parties are disclosed prior to execution, and if there be no fraud, coercion or unlawful purpose in the execution, may be fully enforced. There is no public policy or legal reason why an adult spouse may not, under the proper circumstances, waive her right to future support. *Commonwealth v. Doghty,* 187 Pa. Super. 499, 144 A. 2d 521 (1958); *Commonwealth ex rel. Jablonski v. Jablonski*, 179 Pa. Super. 498, 118 A. 2d 222 (1955)."

In the case at bar, there is no contention by the plaintiff that she is not of age or that the agreement was secured by fraud or mistake. Indeed, by the provisions of paragraph 12, supra, she acknowledges that it is fair and equitable, entered into voluntarily and that she has the right to have it reviewed by the attorney of her choice. We note that Mrs. Johnson's signature on the agreement is witnessed by George E. Wenger, Jr., who was identified in paragraph 12 as her counsel.

We note that counsel for Mrs. Johnson argues that paragraph 8 "covers and is intended to cover the situation where upon the death of either spouse such rights as are mentioned in paragraph 8 could not be asserted against the estate", and the word "support" was included in the paragraph only to demonstrate the intention of the parties that the support obligation would terminate upon the death of Mr. Johnson. We find no merit in this contention for:

1. Paragraph 8 also waives other claims more associated with life than with death.

2. Paragraph 8 provides that each spouse will at the request of the other "execute, acknowledge and deliver any and all instruments which may be necessary or advisable to carry into effect this mutual waiver and relinquishment of all such interest, rights and claims". It certainly assumes the parties to be alive.

3. Paragraph 15 effectively eliminates consideration of the title of paragraph 8.

In our judgement the language of both paragraphs 5 and 8 are legally sufficient to effectively terminate the right of Judy E. Johnson to personal support from Robert Lee Johnson effective as of the date of the agreement.

The appeal will, therefore, be dismissed.

ORDER OF COURT

NOW, this 18th day of October, 1984, the appeal of Judy E. Johnson from the order of August 1, 1984, is dismissed.

Costs to be paid by appellant.

Exceptions are granted the appellant.

FRANKLIN COUNTY SPECIAL EDUCATION CENTER v. STEVE BLACK, INC., et al, C.P. Franklin County Branch, No. A.D. 1983 - 181

Summary Judgment - Contract - Economic Loss - UCC - Negligence in Design

1. A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but actually a counter offer.

2. Where a contract is ambiguous either side may introduce parol evidence to resolve the ambiguity and the question of its meaning should be left to the jury and summary judgment is not appropriate.

3. A case involving alleged design negligence of equipment causing economic loss is not in the exclusive realm of the Uniform Commerical Code, but may also proceed on a common law negligence theory.

Anthony Stefanon, Esquire, Counsel for Plaintiff

Daniel L. Sullivan, Esquire, Counsel for Defendant, Steve Black, Inc.

Eileen F. Schoenhofen, Esquire, Counsel for Defendant, York Division of Borg-Warner Corporation

OPINION AND ORDER

EPPINGER, P.J., November 2, 1984:

Plaintiff, the Franklin County Special Education Center, constructed its building in 1977. Defendant, Steve Black, Inc., was

hired to install an air conditioning system which included a hermetic turbopak chilling unit purchased from the defendant, York Division of Borg-Warner Corporation, manufacturer of the unit. The building was completed in December, 1977. On July 7, 1981, the air conditioning system shut down due to the failure of the chilling unit. The plaintiff had to pay $13,135.59 to have the system repaired and put back in operation and sued the defendants to recover its loss.

Borg-Warner has moved for summary judgment as to Counts IV and V of plaintiff's complaint. Count IV is a breach of warranty claim; Count V is based upon negligence in the design, manufacture, inspection, testing and installation of the product in question.

In *Pa. P. U. C. Bar Association v. Thornburg,* 62 Cmwlth. Ct. 88, 434 A.2d 1327 (1981) the court said:

> "Our Court has delineated the following standards before summary judgment may be entered: 1) the case must be clear and free from doubt; 2) the moving party must prove that there is no genuine issue of material fact to be tried and that it is entitled to judgment as a matter of law; and 3) the record must be viewed in the light most favorable to the non-moving party and all doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. (Citations omitted)

Id. at 93, 1329-30.

In making its motion, Borg-Warner argues that as to Count IV of plaintiff's complaint, the facts and the running of the statute of limitations entitle it to summary judgment. In the Count V motion, the proposition is that Borg-Warner must prevail on the law.

It is apparent from *Pa. P. U. C. Bar Association,* supra, that where issues of fact are involved doubts as to the existence of such facts must be resolved against Borg-Warner. The second motion, however, involves an issue of law which all parties agree is not clearly decided in Pennsylvania.

