §2-315, the cause of action accrued when the goods were delivered on March 9, 1977, regardless of *Murphys'* knowledge of the breach. §2-725(1) gave *Murphy* 4-years from that date to file the action. The 4-years ended on March 9, 1981, two months before suit was filed.

The Court also held that the "future performance" exception in §2-725(2) was not applicable, because the warranty did not "explicitly" extend to future performance. (See discussion of this issue infra, page 6).

B. Recession, Revocation of Acceptance, and Reformation

1. **Reformation.** In *York Equipment v. Ashwill*, 2 Neb. App. 374 (Dec. 21, 1993) the Court of Appeals allowed a seller of farm machinery to reform a sales contract due to a mutual mistake made by the seller and buyer.

*Ashwill* agreed to purchase equipment for a price of \$1,138,377.00. He traded in equipment which the contract scheduled at a "net trade allowance" of \$570,141.00. This amount was reached by subtracting certain listed liens against the trade-in equipment from its full value. However, due to the seller's error in omitting liens on two pieces of equipment, the amount subtracted from the total trade-in allowance was \$109,397.67 too low. When the seller discovered this error it asked the buyer to sign a new installment note in the increased amount. Buyer refused, and seller sued for reformation.

The Court of Appeals concluded that the buyer and seller had made a "mutual mistake" justifying reformation. [The Court did not refer to §1-103, the "Supplemental" rules section, but that section no doubt allows incorporation of common law reformation rules.] The Court reasoned that under §2-312(1) *Ashwill* (who would be a "seller" with respect to the trade-in equipment) warranted that the equipment was free of liens except those listed in the addenda. Therefore, the Court said, *Ashwill* must have believed the addenda were correct. So too must the seller,

the Court found. Therefore, a "mutual mistake" had been made, entitling the seller to reformation.

2. **Recession.** In *Haves v. Equine Equities, Inc.*, 239 Neb. 964, 480 N.W.2d 178 (1992) the Supreme Court permitted a disgruntled buyer to rescind his purchase of a quarter horse from *Equine*. The Court found that, notwithstanding a 21-month gap between the purchase of the horse and the demand for rescission, material misrepresentations made by the seller at time of sale justified rescission. No section of the U.C.C. was cited by the Court for this conclusion.

Justice Shanahan dissented, primarily because the court failed to consider the effect, if any, of §2-608 on the case.

3. **Revocation of Acceptance, §2-608.** In *Design Data Corp. v. Maryland Casualty Corp.*, 243 Neb. 945, 503 N.W.2d 552 (1993) the Supreme Court discussed the relationship between effective revocation of acceptance under §2-608, and risk of loss under §2-509.

*Design* sold a computer system to a buyer for a price of \$73,495.00, which included hardware, installation and training. [The Court found the U.C.C. applicable, because the predominant purpose of the contract was the sale of the equipment.] Under that contract, *Design* was authorized to ship the equipment by carrier, which it did.

When the equipment was delivered to the buyer it was discovered that one of the cartons which contained a piece of equipment was damaged. The buyer signed for the equipment without further inspection at that time.

When the equipment was installed by *Design* a few days later it was found to be defective. The Court concluded that at this time the buyer timely revoked acceptance of the equipment.

*Design* sued its insurer for the damage to the equipment, arguing that under §§2-509, 2-510 and 2-608 the revocation of acceptance by the buyer shifted the risk of loss, which otherwise passed to the buyer either when the goods were placed on the carrier or accepted by the buyer, back to the seller. The Court agreed, and found *Design* had the risk of loss. (However, the Court concluded that the insurer provided no coverage for "in transit" losses.)

### Performance and Breach

1. **§2-609. Damages for Anticipatory Breach.** In *Trinidad Bean and Elevator Co. v. Frosh*. 1 NCA 1819, 494 N.W.2d 347 (Neb. App. 1992) the Court of Appeals resolved the damages problem created by §§2-610(a) and 2-713. Those sections do not fit well, since §2-610(a) gives a buyer the option to "await performance" for a commercially reasonable time after a repudiation, and 2-713 suggests that damages for repudiation are to be computed as of the time of the breach, which could mean the time for performance. It would seem §2-610(1) requires the aggrieved buyer to act after a commercially reasonable time has elapsed; yet, if §2-713 determines damages as of the date for performance, no penalty would exist for the buyers failure to act.

Because of this anomaly, the Court of Appeals concluded that where the seller of beans repudiated his agreement to deliver beans in the fall, the date of that repudiation should be used to determine damages sustained by the buyer. The market price of the beans on that date determines the buyer's recovery, not the market price in the fall, when performance is due.

2. **§2-615. Excuse of Performance.** In *Lambert v. City of Columbus*. 242 Neb. 778, 496 N.W.2d 540 (1993), the Court applied §2-615, the "commercial impracticability" section, to a contract for sale of dirt from a site to be excavated by the Corps, of Engineers. The contract obligated the *City* to deliver about 86,440 cubic yards of dirt to plaintiff. The dirt **was** to come from a flood-control project to be performed by the Corps, of Engineers.

The Corps, of Engineers ended up producing less dirt then contemplated, so the *City* was unable to fulfill the contract obligation. It argued it was excused under §2-615.

The Court disagreed, because (1) the contract did not excuse the defendants duty to deliver if the supply of dirt was diminished, and (2) the notice required by §2-615(c) was not given.

## **Warranties.**

- a. **§2-313. Creation of Express Warranty.** Three recent cases discussed the manner in which an express warranty is created. These cases are related, in some degree, to the opinions of the Supreme Court in *Moore v. Paget Sound Plywood Inc.*, 214 Neb. 14, 332 N.W.2d 212 (1983), and *Hillcrest County Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990). In those cases the Court held that an express warranty under §2-313 can be created by any representation or description of the goods, so long as that representation or description was made a "basis of the bargain". In Nebraska, "basis of the bargain" means the representation or description must have been relied upon by the buyer when buying the goods.

