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Implied Warranties in Ohio Home Sales

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Recommended Citation

Note, Implied Warranties in Ohio Home Sales, 30 Clev. St. L. Rev. 177 (1981)

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IMPLIED WARRANTIES IN OHIO HOME SALES

I. INTRODUCTION

The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. . . .¹

A PURCHASER IN OHIO OF A TWO DOLLAR FOUNTAIN PEN would probably be pleased to know that the law has provided certain warranties with the purchase of the pen.² If the same individual chooses to purchase a \$100,000 house, he may be shocked to discover that the law provides no similar warranties in the sale of real estate.³ An unwary purchaser in Ohio may still be a victim of the harsh common law doctrine of *caveat emptor*, or "let the buyer beware." The majority of states other than Ohio have rejected the *caveat emptor* doctrine and adopted an implied warranty of habitability in the sale of new homes,⁴ but the irony of

¹ Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 82, 207 A.2d 314, 325 (1965).

² OHIO REV. CODE ANN. §§ 1302.27 and 1302.28 (Page 1979); see Roberts, *The Case of the Unwary Home Buyer: the Housing Merchant Did It*, 52 CORNELL L. Q. 835 (1967) [hereinafter cited as Roberts]; see also McDonald v. Mianeki, 79 N.J. 275, 398 A.2d 1283 (1979).

³ Haskell, *The Case for an Implied Warranty of Quality in the Sales of Real Property*, 53 GEO. L.J. 633 (1965) [hereinafter cited as Haskell]. Rather than compare the home buyer's situation to the purchase of a two dollar fountain pen, Haskell compares the home buyer's situation to the purchase of a dog leash. *Id.* at 633. The principle is the same for both cases; the buyer of goods seemingly has more protection under the law than a buyer of realty. Roberts vividly details the home buyer's circumstances:

Let us imagine that a year later the happy homeowner is busily engaged in the kitchen mixing himself a martini when he hears a loud crash from the rumpus room. Lo and behold, there sits that master's bed atop the piano—the rumpus room ceiling has collapsed! Somewhat perturbed by this turn of events, the homeowner asks the developer either to repair or to pay for repairing what appears to have been a rather shoddy piece of workmanship. Here, however, comes the punch line: *caveat emptor* applies to the sale of a new home so that the developer is not liable for his substandard product. Indeed, the developer may well have been a collapsible corporation which, like Maeterlinck's bee, ceased to exist when the last house was sold. Consequently, the irate purchaser may be deprived even of the opportunity to attack the principle of *caveat emptor*.

Roberts, *supra* note 2, at 836.

⁴ See, e.g., Cochran v. Keeton, 287 Ala. 439, 252 So. 2d 313 (1971); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Carpenter v. Donahoe, 154

this situation is that it was an Ohio case, *Vanderschrier v. Aaron*,⁵ that first recognized implied warranties in the sale of a home.⁶ This Note will demonstrate that Ohio should adopt an implied warranty of habitability in the sale of new homes by builder-vendors.

II. HISTORY OF CAVEAT EMPTOR

Few people are unfamiliar with the doctrine of *caveat emptor*. Legal training is not necessary to realize that these two simple Latin words may be used to deny a purchaser relief for defective materials and workmanship. It can be argued that the simplicity of the doctrine in part creates the problem in rejecting the doctrine. Hamilton, in his classic article on *caveat emptor*, describes this problem:

An adage was never fitted more neatly to the part than *caveat emptor*; it is, among many excellent examples, the ideal legal maxim. It is brief, concise, of meaning all compact. Its terms are too broad to be pent up within the narrow confines of rules of law; they are an easy focus for judicial thought, a principle to be invoked when the going is difficult, a guide to be followed amid the baffling uncertainties of litigation. The phrase seems to epitomize centuries of experience; it is written in the language of Rome, the great law-giver; it comes with the repute of the classics and with the prestige of authority.⁷

Colo. 78, 388 P.2d 399 (1964); *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200 (1970); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Hanavan v. Dye*, 4 Ill. App. 3d 576, 281 N.E.2d 398 (1972); *Theis v. Heuer*, 264 Ind. 1, 280 N.E.2d 300 (1972); *Krol v. York Terrace Bldg., Inc.*, 35 Md. App. 321, 370 A.2d 589 (1977); *Weeks v. Slavick Builders, Inc.*, 24 Mich. App. 621, 180 N.E.2d 503, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970); *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972) (*en banc*); *Norton v. Burleaud*, 115 N.H. 435, 342 A.2d 629 (1975); *Centrella v. Holland Construction Corp.*, 82 Misc. 2d 537, 370 N.Y.S.2d 832 (N.Y. Dist. Ct. 1975); *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976); *McDonald v. Miannecki*, 79 N.J. 275, 398 A.2d 1283 (1979); *Jones v. Gatewook*, 381 P.2d 158 (Okla. 1963); *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974) (*en banc*); *Elderkin v. Gaster*, 477 Pa. 118, 288 A.2d 771 (1972); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 299 S.E.2d 728 (1976); *Waggoner v. Midwestern Dev. Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (1975); *Klos v. Gockel*, 87 Wash. 2d 567, 555 P.2d 1349 (1976) (*en banc*); *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975).

⁵ 103 Ohio App. 340, 140 N.E.2d 819 (8th Dist. 1957).

⁶ *Id.* at 341-42, 140 N.E.2d at 821.

⁷ Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931) [hereinafter cited as Hamilton].

Roberts maintains that the Hamilton article is such a classic that it is unnecessary to footnote it in detail. Roberts, *supra* note 2, at 836. It should be noted, however, that Hamilton's article not only details *caveat emptor* as a legal doctrine, but also covers the doctrine's history with great interest. To read Hamilton's article is to be transported to another era by way of his perceptive, lively and nearly poetic prose.

Although *caveat emptor* seems to arise from "centuries of experience," its true origin is unknown. The idea that the buyer must look out for himself is "alien to the spirit of the civil law."⁸ Nor can this doctrine be traced to the law of the merchant.⁹ The phrase *caveat emptor* appears in print for the first time in England in the 16th century,¹⁰ but came to full fruition in America.¹¹ American courts in the 19th century developed the doctrine as it is understood today, reflecting the country's trend toward the "creed of laissez faire,"¹² and today the purchaser in Ohio must protect himself by an express warranty, or rely solely on the defense of fraud.¹³

One may argue that *caveat emptor* had some rational basis at a time when a buyer and seller dealt at arm's length and when the buyer was knowledgeable enough to inspect a simple home for defects. This has not been the case in the United States since World War II, when homes began to be built in large numbers:

After World War II, . . . the building industry underwent a revolution. It became common for the builder to sell the house and land together in a package deal. Indeed, the building industry outgrew the old notion that the builder was an artisan and took on all the color of a manufacturing enterprise, with acres of land being cleared by heavy machinery and prefabricated homes being put up almost overnight.¹⁴

Today's home buyer arguably lacks the requisite skills to discover

⁸ Hamilton, *supra* note 7, at 1157.

