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Avoiding the Issue of Whether Implied Warranties Extend to Professional Services by Defining Horse Training as a Modification of an Existing Tangible Good.

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RECENT DEVELOPMENT

CONSUMER PROTECTION—DECEPTIVE TRADE PRACTICES—AVOIDING THE ISSUE OF WHETHER IMPLIED WARRANTIES EXTEND TO PROFESSIONAL SERVICES BY DEFINING HORSE TRAINING AS A MODIFICATION OF AN EXISTING TANGIBLE GOOD. *Archibald v. Act III Arabians*, 755 S.W.2d 84 (Tex. 1988).

In the spring of 1982, John Archibald placed Gayle Silva Robyn (“Robyn”), an Arabian mare, in Act III Arabians’ (“Act III”) show training program. *Archibald v. Act III Arabians*, 741 S.W.2d 957, 958 (Tex. App.—Houston [14th Dist.] 1987), *rev’d and remanded*, 755 S.W.2d 84 (Tex. 1988). Act III was to train the mare in the English pleasure riding style. *Id.* Robyn proved difficult to train. *Id.* When commanded to trot, the mare would buck. *Id.* On November 11, 1982, one of Act III’s trainers, determined to correct the mare’s bucking habit, put Robyn through a “particularly strenuous training session.” *Id.* As a result of the trainer’s extensive use of his riding crop, welts developed on the horse’s hindquarters. *Id.* Although she was treated three days later by a veterinarian for abrasions and swelling, Robyn’s skin became dry and leatherlike and sloughed off. *Id.* The skin condition began to improve when Robyn developed founder, a disease caused by the impairment of blood circulation to the hoof which results in lameness. *Id.* By January 17, 1983, the mare was so incapacitated by the founder that “she had to be destroyed.” *Id.*

John Archibald sued Act III alleging negligence and violations of the Deceptive Trade Practices-Consumer Protection Act (“DTPA”). *Archibald*, 755 S.W.2d at 85. The jury found Act III negligent in its training but failed to find that its negligence was the proximate cause of Robyn’s death. *Id.* Under the DTPA theory, although the jury found that Act III’s failure to train the horse in a good and workmanlike manner was a producing cause of the mare’s death and that the fair market value of the horse was \$75,000, the trial court asserted that under Texas law no implied warranties for services exist and rendered a take nothing judgment. *Id.* The court of appeals stated that the principle issue for appeal was whether “an implied warranty of good

and workmanlike performance of personal services rendered by a professional" existed under Texas law and affirmed the trial court's decision, holding that no such implied warranty had been established in Texas. *Archibald v. Act III Arabians*, 741 S.W.2d 957, 958 (Tex. App.—Houston [14th Dist.] 1987), *rev'd and remanded*, 755 S.W.2d 84 (Tex. 1988). The Texas Supreme Court reversed, holding that the implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner established in *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987), extended to horse training services. *Archibald*, 755 S.W.2d at 86.

A consumer may bring a cause of action under section 17.50(a)(2) of the DTPA where breach of an express or implied warranty is a producing cause of actual damages. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon 1987). However, the DTPA does not establish any express or implied warranties. *La Sara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984). Therefore, to maintain an action under section 17.50(a)(2), the consumer must rely upon warranties expressly created by contract or those implied by statute or common law. *Id.* A consumer acquiring goods will be able to take advantage of the warranties implied under the Texas Business and Commerce Code's provisions. *Id.*; see also TEX. BUS. & COM. CODE ANN. §§ 2.314-2.315 (Tex. UCC)(Vernon 1968)(implying warranties of merchantability and fitness for a particular purpose). However, a consumer of services has a more difficult task since he must rely exclusively upon those warranties created by the courts. See *Melody Home*, 741 S.W.2d at 353-54 (no statutory or common-law implied warranties for services but service warranty applicable to repairs or modifications of tangible goods); see also *Humber v. Morton*, 726 S.W.2d 554, 555 (Tex. 1968)(establishing implied warranty of good and workmanlike manner and suitability for human habitation applicable to house construction).