In *Murphy v. Spelts-Schultz Lumber Co.*, discussed *supra*, page 2, the plaintiffs argued that a description of the goods as "roofing trusses" amounted to an express warranty which "explicitly extends to future performance." They relied on *Moore*, where the Court said description of the goods as "siding" amounted to a representation that the goods would last the life of the house. The Court found *Moore* inapplicable, because no "express representation" concerning the goods sold was made by *Spelts-Schultz*.

In *Vlasin v. Shuev*, 2 NCA 712 (Neb. App. 1993) the Court held that a description of livestock constituted an express warranty, but that the 4-year limitation period of §2-725 applied to bar the action for breach.

In *T.O. Haas Tire Co. v. Futerra Coatings, Inc.*, 2 Neb. App. 1 (1993) the manufacturer was found to have made an express warranty concerning the watertight feature of its roof covering. While the company never issued a written warranty to the plaintiff, it had received roof plans from the plaintiff before the roof covering was sold and applied. Moreover, a representative of the seller inspected the roof prior to completion. From this evidence, the Court concluded, the district court could conclude an express warranty about the roofs ability to withstand water had been made.

**§2-313. Breach of Warranty.** In *Warner v. Reagon Buick, Inc.*, 240 Neb. 668, 483 N.W.2d 764 (1992) the Court concluded that the description of a car as a "1983 Buick Riveria" created an express warranty, although the car was sold "as is". The Court found that this warranty was breached because the car was in fact a "mish-mash" of assorted parts from various cars. Moreover, the representation of the car as a "one-owner" car would also be an express warranty which was breached.

**§2-714. Damages for Breach of Warranty.** The *Haas Tire Case*, supra, also considered the proper measure of damages under §2-714. §2-714 states that damages are determined by comparing the difference between the value of the goods as accepted and their value as warranted. The lower court in *Haas* used repair costs as the measure of damages, which was error. The lower court may have relied on *Hillcrest County Clerk*, supra, page 6, where cost of repair or replacement of a leaking roof was used to

determine damages. However, that measure was used there only because the parties had agreed to it in a binding pre-trial order.

**§§2-316 and 2-719(3). Disclaimer of Warranties and Limitation of Remedies.** In *Adams v. American Cyanamid Co.*, 498 N.W.2d 577 (Neb. App. 1992) the Court of Appeals considered several issues relating to implied warranties, exclusion of warranty, and limitation of remedies.

*Adams*, through a consultant, Johnson, purchased herbicide manufactured by *American Cyanamid*. The herbicide was applied by the seller, a co-op, under Johnsons' supervision. Beans planted in the fields where the herbicide was applied died. The Court found that the herbicide caused the crop failure.

*Adams* sued *American Cyanamid*, alleging both breach of warranty and strict liability in tort. [The Court of Appeals concluded the strict liability claim should have been dismissed because *Adams* did not prove that the herbicide was "unreasonably dangerous".]

On the implied warranty of merchantability the Court concluded that the standard of merchantability for herbicides is that they should not damage crops. Evidence supported the jury's conclusion that the cause of the crop loss was the herbicide, so the implied warranty was breached.

The herbicide "label" contained a disclaimer of warranties, including the warranty of merchantability. The "label" was part of a 107 page manual about various herbicides, which may or may not have been given to *Adams* when the herbicide was purchased.

The Court held that the disclaimer was "conspicuous", as required by §2-316(2), and that the question of conspicuousness should have been decided by the Court, as required by §1-201(10).

The Court also held, however, that a mere finding of conspicuous does not end the matter. The seller must show that the buyer actually received the disclaimer under circumstances where he had an opportunity to read it, or at least that the terms of the disclaimer were brought to the buyers attention. [The Court found that Johnson, the consultant hired by *Adams*, was not *Adams'* agent, but even if he were, "the cases require that the disclaimer be presented to the purchaser." No evidence existed to show Johnson was *Adams'* agent for purpose of purchasing the herbicide, if in fact Johnson was the purchaser.]

*American Cyanamids'* disclaimer also limited damages to "direct damages," and excluded "consequential damages," as permitted by §2-719(3).

The Court concluded that *Adam's* damages were consequential rather than direct, and thus covered by the disclaimer. It also concluded that a limitation of remedy provision must be conspicuous, though §2-719 says nothing about such a requirement. *American Cyanamids* disclaimer was conspicuous, the Court held.

The Court found that the limitation of remedy was "unconscionable" under §§2-719 and 2-302, and that the parties had a reasonable opportunity to be heard on this issue. The Court found the clause "substantively" unconscionable, since it leaves the herbicide user without any effective remedy. It found the clause "procedurally" unconscionable because it was not the result of a true bargain with *Adams*. The Court noted in this regard that all sellers of herbicide

had similar limitations, so *Adams* could not have bargained for better terms, the Court found.

The Court thus remanded the case solely on the issue of whether or not *Adams* actually received the disclaimer.

Who may sue **for breach of warranty?** In *Hanson v. General Motors Corp.* 241 Neb. 81, 486 N.W.2d 223 (1992) the Court again considered the relationship of Neb. Rev! Stat. §60-105(1), the certificate of title law, to the U.C.C. generally. In *Hanson* a husband and wife each contributed to the purchase price of a car, which was titled only in the wife's name.

Husband and wife both sued for breach of warranty, and the husband's claim was dismissed. Subsequently, the manufacturer settled with the wife. The Court held that §60-105 was not conclusive on the issue of ownership of the car for purposes of breach of warranty actions.