⁹ *Id.* at 1158. Hamilton states in a note which epitomizes his style that: The idea is to be found in the elementary formula for Christian marriage; the parties accept each other for better or for worse. In England from a time unknown until quite recently there has been a limited indulgence in the sale of wives. Even though the law has not accorded recognition, the bargains have usually stood. Whether the price was a mug of beer or a lusty sum in gold, it was understood that the buyer took his chance upon latent defects in the chattle. [*citing Kenney, Wife Selling in England*, 45 L.Q. REV. 494 (1929).]

Hamilton, *supra* note 7, at 1162 n.196.

¹⁰ Hamilton, *supra* note 7, at 1164.

¹¹ *Id.* at 1178.

¹² Roberts, *supra* note 2, at 836. Hamilton notes that:

It is a far cry from authoritative control to modern mercantilism. The English borough sought to guard the gates of the market and deny entrance to unworthy goods. The up-to-date state undertakes to instruct producers how to subordinate goodness in their wares to vendibility. Yet *caveat emptor* claims to descend from an ancient lineage.

Hamilton, *supra* note 7, at 1185.

¹³ Note, *Phasing Out Caveat Emptor: Implied Warranties in Builder-Vendor Contracts*, 2 CAP. U. L. REV. 199, 200 (1973).

¹⁴ Roberts, *supra* note 2, at 837.

defects that may exist in plumbing, electrical wiring or the actual structure itself.¹⁵

It appears that some courts have recognized the realities of the modern real estate transaction, and have adopted the concept of an implied warranty of habitability in the sale of new homes. This change from the common law doctrine of *caveat emptor* occurred in a relatively short period of time, initiated in 1957 by the Ohio decision in *Vanderschrier*.¹⁶ In 1961, the rule that no implied warranties existed in the sale of new homes appeared to be well established in most jurisdictions.¹⁷ By 1969, although most courts still recognized no warranties in the sale of older buildings, a different trend appeared to be developing in the sale of new homes. Modern decisions began holding the vendor-builder liable to original purchasers on a theory of implied warranty of fitness.¹⁸ The courts found the old rule of *caveat emptor* did not satisfy the demands of justice.¹⁹ One commentator recommended that "[i]t would be better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years."²⁰ While it appeared in *Vanderschrier*²¹ that Ohio would lead the nation in casting out *caveat emptor*, ultimately the doctrine was retained.²²

III. OHIO LAW

In 1955, a purchaser of a new home in Ohio could only recover from the builder damages for any defects detected upon possession on the

¹⁵ See, e.g., *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975). The court recognized that building construction today is "complex and intertwined with governmental codes and regulations." *Id.* at 1279.

¹⁶ 103 Ohio App. 340, 140 N.E.2d 819 (8th Dist. 1957). See also Hyatt and Rhoads, *Concepts of Liability in the Development and Administration of Condominium & Home Owners Associations*, 12 WAKE FOREST L. REV. 915 (1976). The Hyatt and Rhoads article describes *Vanderschrier* as "the first chink in the armor of *caveat emptor*." *Id.* at 956.

¹⁷ Annot., 78 A.L.R. 446, 447 (1961).

¹⁸ See, e.g., Annot., 25 A.L.R.3d 383 (1969).

¹⁹ *Id.* at 396. It is reasoned that:

[T]he purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime; and that to apply the rule of *caveat emptor* to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling houses, is manifestly a denial of justice.

Id.

²⁰ 7 WILLISTON, CONTRACTS § 926A, at 818 (3d ed. 1963).

²¹ 103 Ohio App. 340, 140 N.E.2d 819 (8th Dist. 1957).

²² *Mitchem v. Johnson*, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

theories of fraud or express warranty,²³ and no implied warranties were recognized in the sale of real estate. Two years later, in *Vanderschrier*,²⁴ an Ohio appellate court was presented with a case involving the sale of a home still under construction.²⁵ The court found that few cases in the United States were on point,²⁶ and adopted the law of England that "upon the sale of a house in the course of erection, there is an implied warranty that the house will be finished in a workmanlike manner."²⁷ The *Vanderschrier* court accordingly held that:

[S]ufficient credible evidence established the fact that the house when sold, was still in the course of construction and incomplete; and the bargain implied in law between the sellers and the buyers was the completion of the entire house in such a way that it would be reasonably fit for its intended use, and that the work would be done in a reasonably efficient and workmanlike manner.²⁸

Like the rule in England, the implied warranty arose only as to homes under construction. The *Vanderschrier* court did, however, go one step further than England had when it required the completed home to be "reasonably fit for its intended use."²⁹ What is unfortunate is that the *Vanderschrier* court refused to acknowledge implied warranties in connection with the sale of a completed home, but then went on to address the issue regardless. The court stated in dictum that "the vendor of a completed house, in respect of which there is no work going on and no work to be done, does not generally in the absence of some express bargain or warranty, undertake any obligation with regard to the condition of the house."³⁰

²³ *Shapiro v. Kornicks*, 103 Ohio App. 49, 124 N.E.2d 175 (8th Dist. 1957).

²⁴ 103 Ohio App. 340, 140 N.E.2d 819 (8th Dist. 1957).

²⁵ *Id.*

²⁶ *Id.* at 342, 140 N.E.2d at 821.

²⁷ *Id.* at 341-42, 140 N.E.2d at 821. The *Vanderschrier* court was quoting from *Perry v. Sharon Dev. Co., Ltd.*, (1937) 4 All E.R. 390 (C.A.).

²⁸ 103 Ohio App. 340, 342, 140 N.E.2d 819, 821 (8th Dist. 1957).

²⁹ *Id.* It is interesting to note that although the English rule centered on an implied warranty of workmanlike construction, concern had there been expressed as to the dwelling's habitability. In *Miller v. Cannon Hill Estates, Ltd.*, (1931) 2 K.B. 113, it was stated that "the house which was to be built by the defendants for the plaintiff should be a house which was habitable and fit for humans to live in." *Id.* at 120.

