Chicago-Kent Law Review

Volume 65
Issue 3 *Symposium on the Seventh Circuit as a Commercial Court*

Article 10

October 1989

Rebuttal: One Last Case

Richard E. Speidel

REBUTTAL: ONE LAST CASE

RICHARD E. SPEIDEL

I have read with interest and appreciation the careful response of Dean Rogers and Ms. Michaels to my critique of the Seventh Circuit's warranty decisions. They have, in a gentle manner, suggested that at times I have been overzealous in my criticism. Rather than respond directly to them, let me conclude with a brief analysis of a recent Seventh Circuit warranty case that was not reported at the time of the original survey. Once again, the seller prevailed, this time with some justification. Once again, however, there were methodological problems.

In *Trans-Aire International, Inc. v. Northern Adhesive Co.*,[1] the buyer (Trans-Aire) needed an adhesive to laminate various materials used in the process of converting standard automotive vans to recreational vehicles. The first brand of adhesive used (3M 4500) frequently failed to adhere under summer temperatures. Trans-Aire then approached the seller (Northern), a manufacturer of diversified adhesive products, and stated the purposes for which it needed adhesives. Northern sent Trans-Aire several samples for experimentation and allegedly stated that one sample, #7448, was a "match" for 3M 4500. Trans-Aire tested the samples under cool rather than hot weather conditions. After extensive intracorporate discussions, Trans-Aire decided *not* to do a test under summer conditions and ordered several shipments of #7448 over a seven month period from Northern. By May, 1983, it was evident that #7448 performed no better than 3M 4500 under summer temperatures. Trans-Aire, which was required to repair over 500 hundred vans, sued Northern for breach of warranty. The district court, after an evidentiary hearing, granted Northern's motion for summary judgment.[2]

The Seventh Circuit affirmed. The chief evidence upon which Northern sought a summary judgment was the deposition of a former Trans-Aire employee. Trans-Aire admitted that it could not muster any evidence to conflict with the deposition. The Court, therefore, focused "solely upon Trans-Aire's ability to demonstrate that the district court's legal conclusions are erroneous" rather than whether there was a genuine issue of material fact.[3]

1. 882 F.2d 1254 (7th Cir. 1989).
2. *Id.* at 1256 (the district court opinion is unreported).
3. *Id.* at 1257. (References to the "Court" mean the United States Court of Appeals for the

I. THE EXISTENCE OF WARRANTIES

The first question was whether Northern made and breached any warranty that #7448 was suitable for Trans-Aire's laminating purposes. This, in turn, depended in part upon who had what burden of proof to establish that there was or was not a warranty.

Since the adhesive had been accepted, Trans-Aire had the burden "to establish any breach with respect to the goods accepted."[4] There was, apparently, no dispute over whether the adhesive was unmerchantable. Trans-Aire introduced no evidence that #7448 was not "fit for the ordinary purposes for which such goods are used."[5] The Court's primary concern, therefore, was whether there was a breach of the implied warranty of fitness or whether Northern made an express warranty that #7448 was fit for Trans-Aire's purposes.

On the fitness warranty, the Court began by incorrectly paraphrasing the text of U.C.C. section 2-315. According to the Court:

> Section 2-315 of the code states that a sale of goods also includes an implied warranty of fitness for a particular purpose if a seller knows of the buyer's particular purpose for the goods and the buyer relies upon the seller's skill or judgment to select suitable goods.[6]

Among other things, this paraphrase substitutes the word "knows" for the phrase "has reason to know," thereby making it harder for the buyer to prevail. A seller may have "reason to know" without having actual knowledge of a fact.[7] The paraphrase also creates an ambiguity by deleting a critical "that," which, in section 2-315, requires the seller to have reason to know both "any particular purpose for which the goods are required and *that* the buyer is relying on the seller's skill or judgment to select or furnish suitable goods."[8] The paraphrase suggests, incorrectly, that the buyer who relies may win even though the seller has no reason to know of the reliance.

Inaccurate paraphrasing aside, the Court correctly concluded that the question was whether, assuming that Northern "knew" of Trans-

Seventh Circuit). If the movant has, when the entire record is considered, demonstrated the absence of a genuine issue of material fact, the inquiry shifts to whether the evidence actually submitted is sufficient as a matter of law. *See* Quaker Alloy Casting Co. v. Gulfco Indus., Inc., 686 F. Supp. 1319, 1325-26 (N.D. Ill. 1988). *See also* F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 4.10, 5.19 (1985).