The Texas Supreme Court has previously decided cases in which the need to create an implied warranty was at issue. The court's willingness to extend such a warranty was based on public policy considerations. See *Melody Home*, 741 S.W.2d at 354. For example, in *Dennis v. Allison*, a patient brought an action against her doctor after she was beaten and sexually assaulted during the course of psychiatric treatment. *Dennis v. Allison*, 698 S.W.2d 94, 94 (Tex. 1985). The court observed that implied warranty theories had previously been extended only where the plaintiff's burden of proof under other theories made recovery impossible due to the plaintiff's lack of access to necessary information. *Id.* at 95 (discussing history of implied warranty adoption in Texas). The court noted that, in a professional service situation, the client could readily determine the exact person responsible for the injury and the specific wrong committed, implying that no great burden of proof would be imposed by other theories of recovery. *Id.* at 96. Therefore, the court concluded that the plaintiff patient had adequate remedies

and held that no implied warranty was necessary in professional service transactions. *Id.* In contrast, the Texas Supreme Court examined a situation in *Melody Home* in which it decided an implied warranty was necessary. See *Melody Home*, 741 S.W.2d at 354.

In *Melody Home*, the Barnes' brought a suit for damages after they suffered extensive water damage to their home caused by the defendant's improper repairs. See *Melody Home*, 741 S.W.2d at 351. The court analyzed several strict liability policies, including the need to protect rather than merely compensate consumers and the ability of the parties to prevent or distribute the loss, and concluded that the policies favored an extension of an implied warranty to repair services. *Id.* at 353-54. In addition, the court reasoned that since the legislature refused to exempt services from the scope of the DTPA, legislative history supported the creation of a service warranty. *Id.* at 354. Thus, the court held that public policy necessitated the extension of an implied warranty "to repair or modify tangible goods or property in a good and workmanlike manner" to all service transactions. *Id.*

After comparing the holdings in *Dennis* and *Melody Home*, two interrelated questions arise. Does the *Melody Home* warranty apply to transactions involving professional services; and, if not, what types of services are included within the court's definition of "professional"? In the first opinion issued in *Melody Home*, the court overruled *Dennis* and held that the *Melody Home* warranty extended to all service providers including professionals. *Melody Home*, 30 Tex. Sup. Ct. J. 489, 491 (June 17, 1987), *withdrawn*, 741 S.W.2d 349 (Tex. 1987). However, on rehearing, the Texas Supreme Court reserved judgment on the issue, stating that "[t]he question whether an implied warranty applies to services in which the essence of the transaction is the exercise of professional judgment by the service provider is not before us." *Melody Home*, 741 S.W.2d at 354.

In framing the issue to be decided in *Archibald*, the Texas Supreme Court ignored the court of appeals' evaluation of the main issue. See *Archibald*, 755 S.W.2d at 87 (Gonzalez, J., dissenting) (asserting majority failed to address court of appeal's reasoning). The court of appeals had stated that the principle issue for appeal was whether Texas law recognized "an implied warranty of good and workmanlike performance of personal services rendered by a professional." *Archibald*, 741 S.W.2d at 958. Unfortunately, the court of appeals incorrectly interpreted the *Melody Home* warranty as only applicable to sellers whose contract involved a service associated with the creation of a tangible product. *Id.* at 959. Perhaps if the court of appeals had expressly rejected the *Melody Home* warranty due to the "professional" nature of the services, the Texas Supreme Court would have been forced to address the issue. However, the Texas Supreme Court blindly asserted that the dispositive issue in *Archibald* was whether horse training services fell within the scope of the *Melody Home* warranty without reference to the

word "professional." *Archibald*, 755 S.W.2d at 85; see also *Archibald*, 755 S.W.2d at 87 (Gonzalez, J., dissenting) (pointing out court's omission). The court stated that the *Melody Home* warranty, by its very terms, extends to a vast array of services. *Archibald*, 755 S.W.2d at 85. Citing Black's Law Dictionary and a case involving a guaranty agreement to a note, the court defined modification as "any change or alteration that 'introduces new elements into the details [of the subject matter] or cancels some of them' but which leaves 'the general purpose and effect of the subject matter intact.'" *Id.* at 86 (citing Black's Law Dictionary and *Webb v. Finger Contract Supply Co.*, 447 S.W.2d 906, 908 (Tex. 1969)). The court then reasoned that since horse training introduces "new elements" which enhance the horse's capabilities and personality and extinguishes undesirable traits thereby altering the animal's demeanor and skills, training is a modification. *Id.* Therefore, under a definitional analysis, the court held that the *Melody Home* warranty applied to horse training services. *Id.* at 86.