³⁰ 103 Ohio App. 340, 341, 140 N.E.2d 819, 821 (8th Dist. 1957). *Vanderschrier* follows both of the English cases of *Perry* and *Miller* as to this point. In *Perry* it was stated that "[i]t is, of course well settled that a vendor of a completed house, . . . does not, in the absence of some express bargain, undertake any obligation with regard to the condition of that house." (1937) 4 All E.R. 390, 392 (C.A.). The *Miller* court simply stated that the buyer "can always get an express warranty

In *Rappich v. Altermalt*,³¹ decided nine months after *Vanderschrier*, a recovery by the plaintiff-purchaser was disallowed where the defect in construction was not discovered until six years after the defendant-builder had completed the home.³² The court relied upon the dictum in *Vanderschrier* that no obligation is imposed upon the builder-vendor of a completed home absent an express bargain,³³ thus retreating to the doctrine of *caveat emptor* in such sales.³⁴ The court rejected the notion of an implied warranty in the sale of homes.³⁵ *Vanderschrier* was distinguished by pointing out that in said case the house was bought while being constructed and that there had been a breach of the agreement to complete it in a workmanlike manner.³⁶ One thing that the *Rappich* court failed to acknowledge was that the "agreement" breached in *Vanderschrier* was one implied in law.

The issue of an implied warranty of fitness in the sale of a new house finally came before the Ohio Supreme Court in *Mitchem v. Johnson*.³⁷ The plaintiff-purchasers of an uncompleted home contended that their house had been built in an unworkmanlike manner, resulting in surface-water and home damage.³⁸ Tracing the language of *Vanderschrier*, the trial court instructed the jury that "it is an implied term of the sale that the builder will complete the house *in such a way that it will be reasonably fit for its intended use* and that the work be done in a reasonably efficient and workmanlike manner."³⁹ The Ohio Supreme Court expressly rejected that part of the instruction which stated that construction "will be reasonably fit for its intended use,"⁴⁰ and in so doing overruled, *sub silentio*, the corresponding excerpt from the holding in *Vanderschrier*. The court proceeded to concur with *Vanderschrier*'s "workmanlike manner" standard for completion of construction.⁴¹ To

that an unfurnished house is fit for habitation, if he is prepared to pay the price which attaches to an unfurnished house which has such a warranty. . . ." (1931) 2 K.B. 113, 121.

³¹ *Rappich v. Altermalt*, 106 Ohio App. 282, 151 N.E.2d 253 (10th Dist. 1957).

³² *Id.*

³³ *Id.* at 284, 151 N.E.2d at 255.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

³⁸ *Id.* at 67, 218 N.E.2d at 595. It is interesting to note that in *Vanderschrier* serious water-related problems (*i.e.*, the sewer hook-ups) were the apparent basis for recovery against the builder.

³⁹ *Id.* at 68, 218 N.E.2d at 596 (emphasis added). The portion of the above jury instruction appearing in italics is an exact quote from the holding in *Vanderschrier*. 103 Ohio App. 340, 342, 140 N.E.2d 819, 821 (8th Dist. 1957).

⁴⁰ 7 Ohio St. 2d 66, 73, 218 N.E.2d 594, 599 (1966).

⁴¹ *Id.*

achieve this result the Ohio Supreme Court employed elipsis when quoting *Vanderschrier*, carefully excising the language "will be reasonably fit for its intended use,"⁴² but never expressly admitting to their so doing. The precise standard adopted by the court was borrowed from a Missouri case⁴³ which held: "It is the duty of the builder to perform his work in a workmanlike manner; that is the work should be done as a skilled workman would do it; the law exacting from a builder ordinary care and skill only."⁴⁴

The standard adopted in *Mitchem* was not a new and unique duty, but rather a "duty historically imposed upon all persons that they measure their conduct by that of the ordinarily prudent person under all circumstances. . . ."⁴⁵ The court considered the then available meager collection of cases which had created an implied warranty in favor of purchasers of newly constructed homes and then dismissed them as being just that: a meager collection of cases.⁴⁶ It upheld the doctrine of *caveat emptor* because it was supported by the "overwhelming weight of authority."⁴⁷ The practical effect of the court's decision in *Mitchem* was to destroy the enlightened approach of *Vanderschrier*, while concurrently firmly entrenching Ohio in the nineteenth century by endorsing an antiquated doctrine.

The cases decided subsequent to *Mitchem* were based on the defendant-builder's duty to perform in a workmanlike manner; implied warranties were again rejected and *caveat emptor* controlled.⁴⁸ The courts were faced with a problem, however, when the applicable statute of limitations arose as an issue: Was this an action in tort, or an action

⁴² *Id.* at 69, 218 N.E.2d at 596.

⁴³ *Flannery v. St. Louis Architectural Iron Co.*, 194 Mo. App. 555, 558, 185 S.W. 760, 761 (1916).

⁴⁴ 7 Ohio St. 2d 66, 69, 218 N.E.2d 594, 597 (1966).

⁴⁵ *Id.* at 72, 218 N.E.2d at 599.

⁴⁶ *Id.* at 71, 218 N.E.2d at 598.

⁴⁷ *Id.* at 70, 218 N.E.2d at 597. The court also considered the relative burdens of proof under the implied warranty and workmanlike manner theories of recovery. In a somewhat confused discussion of the matter, it determined that if it adopted the implied warranty theory, the plaintiff would only have to prove defect and damages with the "burden of explanation" shifting to the defendants. *Id.* at 71, 218 N.E.2d at 598. The court apparently viewed this as an untenable approach because it believed the plaintiff would not be required to show a failure on the defendant-builder's behalf to exercise "ordinary care" and "a lack of good workmanship." *Id.* The unanswered question is why the builder of a house unfit for habitation should not have the "burden of explanation" shifted to him.