4. U.C.C. § 2-607(4) (1987). The Court did not cite this section.

5. *Id.* § 2-314(2)(c). The Court paraphrased § 2-314(1) in the text and quoted the provision in a footnote. 882 F.2d at 1257. There was no further discussion.

6. 882 F.2d at 1257. Section 2-315 is quoted at *id.* n.3.

7. A person "knows" of a fact when he has "actual knowledge of it." A person has "notice" of facts when "from all the facts and circumstances known to him at the time in question he has reason to know that it exists." U.C.C. § 1-201(25) (1987).

8. *Id.* § 2-315 (emphasis added).

Aire's purposes, Trans-Aire relied in fact upon Northern's skill and judgment. The district court found that there was no genuine issue of material fact on the reliance issue and the Seventh Circuit agreed. By conducting its own experiments on the samples that Northern furnished and by making its own decision on which sample was suitable, Trans-Aire relied upon its own rather than Northern's skill and judgment in selecting suitable adhesive. This result, on the uncontested facts, is clearly defensible under section 2-315, however badly it was paraphrased.[9]

The Court also affirmed the district court's conclusion that Northern, even though it knew of them, made no express warranty that #7448 or any other sample was fit for Trans-Aire's particular purposes. To the contrary, Northern stated only that #7448 was a "match" for 3M 4500 and that there was "no warranty on [adhesive 7448] other than that—what they would ship would be like the sample. It would be the same chemistry."[10]

Again, this result is defensible under section 2-313 in a summary judgment proceeding. There was, apparently, no evidence that Northern affirmed or promised that #7448 would be fit for Trans-Aire's purposes. At most, the sample of #7448 provided by Northern amounted to a warranty that the "whole of the goods shall conform to the sample or model."[11] As such, the Court avoided, without any overt awareness, the "basis of the bargain" quagmire which has plagued the Seventh Circuit in other decisions.[12]

II. DISCLAIMERS

Not content to affirm on the grounds that no warranties were created as a matter of law, the Court proceeded to an alternative ground for affirmance. Assuming that an implied warranty that #7448 was fit for Trans-Aire's known purposes was created under section 2-315, the question was whether it was excluded because Trans-Aire had examined and tested the goods before the contract was formed?

9. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE §§ 9-11, at 421 (3d ed. 1988) (in "unusual" case where buyer is more knowledgeable than seller, seller may win on the grounds that the buyer did not rely). The Court cited no authorities to support its conclusion.

10. 882 F.2d at 1260.

11. U.C.C. § 2-313(1)(c) (1987).

12. If Northern had stated that #7448 was suitable for Trans-Aire's known purpose and Trans-Aire then purchased the goods, the burden would shift to Northern to prove that the affirmation did not become part of the "basis of the bargain." *Trans-Aire*, 882 F.2d at 1260. In this setting, the absence of any evidence from Northern that Trans-Aire did not rely means that the court should grant a summary judgment to Trans-Aire.

Under Article 2, the answer depends upon the relationship between section 2-316(2) and section 2-316(3)(b). Under the former subsection, the exclusion of the implied warranty of fitness "must be by a writing and conspicuous." This limitation, however, is subject to section 2-316(3)(b), which provides:

> When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.

The Court did not engage in an extensive statutory analysis. Rather, after paraphrasing and quoting snippets from section 2-316(3)(b), the Court affirmed the district court's holding that any implied warranty had been excluded or waived by Trans-Aire's conduct in examining and testing the samples.

Assuming that Trans-Aire examined the goods as "fully as he desired," the statutory question under section 2-316(3)(b) was whether the implied warranty of fitness was excluded "with regard to defects which an examination ought in the circumstances to have revealed to him." Conceding that goods which fail to conform to an implied warranty of fitness contain "defects," it is clear that Trans-Aire failed to discover the defects during its examination under "cool" conditions. Under those "circumstances," it is hard to conclude that the defects "ought" to have been revealed. Presumably, the defects would not be evident unless the adhesive was tested under summer conditions. Given that Trans-Aire knew of these other "circumstances" and made no further tests, can the Court conclude as a matter of law that Trans-Aire failed to perform a "reasonably adequate examination that would have revealed the defect"?[13]

Although the deposition evidence established that Trans-Aire decided not to test #7448 under summer conditions, there was no evidence from either side on the feasibility of conducting such tests or the probability that the tests, if conducted, would have revealed the defects. Even so, the Court concluded that there was no genuine issue of material fact on whether Trans-Aire "ought" to have or "should have" conducted the additional examination.[14] The further testing should have been done

13. Comment, *Special Project—Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1280-82 (1987) (concluding that questions of fact "often arise" in the determination of whether a buyer "ought" to have discovered the defect). *See also* Comment, *Special Project—Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 197-202 (1978).

