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Residential Re-Roofing Contract is a Consumer Product Covered by the Magnuson-Moss Warranty Act

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dangerous conditions, she may have contributed to her injury. Under Washington's comparative negligence law, this type of risk assumption could reduce recovery but could not bar it completely. The court also considered Washington's ski statute, WASH. REV. CODE § 70.117, which imposed duties both on skiers and on ski operators, but which did not relieve operators from liability for their negligence.

Accordingly, the court noted that under Washington law, the Ski Resort had a duty to warn skiers of any dangerous condition unless that condition was so obvious as to be inescapably noticeable. At trial there was some dispute between the parties regarding the tow-shack's position in relation to the race course. The Ski Resort claimed that the shack was an obvious danger, and that therefore, the Ski Resort had no duty to warn Justin. The Scotts, on the other hand, asserted that the shack was not an obvious hazard and that it posed an unanticipated danger and an unknown risk to Justin. Noting that primary implied assumption of risk in a sports context does not release the operator from the duty to provide reasonably safe facilities, the court held that a jury must decide the extent of the Ski Resort's responsibility for the accident.

The court also found that Justin's awareness of the risks inherent in the sport of skiing did not automatically make him liable for any failure by the Ski Resort to provide safe facilities. Rather, Justin may have been contributorily negligent by knowingly participating in a race on such a hazardous course. Such contributory negligence, the court noted, would not preclude his recovery in a negligence action against the Ski Resort, but instead would reduce any damages he might recover.

Accordingly, the Washington Supreme Court reversed the grant of summary judgment for the Ski Resort, and returned the case to the trial court in order to allow a jury to decide Justin's

claims against the Ski Resort. ❖
— *Laura M. Zubor*

Residential Re-Roofing Contract is a Consumer Product Covered by the Magnuson-Moss Warranty Act

In *Muchisky v. Frederic Roofing Co.*, 1992 WL 182300 (Mo. App., Aug. 4, 1992), the Missouri Court of Appeals held that the re-roofing of a home under a written contract, which provided a warranty for the workmanship and materials, is a consumer product within the meaning of the Magnuson-Moss Act ("Act"), 15 U.S.C. § 2301. Furthermore, the court distinguished between fixtures added to an existing structure and fixtures incorporated in the creation of the structure, characterizing only the former as consumer products within the statutory definition.

Continuous Problems with the Roof

Thomas P. Muchisky ("Muchisky") contracted with Frederic Roofing Co., Inc. ("Frederic") to re-roof his home. The contract contained a twelve year, defect-free warranty on the completed roof, which guaranteed workmanship as well as materials. Frederic re-roofed the house on March 21, 1988. Subsequently, Muchisky called the contractor twice to make remedial repairs to the new roof. On August 16, 1988, Muchisky notified Frederic of his continued dissatisfaction with the roof and terminated Frederic's services, after he paid only \$4,000 of the \$8,272 contract price.

Muchisky then filed suit against Frederic, alleging breach of contract, breach of warranty, and violation of the Magnuson-Moss Warranty Act for

breach of written warranty. Frederic counterclaimed, alleging breach of contract for the homeowner's failure to pay the contract price. The jury found in favor of Muchisky and awarded him damages of \$10,000 and \$11,200 in attorney's fees. Frederic then appealed to the Missouri Court of Appeals.

On appeal, Frederic asserted that the trial court erred in denying his motion for a judgment as a matter of law for the Magnuson-Moss Warranty Act count. Frederic further contended that the Act did not apply to service contracts, such as the re-roofing contract with Muchisky, but applied only to sales contracts.

Statutory Language and Federal Trade Commission Regulations Not Dispositive

The appellate court found that the Magnuson-Moss Warranty Act defined consumer product as "any tangible personal property which is distributed in commerce and which is normally used for personal, family or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed)." The appellate court also noted that House Reports indicated congressional intent to apply the statute to such real estate fixtures as hot water heaters and air conditioners, irrespective of their common law classification as realty.

The court also found that the Federal Trade Commission ("FTC"), the agency charged with administration of the Act, looked to the nature of the transaction when defining a fixture as a consumer product.

Additionally, the court relied upon 16 C.F.R. § 700.1(f), which interpreted the Act. This section states that when a consumer contracts for the construction of a home or substantial addition to an existing home, the parties are deemed to contract for construction of the integrated structure even though the materials are separately identifiable upon formation of the contract. This sec-

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tion, the court stated, would render the Act inapplicable in this case.

Congressional Intent: Addition or Creation?

The Missouri Court of Appeals reasoned that Congress apparently intended the Act to protect some personal property that traditionally becomes part of real estate. The court also noted that the FTC regulations indicated that Congress intended the sale of real estate to be excluded from the Act's protection. However, the court acknowledged that neither the statute nor the regulations clearly addressed whether the residential re-roofing contract at bar should have been protected by the Act.

The court relied on 16 C.F.R. § 700.1(e), which specified the types of personal property affixed to real property that were intended to be protected by the Act. The court noted that if the consumer contracts for the purchase of materials for the improvement, repair, or renovation of a home, then the materials are consumer products within the scope of the definition. However, if the materials are already integrated into the structure of the residence at the time of sale, they are not distinguishable from realty and thus not protected under the Act.

The court of appeals determined that the distinguishing factor between fixtures that are consumer products and fixtures that become part of real estate was the time at which the fixture was integrated into the structure of the home: during construction, or after construction. Additionally, the court interpreted the time of sale in 16 C.F.R. § 700.1 subsection (e) to mean the time at which a binding contract had been formed. If the language meant at the time the product was supplied and payment was due, the court stated that a consumer would never have a legal basis under the Act for home improvements. The court also relied upon 16 C.F.R. § 700.1(a) of the Act, which instructs courts to resolve questions of product coverage in favor of coverage.

Based on the above interpretation, the Missouri Court of Appeals concluded that the re-roofing was a consumer product within the definition of the Magnuson-Moss Warranty Act.

Dissent Argued that the Materials were Realty

The dissent stated that the roofing materials were the personal property of the contractor prior to their integration into the home, and when the homeowner owned the materials, they had become an integral part of the residence. Thus, the dissent concluded that the materials were realty under traditional property law principles which rendered the Act inapplicable.

The dissent also argued that the majority ignored the FTC's interpretation in 16 C.F.R. § 700.1(e), which indicated that the nature of the sale should be the basis of the analysis. The dissent further cited the language of 16 C.F.R. § 700.1(e) of the Act, which stated that the nature of the transaction must be analyzed, not the nature of the real estate. Accordingly, the dissent stated that the question was whether the contract was to purchase goods and services or whether the contract was to purchase the completed project. The dissent noted that when homeowners such as Muchisky contracts for the completed project, including goods and services, he did not receive consideration until all of the personal property was attached to the real estate. Therefore, the dissent concluded that Muchisky never owned or purchased such consumer goods in order to bring his claim within the purview of the Act.

Furthermore, the dissent found the stated purpose of the Act inapplicable to the circumstances of this case. The purpose of the Act was to supplement state law for the protection of consumers against deceptive warranties. The dissent found that existing state law already protected the homeowner in the instant case and therefore precluded the use of the Act. ♦

— *Christine Cody*

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