⁴⁸ See, e.g., *Hubler v. Bachman*, 12 Ohio Misc. 22, 230 N.E.2d 461 (5th Dist. 1967). In *Hubler*, the plaintiff-purchaser was unable to prove that the defendant-builder had not exercised ordinary care and skill and thus the court held for defendant; the plaintiff was left with a home that had substantial plaster cracking throughout all the rooms. *Id.*

based on contract? *Benson v. Dorger*⁴⁹ held that the duty owed by the defendant-builder to the plaintiff-purchaser, that is, the duty to perform in a workmanlike manner using ordinary care, sounded in tort as an action for negligence.⁵⁰ One year later, a different Ohio court came to the opposite conclusion. In *Lloyd v. William Fannin Builders, Inc.*,⁵¹ the court determined that the duty to perform in a workmanlike manner arose out of an implied bargain, and as such the action arose *ex contractu*.⁵²

The *Benson* decision, which held that such an action was based on tort principles, was expressly overruled in 1977 by *Tibbs v. William Fannin Builders, Inc.*⁵³ *Tibbs* agreed with *Lloyd* that this action against the builder-vendor arose *ex contractu*,⁵⁴ and for this reason, the plaintiff-purchaser's remedy was limited to compensatory damages.⁵⁵ This conclusion flowed from the fact that Ohio courts have traditionally limited recovery in breach of contract actions to compensatory damages, deeming it unsound to award punitive damages absent a showing of malice.⁵⁶ Judge Keefe, concurring in result,⁵⁷ did not agree that the cause of action was clearly in contract,⁵⁸ and he apparently saw the defendant's failure to exercise ordinary care as a tortious act, thereby concluding that the cause of action was a curious mix of contract and tort.⁵⁹

⁴⁹ 33 Ohio App. 2d 110, 292 N.E.2d 919 (1st Dist. 1972). This case was subsequently overruled by *Tibbs v. Nat'l Home Constr. Corp.*, 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1st Dist. 1977).

⁵⁰ 33 Ohio App. 2d 110, 292 N.E.2d 919 (1st Dist. 1972). The court held that OHIO REV. CODE ANN. § 2305.09 (Page 1953), along with its four years statute of limitations, applied. *Id.*

⁵¹ 40 Ohio App. 2d 507, 321 N.E.2d 738 (10th Dist. 1977).

⁵² *Id.* at 510, 320 N.E.2d at 741. The court failed to continue its analysis, however, in discerning whether the action was for breach of a written contract (whereby the applicable time limit would be the fifteen year limitation period of OHIO REV. CODE ANN. § 2305.06 (Page 1981)), or for a breach of an unwritten contract in connection with the implied bargain (whereby the six year limitation period of OHIO REV. CODE ANN. § 2305.07 (Page 1981) would be applicable).

⁵³ 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1st Dist. 1977).

⁵⁴ *Id.* at 292, 369 N.E.2d at 1225.

⁵⁵ *Id.* at 293, 369 N.E.2d at 1226. It is interesting to note that the concurring opinion in *Tibbs* viewed the action as a combination of contract and tort which would open the door to exemplary damages as well. *Id.* at 297, 369 N.E.2d at 1228 (Keefe, J., concurring).

⁵⁶ See, e.g., *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922).

⁵⁷ 52 Ohio App. 2d 281, 297, 369 N.E.2d 1218, 1228 (1st Dist. 1977) (Keefe, J., concurring).

⁵⁸ *Id.*

⁵⁹ *Id.* The field of products liability has developed an implied warranty which Prosser describes as "a curious hybrid born of the illicit intercourse of tort and contract, unique in the law." W. PROSSER, LAW OF TORTS 634 (4th ed. 1971).

The law in Ohio today remains as that which *Mitchem* articulated in 1967: There are no implied warranties of habitability in the sale of homes, the law imposing on the builder only the duty to perform in a workmanlike manner. The distinction between completed and in-completed homes has been lost,⁶⁰ and the duty now accrues in either situation. The purchaser of a home, either newly completed or under construction, must "beware" as *caveat emptor* still controls the sale in Ohio.

IV. DEVELOPMENT OF IMPLIED WARRANTIES IN THE SALE OF HOMES

While Ohio held fast to *caveat emptor*, the majority of other states considering the issue followed *Vanderschrier's* lead by adopting an implied warranty of habitability. In *Glisan v. Smolenoke*,⁶¹ the Colorado Supreme Court recognized the growing body of law adopting the warranty theory of recovery,⁶² and adopted an implied warranty of habitability in the sale of homes "where the vendor's workmen are still on the job, and particularly where completion is not accomplished until the house has arrived at the contemplated condition—namely, finished and fit for habitation."⁶³

In light of Ohio's current position, it was ironic for the *Glisan* court to state that "[o]ne of the early decisions in this country on the point is that written in the case of *Vanderschrier v. Aaron* [citation omitted]. In that case . . . the Court held that an implied warranty of fitness for human habitation existed. We follow the *Vanderschrier* case."⁶⁴

Less than a year later, the Colorado Supreme Court was presented with a similar case, but in this instance the house was completed when sold. In *Carpenter v. Donohue*,⁶⁵ the court could find no reason to distinguish completed homes from those still under construction or near completion. In fact, the court declared it to be incongruous to treat the purchaser of a newly completed home differently from the purchaser of a home under construction,⁶⁶ and stated that there could be no reasonable basis for treating the respective purchasers differently.⁶⁷

⁶⁰ *E.g.*, *Tibbs v. Nat'l Home Constr. Corp.*, 52 Ohio App. 2d 281, 396 N.E.2d 1218 (1st Dist. 1977) (sale of newly constructed home with the court reciting the workmanlike manner standard). It will be recalled that recovery under *Vanderschrier* was premised on the fact that the house was purchased while still under construction. See note 24 *supra* and accompanying text.

⁶¹ 153 Colo. 274, 387 P.2d 260 (1963).

⁶² *Id.* at 279, 387 P.2d at 262.

⁶³ *Id.* at 279, 387 P.2d at 263.

⁶⁴ *Id.* Unfortunately, *Vanderschrier* is not followed in its state of origin, Ohio.

⁶⁵ 154 Colo. 78, 388 P.2d 399 (1964).

⁶⁶ *Id.* at 83, 388 P.2d at 402.

⁶⁷ The *Carpenter* court held that:

[T]he implied warranty doctrine is extended to include agreements be-

After *Carpenter*, other states continued to reject the doctrine of *caveat emptor* in the sale of completed and incompleated homes, adopting instead an implied warranty of habitability.⁶⁸ Many of these states followed the "lead" of *Vandershrier* even though Ohio had not.⁶⁹

The rationale for the warranty of habitability parallels that for the implied warranty of merchantability or fitness for particular purpose in the sale of goods: unequal bargaining positions, modern mass production methods and protection of the public from dangerously defective items. *Schipper v. Levitt & Sons, Inc.*,⁷⁰ explains this similarity as follows:

We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. . . .