14. The inference is that unless the buyer contests the feasibility issue, it will be "held to have

and by failing to act, Trans-Aire "waived" the implied warranty.

Yet in reaching this conclusion, the Court assumed that an implied warranty of fitness had been made. This means that Northern had reason to know of Trans-Aire's purposes and that Trans-Aire would rely upon the suitability of #7448. Given this, the Court fails to explain why the failure to undertake the more difficult testing was not justified by Trans-Aire's assumed reliance on the implied warranty of fitness.

The obvious answer is that Trans-Aire, on the facts, did not in fact rely on Northern's skill and judgment.[15] As such, the exclusive grounds for the affirmance should have been section 2-315 rather than section 2-316(3)(b). This ground avoids the sticky issues not fully explored under section 2-316(3)(b).

III. EVALUATION

As suggested, the result in *Trans-Aire* on whether any warranties were created is defensible on the facts in a summary judgment setting. Given the lack of conflicting evidence, this was not the best case for a clearer discussion of the role of summary judgment in disposing of warranty claims under Article 2.[16] When that case arises, the Court should be more explicit on who has what burden of proof and be more sensitive to the Code's underlying policy favoring the admissibility of surrounding circumstances in warranty disputes.

The Court, however, paraphrased, sometimes improperly, the relevant statutes and cited the text in the footnotes. This is clearly improper. Beyond plain sloppiness, the practice undercuts the legitimate source of law in these disputes and provides little incentive for the parties or the court to pay attention to interlocking statutory provisions, definitions, comments, and legislative history. Thus, *Trans-Aire* is yet another example of incomplete, if not improper, Code methodology in a case which arguably reaches a correct result.[17]

assumed the risk as to all defects which a professional in the field ought to observe . . . ." U.C.C. § 2-316 comment 8 (1987). If, however, Trans-Aire had raised a factual issue on feasibility and Northern had failed to submit evidence on whether the defect "ought" to have been discovered, summary judgment should be denied. *See* Quaker Alloy Casting Co. v. Gulfco Indus., Inc., 686 F. Supp. 1319, 1334 (N.D. Ill. 1988). *See also* J. WHITE & R. SUMMERS, *supra* note 9, § 12-6, at 508-11.

15. *See* J. WHITE & R. SUMMERS, *supra* note 9, at 509-10 (pre-contract examination is one factor that prevents creation of express warranty).

16. *See Quaker Alloy*, 686 F. Supp. at 1325-26.

17. The Court's opinion also lacks the richness that inspires confidence in its conclusions of law. Paraphrased statutory language, facts, and some reference to the comments are the key ingredients in the decision. Missing are references to other cases that have decided the same issues, whether within or without the Seventh Circuit, and secondary literature. There is a sense of spare isolation rather than an intimate connection with the developing warranty jurisprudence under Article 2.

Finally, the Court unduly complicated the issues by attempting to justify the result by an alternative holding under section 2-316(3)(b). To do this, the Court assumed that an implied warranty of fitness was made under section 2-315. In the process, two issues were not carefully worked out. First, the Court failed to explain why, as a matter of law, the failure of Trans-Aire to conduct additional experiments under different circumstances "ought" to have revealed the defects, especially where there was no evidence on feasibility or probability. Second, the Court failed to explain why, if Northern knew that Trans-Aire would rely upon its skill and judgment, Trans-Aire was not justified in deciding not to conduct the additional tests. This incomplete rendition of section 2-316(3)(b) could have been avoided by concluding that since no implied warranties were created (a result supported by the facts), there was no need to consider whether they were excluded by examination.

Is this critique overzealous? Perhaps, if you believe that sound Code outcomes trump the need for sound code processes. My argument, however, is that under Article 2 you cannot consistently have the former without the latter. The decisions of the Seventh Circuit over the last twenty-five years, by and large, support this position.