Plaintiff contracted with Black for all of the heating, ventilating and air conditioning work in the building. The agreement required the contractor to carry out all of the provisions contained in the architect's specifications, which included a five-year manufacturer's

BEING sold as the property of Kenneth R. Lyons and Grace L. Lyons, husband and wife, Writ No. AD 1985-143.

SALE NO. 7
Writ No. DSB 1984-135 Civil 1985
Judg. No. DSB 1984-135 Civil 1985
Charles M. Cook
and
Margery C. Cook, his wife,
and
Charles McK. Cook
and
Nancy W. Cook, his wife
— vs —
Kanti Purohit, Anil Kothari t/a
Mim Three Properties
Atty. Stephen E. Patterson

ALL THAT CERTAIN tract of real estate together with the improvements erected thereon lying and being situate at Blue Ridge Summit, on Norwood Avenue, Washington Township, Franklin County, Pennsylvania, known as the Sumerfield Hotel Property, bounded and described as follows:

BEGINNING at an iron pin on the northerly edge of Norwood Avenue, said iron pin marking the southeasternmost corner of lands now or formerly of Donald I. Kline and wife; thence by lands now or formerly of Donald I. Kline and wife, north 9 degrees 00 minutes east 100 feet to an iron pin; thence by the same, north 2 degrees 00 minutes west 509.4 feet to an iron pin; thence by lands now or formerly of Eighenbrode and by Lots Nos. 1 and 2 of a plan of three lots laid out by J. Harvey Gearhart in November, 1954, north 88 degrees 00 minutes east 242.5 feet to an iron pin in the centerline of a 33-foot-wide easement or right-of-way opposite lands now or formerly of Henry J. Werrick and wife; thence with said centerline, south 3 degrees east 140 feet to an iron pin near an apple tree; thence continuing with said centerline, south 12 degrees 00 minutes east 335 feet to an iron pin on the northerly edge of Norwood Avenue; thence by the same on a curve to the left, having a radius of 108.25 feet, a distance of 85.3 feet to a point; thence by the same, south 1 degree 45 minutes east 47.7 feet to a point; thence by the same on a curve to the right having a radius of 68.5 feet a distance of 128.50 feet to a point; thence by the same, north 74 degrees 15 minutes west 206.5 feet to an iron pin, the place of beginning. CONTAINING 3.98 acres, more or less, according to a survey by John Howard McClellan, C.S., recorded in Franklin County Plot Book Volume 288, Page 273.

BEING the same real estate conveyed by Charles M. Cook and Margery C. Cook, his wife, and Charles McK. Cook and Nancy W. Cook, his wife, to Kanti Purohit and Anil Kothari t/a Mim Three Properties by deed dated May 27, 1981, and recorded in Franklin County Deed Book Volume 837, Page 107.

INCLUDED within the above-described tract of real estate; but specifically excepted and excluded from this conveyance are the following two (2) tracts of real estate:

(A) All that tract of real estate containing 19,149 square feet, being Parcel "A" according to a survey prepared by William A. Brindle Associates, dated October 9, 1976, and conveyed by the within Grantors to Mike J. Orlando and Esther T. Orlando, his wife, by deed dated July 18, 1977, and recorded in Franklin County Deed Book 745, Page 851.

(B) All that tract of real estate containing 23,796.8 square feet, being Parcel "B" according to a survey prepared by William A. Brindle Associates, dated October 9, 1976, and conveyed by the within Grantors to Mike J. Orlando and Esther T. Orlando, his wife, by deed dated July 18, 1977, and recorded in Franklin County Deed Book 745, Page 854.

BEING sold as the property of Kanti Purohit and Anil Kothari, t/a Mim Three Properties, Writ No. DSB 1984-135.

TERMS

As sson as the property is knocked down to a purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, August 26, 1985, at 4:00 P.M. E.D.S.T. Otherwise all money previously paid will be forfeited and the property will be resold on Friday, August 30, 1985 at 1:00 P.M. E.D.S.T., in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

guarantee on the chilling unit.[1] Borg-Warner sent Black an offer to furnish the chilling unit, detailing the type of equipment to be installed and offering and eighteen-month manufacturer's warranty. Responding to this offer, Black sent Borg-Warner a purchase order which contained the note: "all as per architects or engineers intent, plans or specifications, and addendums."

As to Count IV, Borg-Warner claims that since the failure of the equipment occurred beyond the eighteen-month warranty it offered to Black, the statute of limitations expired before the plaintiff brought this action. Borg-Warner contends the unit was delivered on October 29, 1976, and that the warranty expired in April, 1978.

In addition to the question of the warranty (18 months or five years) there is a dispute between Black and Borg-Warner on the contract price and when it was finally agreed upon. Conflicting copies of Borg-Warner's offer were presented, Borg-Warner's showing a handwritten figure of $35,700 and Black's showing a figure of $32,500.