When a vendee buys a development house from an advertised model, . . . he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. . . . The public interest dictates that if . . . injury does result from the defective construction, its cost should be borne by the responsible developer who is in the better economic position to bear the loss. . . .⁷¹

tween builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied warranties that the home was built in a workmanlike manner and is suitable for habitation.

Id. at 83-84, 388 P.2d at 402.

⁶⁸ See, e.g., *Wagoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967); *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972); *Favares v. Hortsman*, 542 P.2d 1275 (Wyo. 1975).

⁶⁹ E.g., *Loch Hill Constr. Co., Inc. v. Fricke*, 284 Md. 708, 399 A.2d 883 (1979). The court stated that:

Although the existence of implied warranties arising from the construction and sale of new residential dwellings was first recognized by a court in this country only a little over two decades ago, *Vandershrier v. Aaron* . . . , since that time judicial acceptance of such warranties has spread rapidly until at present new home purchasers in over one-half of the states enjoy the protection of at least some type of implied warranty.

Id. at 721, 399 A.2d at 886-87.

⁷⁰ 44 N.J. 70, 207 A.2d 314 (1965).

⁷¹ *Id.* at 90-91, 207 A.2d at 325-26. As indicated by the court, the defendant in *Schipper* built homes using mass production methods. This factor was focused upon by the court in illustrating unequal bargaining power:

Caveat emptor developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not on an equal footing with the builder-vendors and are no more

This court, unlike the Ohio courts, rejected the argument that the builder-vendor would become an insurer. Paralleling the burden of proof in tort cases, *Schipper* requires the plaintiff to show "that the house was defective when constructed and sold and that the defect proximately caused the injury."⁷² The builder-vendor has performed his duty if the house is reasonably fit for habitation; perfection, therefore, is not required.⁷³

It should be noted that *Schipper* was a 1965 case, and therefore was decided at a time when the law still favored the builder-vendor and supported the doctrine of *caveat emptor* in the sale of real estate. The *Schipper* court refused to follow the traditional rules stating: "Law as an instruct for justice has infinite capacity for growth to meet changing needs and mores."⁷⁴

In 1979, the New Jersey Supreme Court was again faced with the issue of implied warranties in the sale of homes. In *McDonald v. Minanecki*,⁷⁵ even though the defendant was not a developer of mass-produced homes, the court nevertheless had to consider whether or not the implied warranty should apply. In affirming for the plaintiff, the court noted how the law had changed; unlike the situation in 1965, by 1979 most cases deciding the issue of liability favored implied warranty as a basis for recovery. Support for the decision was found in other sources including the Uniform Land Transactions Act.⁷⁶

In reaching its conclusion, the court reiterated the rationales used by other states to support implied warranties. First, the builder-vendor has a far superior bargaining position.⁷⁷ Also, the buyer often signs a standard form contract, has not seen the home during the construction, and relies on the skill of the builder-vendor.⁷⁸ An additional reason for im-

able to protect themselves in a deed than are automobile purchasers in a position to protect themselves in the bill of sale.

Id. at 91-92, 207 A.2d at 326.

⁷² *Id.* at 92, 207 A.2d at 326.

⁷³ *Id.*

⁷⁴ *Id.* at 89, 207 A.2d at 324.

⁷⁵ 79 N.J. 275, 398 A.2d 1283 (1979).

⁷⁶ *Id.* at 286, 398 A.2d at 1289. Germane is the UNIFORM LAND TRANSACTIONS ACT § 2-309, which provides in its Prefatory Note that:

Perhaps the most important example of modernization of real estate law [affected] by this Act is Section 2-309 which imposes implied warranties of quality on persons in the business of selling real estate. For a substantial period of years, the nearly universal opinion of writers on the subject has been that the old rules of caveat emptor were totally out of date and pernicious in effect.

13 UNIFORM LAWS ANN., 1979 Pamphlet at 41. See also *The National Association of Home Builders, What About H.O.W.—Home Owners Warranty*, 60.13 NAT'L ASSOC. HOME BUILDERS 5 (1975).

⁷⁷ 79 N.J. 275, 289, 398 A.2d 1283, 1290.

⁷⁸ *Id.*

posing the implied warranty is to discourage sloppy building practices.⁷⁹

The holding of *McDonald* expresses the policy and concerns behind the implied warranty:

Caveat emptor is an outmoded concept and is hereby replaced by rules which reflect the needs, policies and practices of modern day living. It is our conclusion that in today's society it is necessary that consumers be able to purchase new homes without fear of being "stuck" with an uninhabitable "lemon."

Caveat emptor no longer accords with modern day practice and should therefore be relegated to its rightful place in the pages of history.⁸⁰

Having sounded the death bell for *caveat emptor* in the sale of new homes in a great many states, several questions remain concerning the implied warranty that has replaced it. The following sections explore these issues: What is a builder-vendor? What is meant by "habitability"?⁸¹ Does the warranty arise from tort or contract? Does the warranty extend to subsequent purchasers of a new home?

A. *Builder-Vendor*

The courts have consistently used the phrase "builder-vendor" when referring to a potentially liable defendant, but not all courts have attempted to define the term. The reason for this is that often the situation appears self-explanatory and elaboration is not necessary. The Texas Supreme Court, in *Humber v. Morton*,⁸² discovered that "builder-vendor" could be defined by reiterating the circumstances of the case:

It conclusively appears that defendant Morton was a "builder-vendor." The summary judgment proofs disclose that he was in the business of building or assembling houses designed for dwelling purposes upon land owned by him. He would then sell

⁷⁹ The *McDonald* court cited *Humber v. Morton*, 426 S.W.2d 554, 562 (Tex. 1968) and quoted:

The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and surveyors of shoddy work.

79 N.J. 275, 290, 398 A.2d 1283, 1290.

⁸⁰ *Id.* at 299, 398 A.2d at 1295.

⁸¹ The term "habitability" alone is used, although the courts will usually use the phrase "implied warranty of workmanlike construction and habitability." *Elderkin v. Gaster*, 447 Pa. 118, 125, 228 A.2d 771, 775 (1972). While "workmanlike construction" imports a duty of care in building the home, "habitability" is more a rigorous standard which focuses upon the quality of the finished product. *See Crowder v. Vandendeale*, 564 S.W.2d 879, 882 (Mo. 1978) (*en banc*).