Justice Gonzalez dissented, stating that the court's analysis fell short of the crucial issue. *Id.* at 87 (Gonzalez, J., dissenting). Justice Gonzalez asserted that *Dennis* controlled the case's outcome because horse training is a professional service. *Id.* He further argued that an implied warranty guaranteeing error free performance was inconsistent with the nature of a professional's service. *Id.* However, in reaching this conclusion, Justice Gonzalez failed to recall the caution issued by the court in *Melody Home*. See *Melody Home*, 741 S.W.2d at 355 & n.8 (noting that Gonzalez's concurring opinion overlooked essence of holding in that case also). The court stated that it was not requiring a guarantee of results but merely that repair or modification services be performed in a good and workmanlike manner. *Id.* at 355. Therefore, while the dissent correctly defined the issue of the case, it reached a conclusion based on an inaccurate interpretation of the requirements imposed by the *Melody Home* warranty.

The most productive aspect of the *Archibald* dissent was its attempt to define the term "professional services." Justice Gonzalez stated that a "professional service" is any service requiring "the exercise of intellectual skill, judgment and discretion." *Archibald*, 755 S.W.2d at 87 (Gonzalez, J., dissenting). However, the type of service performed in *Archibald* greatly differs from the professions considered in *Dennis*. Compare *Archibald*, 755 S.W.2d at 85 (horse training) with *Dennis*, 698 S.W.2d at 95-96 (psychiatrists, physicians, and optometrists). The types of professional services listed in *Dennis* require licensing and, in certain occupations, the adherence to strict ethical standards, which do not apply to horse trainers. See Tex. Rev. Civ. Stat. Ann. arts. 4495-4512 (Vernon 1976 & Supp. 1988)(physician regulations); Tex. Rev. Civ. Stat. Ann. art. 4512c (Vernon 1976 & Supp. 1988)(psychology regulations); Tex. Rev. Civ. Stat. Ann. arts. 4552-1.01—4552-6.04 (Vernon 1976 & Supp. 1988)(optometry regulations). See generally Com-

ment, *Expansion of Implied Warranty Coverage Under the DTPA: Service Contracts*, 17 Tex. Tech L. Rev. 917, 937 & n.128 (1986)(noting internal and external regulations of occupational categories society labels "professions" and specifically detailing regulation of attorneys in Texas). Perhaps the court failed to address the "professional" issue because it did not consider a horse trainer to be a "professional." If the policy basis for the extension of an implied warranty is the need to protect rather than merely compensate consumers, the definition of "professional services" should arguably be limited to those professions which require licensing, thereby ensuring that only those persons who have obtained a requisite level of knowledge and skill could perform the service. See *Melody Home*, 741 S.W.2d at 353 (listing protection of consumer as policy reason for extending implied warranty).

The crucial issue raised in *Archibald* was whether the *Melody Home* warranty extended to professional services and, if not, what services are to be classified as "professional" and excluded from the scope of the warranty. Although the dissent and numerous commentators have expressed their opinion as to the proper resolution of the issue, the Texas Supreme Court failed to address the question. See *Archibald*, 755 S.W.2d at 87 (Gonzalez, J., dissenting) (asserting majority failed to address issue and concluding no warranty necessary). See generally Greenfield, *Consumer Protection in Service Transactions — Implied Warranties and Strict Liability in Tort*, 1974 Utah L. Rev. 661, 683-96, 707-08 (analyzing arguments for and against extension of warranty to all service transactions and concluding extension appropriate); Note, *The Application of Implied Warranties to Predominantly "Service" Transactions*, 31 Ohio St. L.J. 580, 594-95 (1970)(evaluating and approving New Jersey court decision extending warranties to services); Comment, *The Texas Deceptive Trade Practices — Consumer Protection Act: Application to Professional Malpractice*, 8 St. Mary's L.J. 763, 764-69 (1977)(arguing purpose and scope of DTPA support inclusion of professional services); Note, *Consumer Protection — Deceptive Trade Practices — Breach of Implied Warranty Requiring Goods or Property to be Modified or Repaired in Good and Workmanlike Manner Actionable Under Deceptive Trade Practices — Consumer Protection Act*, 19 St. Mary's L.J. 791, 806-07 (1988)(providing several justifications for not extending implied warranties to professional services); Comment, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services*, 22 UCLA L. Rev. 401, 423-50 (1974)(arguing policies call for extension of implied warranties and enterprise liability to services); Comment, *Guidelines for Extending Implied Warranties to Service Markets*, 125 U. Pa. L. Rev. 365, 413 (1976)(analyzing court decisions on implied warranties in service situations and stating that under certain circumstances implied warranties necessary for professional services). As Justice Gonzalez correctly stated in his dissent, the court's failure to address the crucial issue in *Archibald* "raises more questions than it answers, and will require years of

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costly litigation to remedy.” *Archibald*, 755 S.W.2d at 87 (Gonzalez, J., dissenting).

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