It is basic law that a reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is actually a counter offer. *Hedden v. Lupinsky,* 405 Pa. 609, 612, 176 A.2d 406, 408 (1962), followed by *Daly v. Bright,* 412 F. Supp. 28, 30 (E.D. Pa. 1975). When the contract is ambiguous, either side may introduce parol evidence to resolve the ambiguity, and the question of its meaning should be left to the jury. *Framlau Corp. v. Upper Dublin School Authority Board,* 219 Pa. Super. 369, 372, 281 A.2d 464, 465 (1971), citing *Baldwin v. Magen*, 279 Pa. 302, 305, 123 A. 815, 816 (1924). With these basic issues still in dispute this is not an appropriate case for summary judgment.

Also, as to Count IV, Borg-Warner claims to be entitled to summary judgment because the claim is outside the statute of limitations. When the statute of limitations began to run in this case depends upon the agreement. If the jury would find that there was a five-year warranty, and the break-down was within

[1] 1.14 - "The Heating Contractor shall guarantee . . . all refrigeration sections . . . for five (5) years from the date of acceptance."

that period, then the statute of limitations did not begin to run until the failure on July 7, 1981. Therefore, in this case, when the statute of limitations began to run, as with the warranty, would be a question for the jury. *Smith v. Bell Telephone Company of Pennsylvania,* 397 Pa. 134, 141, 153 A.2d 477, 481 (1959).

It would be incredulous to conclude that where a defect manifests itself during an express warranty period, the statute of limitations could run earlier to bar a suit on the claim under the warranty. The Uniform Commercial Code recognizes this and provides in §2725(b), 13 Pa. C.S.A. §2725(b), that:

> ". . . where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

As indicated earlier, the defect occurred on July 7, 1981, and the plaintiff filed a praecipe for issuance of a writ of summons in trespass and assumpsit on June 21, 1983, within the statute. Pa.R.C.P. 1007; *Benn v. Linden Crane Corp.,* 370 F. Supp. 1269, 1278 (E.D.Pa. 1973).

As to Count V, alleging economic losses caused by negligent design, manufacture and production, plaintiff's position is that this is a simple negligence case. The claim is not one for strict liability. It is not a claim on a warranty. A warranty count is included elsewhere in the complaint.

The issue in Borg-Warner's motion for summary judgment as to Count V is whether a negligence count may stand. In *Industrial Uniform Rental Company, Inc. v. International Harvester,* Pa. Super. , 463 A.2d 1085 (1983), the court held that a case like this is not one for strict liability. The Court discussed the difference in legal theories between strict liability under Section 402A of the Restatement (Second) of Torts and a breach of warranty action under the Uniform Commercial Code, 13 Pa.C.S.A. §2714, and states that the plaintiff's cause of action is in breach of warranty.

We are asked by Borg-Warner to conclude that *Industrial Uniform* and other cases signals a trend in our state's courts to submit all pure economic loss cases to the exclusive realm of the Uniform Commercial Code. If that trend is the law, then a common law negligence count in this action would be inappropriate.

We are immediately confronted by §1103 of the Uniform Commercial Code, 13 Pa.C.S.A. §1103, which declares that unless displaced by the particular provisions of the code, the principles of law and equity shall supplement its provisions. See also *Carpel v. Saget,* 326 F. Supp. 1331, 1333 (E.D.Pa. 1971) and *Skeels v. Universal C.I.T. Credit Corp.* 335 F.2d 846 (3rd Cir. 1964). In the latter case under an earlier version of the Commercial Code, 12A P.S. §1-103, where the finding was that defendant had destroyed plaintiff's business by willful tortious conduct, the court applied equitable and estoppel principles. While the current version of the Commercial Code does not mention the common law tort specifically, it does say that the principles of law, if they are not displaced, apply. We can find nothing in the Commercial Code displacing common law negligence.

Coming to that conclusion, it is difficult for us to conclude that *Industrial Uniform* and the precedents discussed by the court in that case, make it clear that the law of Pennsylvania is that the Commercial Code should apply here to the exclusion of the common law. Since that is so, we are not disposed to grant summary judgment.

ORDER OF COURT

November 2, defendant's, York Division of Borg-Warner Corporation, motions for summary judgment to Count IV and Count V of plaintiff's complaint are denied.

COMMONWEALTH V. SOUDERS, C.P. Fulton County Branch, No. 29 of 1984

Criminal Law - Merger of Offenses - Involuntary Deviate Sexual Intercourse

1. The test of whether one criminal offense merges into another is whether one crime necessarily involves the other.

2. Indecent assault and indecent exposure do not merge where the exposure occurs after the assault.

3. The offenses of indecent assault and corruption of minors merge.

4. Corruption of minors merges with involuntary deviate sexual intercourse where the corruption of a minor is the result of the intercourse.