⁸² 426 S.W.2d 554 (Tex. 1968).

the completed houses together with the tracts of land upon which they were situated to members of the house-buying public.⁸³

The *Humber* analysis is simple and pragmatic but relies on the builder being "in the business." The Missouri Supreme Court gave a more detailed and slightly different explanation in *Smith v. Old Warson Development Co.*:⁸⁴

It should be recognized that the rationale for allowing recovery by a purchaser of a new house, on a theory of an implied warranty of habitability or quality, is applicable only against that person who not only had an opportunity to observe but failed to correct a structural defect, which, in turn became latent, i.e., the builder-vendor.⁸⁵

Missouri's definition emphasizes the fact that the defendant was simply a "builder," while the Texas court's definition emphasizes the fact that the builder was also a developer. The Missouri rule is the better of the two as the ultimate focus is only upon who had the best chance of detecting a defect in construction without regard to the frequency of such opportunities.

In a 1979 decision,⁸⁶ the Wyoming Supreme Court held that there was no reason to distinguish between a builder or contractor who constructs a home for a specific individual and a builder-developer (one building for unknown purchasers).⁸⁷ The court focused on the expectations of the buyers in determining whether the defendant was a builder-vendor for purposes of applying the warranty of habitability:

To the buyer of a home the same considerations are present, no matter whether a builder constructs a residence on the land of the owner or whether the builder constructs a habitation on land he is developing and selling the residential structures as a part of a package including the land. It is the structure and all its intricate components and related facilities that are the subject matter of the implied warranty.⁸⁸

⁸³ *Id.* at 555.

⁸⁴ 479 S.W.2d 795 (Mo. 1972) (*en banc*).

⁸⁵ *Id.* at 801.

⁸⁶ *Moxley v. Faramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979).

⁸⁷ *Id.* at 735. The Wyoming Supreme Court had adopted the implied warranty of habitability in the sale of new homes four years prior to the *Moxley* decision. *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975). In *Tavares* the defendant-builder was also a land developer; in *Moxley* the defendant had built the house specially for the plaintiffs.

⁸⁸ 600 P.2d at 735. The court expressed its concern that all those who are a part of the building industry maintain high standards, and that anyone holding himself out as a builder be treated the same as mass developers. *Id.*

The second half of the term, that is, "vendor" or "seller," must also be considered. In *Mazurek v. Nielsen*,⁸⁹ the central issue was whether or not the defendants were "sellers." The court found that a builder-vendor had to be a person "regularly engaged in building, so that the sale is commercial rather than casual or personal in nature."⁹⁰ In *Mazurek*, defendants had hired an architect, contractor and subcontractor to build their home, and had sold the property to plaintiffs two years after they moved in. Although the court said the defendants were "builders" due to these activities, there was a question as to whether or not they were "sellers." The court reasoned that a builder-seller did not need a history of selling, and that "[e]ven a first-time builder-seller may be 'in the business of building' for purposes of impliedly warranting his work, if his primary reason for constructing the house is to resell it. The intent of the builder-seller in this regard is a factual question."⁹¹

The *Mazurek* intent test, which was established to protect a purchaser, served to deny a purchaser relief in a subsequent case. In *Sloat v. Mathing*,⁹² defendant built a home with the intention of occupying it himself, and due to financial difficulties, he sold the home to the plaintiff instead. The court acknowledged that implied warranties were not restricted to large scale developers, but held that an element of commerciality was required.⁹³ The court reasoned that the policy motives for preventing shoddy workmanship did not apply in a case like this, where one built a home for his own use.⁹⁴

The cases in this section were decided in different states, but some similarities emerge. Where the defendant is the actual builder of the home, whether or not he is a developer, and he sells the home directly to the plaintiff, the defendant is a "builder-vendor." More difficult questions arise where the facts vary; if the defendant builds the home for his own use, but sells it to another person, the courts may deny an aggrieved party's action based on the lack of commerciality. Conversely, other courts might focus on the policy of ensuring good workmanship in new homes, and therefore hold the builder-vendor liable. The latter is the

⁸⁹ 599 P.2d 269 (Colo. App. 1979).

⁹⁰ *Id.* at 271. The court pointed out that the intervening occupancy of the defendants subsequent to completion but prior to sale did not operate to cut off the implied warranty. *Id.*, citing *Duncan v. Schuster-Graham Homes, Inc.*, 578 P.2d 637 (Colo. 1978) (warranty extends to subsequent purchasers if it was the original builder-vendor who repurchased and sold the house).

⁹¹ 599 P.2d at 271.

⁹² 605 P.2d 71 (Colo. App. 1980).

⁹³ *Id.* at 72.

⁹⁴ *Id.* The dissent in *Sloat* reasoned that the implied warranty was designed to protect the purchasers of the home, and that the element of commerciality had little to do with quality of construction accorded occupants. *Id.* at 74 (Sternberg, J., dissenting).

better rule as the focus should be on the safety of occupants, not on the builder-vendor's state of mind.

B. Habitability

The implied warranty of habitability has covered a wide variety of defects: cracked walls,⁹⁵ buckled ceilings,⁹⁶ defective septic tanks⁹⁷ and leaking roofs.⁹⁸

The question remains: What is habitability? The Illinois Supreme Court, in *Peterson v. Hubschman Construction Co.*,⁹⁹ defined habitability as "a warranty that the house, when completed and conveyed to the vendees, would be reasonably suited for its intended use."¹⁰⁰ The *Peterson* court emphasized that the implied warranty arose from the agreement between the parties, and compared it to the implied warranties in the Uniform Commercial Code: "It would more accurately convey the meaning of the warranty as used in this context if it were to be phrased in language similar to that used in the Uniform Commercial Code, warranty of merchantability, or warranty of fitness for a particular purpose."¹⁰¹ What is "fit" or "merchantable" necessarily depends on the facts of each case,¹⁰² but it is generally agreed that the builder is held to a standard of reasonableness, not perfection.¹⁰³

The implied warranty of habitability is not met by the mere fact that a purchaser is inhabiting a builder-vendor built house. In *Peterson*, the court was presented with a unique situation where the defendant asserted that the implied warranty of habitability could only be resorted to if the defects made the structure unfit for habitation. The Illinois Supreme Court rejected this argument: "The mere fact that the house is capable of being inhabited does not satisfy the implied warranty."¹⁰⁴

⁹⁵ *Carpenter v. Donahoe*, 154 Colo. 78, 388 P.2d 399 (1964).

⁹⁶ *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974).

⁹⁷ *Hoagland v. Celebrity Homes, Inc.*, 40 Colo. App. 215, 572 P.2d 493 (1977).

⁹⁸ *Weeks v. Slavik Builders, Inc.*, 24 Mich. App. 621, 180 N.W.2d 503 (1970).

⁹⁹ 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

¹⁰⁰ *Id.* at 42, 389 N.E.2d at 1159.

¹⁰¹ *Id.* at 42, 389 N.E.2d at 1158. For a similar analogy see *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974).

¹⁰² See, e.g., *Banville v. Huckins*, 407 A.2d 247 (Me. 1979); *Loch Hill Constr. Co., Inc., v. Ficke*, 284 Md. 708, 399 A.2d 883 (1979); *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974).

¹⁰³ See *Wimmer v. Down East Properties, Inc.*, 406 A.2d 88 (Me. 1979); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

¹⁰⁴ *Peterson v. Habschman Constr. Co.*, 76 Ill. 2d 31, 41, 889 N.E.2d 1154, 1158 (1979).

In *Banville v. Huckins*,¹⁰⁵ the court declared that not every simple defect would render a house nonhabitable.¹⁰⁶ For purposes of applying the warranty, *Banville* established the following test: "Whether or not a particular defect renders the dwelling 'unsuitable' necessarily requires inquiry as to whether a reasonable person faced with such a defect would be warranted in concluding that a major impediment to habitation existed."¹⁰⁷

The warranty of habitability has been extended beyond the structures themselves to include the selection of the site.¹⁰⁸ The Pennsylvania Supreme Court explained in *Elderkin v. Guster*,¹⁰⁹ that a "developer holds himself out, not only as a construction expert, but as one qualified to know what sorts of lots are suitable for the types of homes to be constructed."¹¹⁰ Thus, the complete "home" may be covered by this warranty, which then gives the term "habitability" a very broad base.

From this overview, it is apparent that the implied warranty of habitability places a greater duty on the defendant than the negligence standard of workmanlike manner. The Wyoming Supreme Court, in *Tavares v. Horstman*,¹¹¹ observed that a buyer may proceed not only upon the basis of implied warranty but upon the basis of negligent design and construction. There obviously can be and probably is in some cases an indistinguishable overlap, but an implied warranty would embrace the wider range of causes and be less restrictive of proof.¹¹² Purchasers would be accorded the fullest protection by requiring the builder-vendor to satisfy an implied warranty of habitability *and* workmanlike construction.

C. *Contract or Tort?*

The implied warranty, be it habitability, fitness or workmanlike manner, arises from the agreement between the buyer and seller,¹¹³ yet the rationale for the development of this essentially common law¹¹⁴ warranty sounds distinctly in tort: protection of innocent purchasers. The courts have analogized the implied warranty of habitability to the

¹⁰⁵ 407 A.2d 294 (Me. 1979).

¹⁰⁶ *Id.* at 297.

¹⁰⁷ *Id.*

¹⁰⁸ *Elderkin v. Guster*, 447 Pa. 118, 288 A.2d 771 (1972).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 130, 288 A.2d at 777.

¹¹¹ 542 P.2d 1275 (Wyo. 1975).

¹¹² *Id.* at 1282.

¹¹³ See *Lloyd v. William Fannin Builders, Inc.*, 40 Ohio App. 2d 507, 320 N.E.2d 738 (10th Dist. 1973).

¹¹⁴ See notes 59-79 *supra* and accompanying text.

developing law of products liability,¹¹⁵ and in *Schipper*, the New Jersey court seemed to use "implied warranty" and "strict liability" almost interchangeably.¹¹⁶

The issue of whether the implied warranty is based in contract or tort becomes important when builder-vendor liability to second or subsequent purchasers is at issue. In *Monley v. Laramie Builders, Inc.*,¹¹⁷ the implied warranty of habitability was extended to cover subsequent purchasers where the damage was foreseeable and caused by the builder-vendor's negligence.¹¹⁸ The court was careful to point out that the warranty ran to subsequent purchasers for only a reasonable time and only in connection with latent defects.¹¹⁹ The court failed, however, to indicate whether the action was based on either tort or contract, or both. In his concurring opinion, Justice Rooney expressed his concern that the majority failed to indicate the basis of the claim and that this would cause confusion over matters including whether Wyoming's comparative negligence statute would be available.¹²⁰

In *Crowder v. Vandendael*¹²¹ the Missouri Supreme Court was confronted with an action by a second purchaser of a home, and discussed the issue of whether the implied warranty was grounded in tort or contract. The court held that the warranty was contractual, and therefore limited to first purchasers. The court reasoned that liability is based on the transaction between the buyer and seller, not the conduct of the builder.¹²² In other words, the warranty arises from the contract of sale.

¹¹⁵ See, e.g., *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972) (*en banc*), where the court directed that "in this state implied warranty is a tort concept not a contract right." *Id.* at 798.

¹¹⁶ 44 N.J. at 96, 207 A.2d at 328. The court stated that:

[T]he plaintiffs may rely not only on the principles of negligence but also on the implied warranty or strict liability principles. . . . [E]ven under implied warranty or strict liability principles, the plaintiff's burden still remains of establishing to the jury's satisfaction from all the circumstances that the design was unreasonably dangerous and proximately caused the injury.

Id. "Unreasonably dangerous," an element of strict liability, RESTATEMENT (SECOND) TORTS § 402A (1962), was here declared an element of proving the implied warranty. The court failed, however, to specify whether it wished to treat the implied warranty of habitability as a concept of tort.

¹¹⁷ 600 P.2d 733 (Wyo. 1979).

¹¹⁸ *Id.* at 736.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 737.

¹²¹ 564 S.W.2d 879 (Mo. 1978).

¹²² *Id.* at 881. The court noted that "[t]he warranty, from which liability arises, is an independently implied covenant arising by reason of the purchase which survives the deed." *Id.* n.3. The reference to surviving the deed is a reference to the doctrine of "merger." Merger, a creature of policy, is somewhat of a justifica-

The court further reasoned that, where appropriate, there may be traditional contractual defenses available to the builder-vendor.¹²³ Only the parties to the contract determine the terms and conditions of the agreement, and the court endorsed for certain situations the execution of a valid disclaimer, although it stated that boiler plate clauses would be ineffective.¹²⁴ The adoption of the contract basis of recovery effected a substantial limitation upon subsequent purchasers' ability to recover for latent defects which were dormant while the original purchasers occupied the house. It seems unfortunate that Texas would eliminate *caveat emptor* to protect innocent first purchasers, but still retain a privity requirement for recovery which then bars subsequent purchasers.

The Indiana Supreme Court, on the other hand, rejected the contract theory because of the privity requirement which follows it.¹²⁵ In *Barnes v. MacBrown & Co., Inc.*,¹²⁶ the second purchaser bought the home after the original purchasers had occupied it for only three years. The court extended the implied warranty, stating that the requirement of privity was outmoded given the increasing complexity of today's technology.¹²⁷ This extension, however, did not go to all defects, but was limited to "latent defects, not discoverable by a subsequent purchaser's reasonable inspection, manifesting themselves after purchase."¹²⁸

tion for the doctrine of *caveat emptor*. When a contract of sale culminated in the execution of a deed, any warranty or promise not expressly retained was "merged" into the deed and lost. In *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968), the court dismissed the merger doctrine as archaic, stating that "[t]he cases which give some weight to the doctrine of merger in the implied warranty situation hold that the doctrine of *caveat emptor* applies to sales of real property, thus reducing the 'merger' theory to the status of a 'unicorn hunting bow.'" *Id.* at 556.

¹²³ 564 S.W.2d at 882. The court in effect established a privity requirement which barred subsequent purchasers from recovering. The rationale for this was that "[t]he first purchaser is the only one with whom the builder may negotiate an allocation of risk." *Id.*

¹²⁴ *Id.* at 881. The court sounded a note of caution by adding that: [O]ne seeking the benefit of such a disclaimer must not only show a conspicuous provision which fully disclosed the consequences of its inclusion but also that such was *in fact* the agreement reached. The heavy burden thus placed upon the builder is completely justified, for by his assertion of the disclaimer he is seeking to show that the buyer has relinquished protection afforded him by public policy. A knowing waiver of this protection will not be readily implied.

Id. n.4 (emphasis in original).

¹²⁵ *Barnes v. MacBrown & Co., Inc.*, 264 Ind. 227, 342 N.E.2d 611 (1976).

¹²⁶ *Id.*

¹²⁷ *Id.* at 229, 342 N.E.2d at 620.

¹²⁸ *Id.* at 229, 342 N.E.2d at 621. *See also* *Duncan v. Schuster-Graham Homes, Inc.*, 578 P.2d 637 (Colo. 1978). Here, the Colorado Supreme Court extended the warranty to subsequent purchasers only on the narrow facts of where the original builder-vendor repurchased the home from the original purchaser and then sold it. *Id.* at 638.

There was a strong dissent in *Barnes* which emphatically declared that the case must be governed by the law of contracts, not the law of torts.¹²⁹ The defendant did not negotiate a contract with the plaintiffs in this case, and therefore had nothing to do with determining the purchase price of the home or the allocation of risk. While this dissent makes a well-reasoned point, it would nonetheless appear to be better in the balance of things to protect purchasers, original and subsequent, by placing the burden of inspection and quality upon the builder-vendor, the person in the best position to detect unworkmanlike construction.

At this point it is difficult to predict with certainty how other states will decide cases requiring a delineation of the basis of the implied warranty of habitability.¹³⁰ Those states that emphasize the contractual nature of the warranty, as the Texas Supreme Court did in *Crowder*, will limit it to first purchasers; the states that focus on the policy behind the warranty will dispense with privity and find for the second purchaser. The implied warranty has only arisen and developed over a period of approximately twenty years, and the courts have based their decisions on the facts of each case. Perhaps it will be the task of the state legislature to create a rule of law which can be equitably and consistently applied in all controversies requiring a remedy, thus ending *ad hoc* judicial drafting in this area of law.

D. Adopting the Implied Warranty of Habitability in Ohio

Given the appropriate case, the Ohio Supreme Court should overrule that part of *Mitchem* which denied the existence of the implied warranty of habitability in the sale of new homes. The rationale for *Mitchem* has been completely eroded since that case was decided in 1967. The Missouri case upon which *Mitchem* was based has since been judicially abandoned, and Missouri now recognizes the implied warranty of habitability.¹³¹ Concurrently, most courts today have rejected *caveat emptor* in the sale of new homes. It is clear that the more "enlightened approach" would be to reject *caveat emptor*.¹³²

The court in *Mitchem* accurately predicted the effect of an implied warranty of habitability: Once the plaintiff has established the existence of the defect, and it is found to make the home unfit or uninhabitable, the builder-vendor will be liable. This should not, however, be viewed as requiring the builder-vendor to insure the purchaser against loss. Rather this should be viewed as requiring the builder-vendor to bear the burden of remedying those defects, and the damages resulting

¹²⁹ 264 Ind. at 230, 342 N.E.2d at 621.

¹³⁰ See generally Note, *Implied Warranties in New Home Construction: Caveat Ohio Purchasers*, 46 U. CIN. L. REV. 207 (1977).

¹³¹ *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972) (*en banc*).

¹³² WILLISTON, CONTRACTS § 926A (1963).

therefrom, which the builder-vendor caused through its own craftsmanship.¹³³ It seems inconsistent that the legislature of Ohio could promulgate a statute creating warranties for the purchaser of a condominium,¹³⁴ and yet provide no warranty protection, either by statute or through case law, for the purchaser of a house.

V. CONCLUSION

Ohio is still at the starting line when it comes to protecting the purchasers of new homes, but enjoys a concomitant opportunity to glean the best from the decisions of other courts, because of their position in this area of law.

Ohio moved quickly in the area of products liability, recognizing the necessity of discarding "legal concepts of the past to meet new conditions and practices of one changing and progressing civilization."¹³⁵ It is now time for Ohio to follow through with what it began in *Vanderschrier* and discard the *caveat emptor* doctrine and adopt a comprehensive implied warranty of habitability in the sale of new homes.

A problem that could arise in Ohio is one that has appeared in other courts: confusing the concepts of contract and tort. The Ohio Supreme Court treats commercial implied warranties as actions in tort and has stated they are "virtually indistinguishable" from actions in strict liability.¹³⁶ This should not be the case with implied warranties in the sale of new homes; the action should be based on contract principles, as the majority of states so hold, thus preserving the requirement of notice and allowing the parties to allocate risk as they deem appropriate. The privity requirement could be relaxed for the protection of subsequent purchasers by simply assigning the original purchaser's allocation of risk with the builder-vendor to the subsequent purchaser.

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¹³³ See, e.g., *House v. Thornton*, 76 Wash. 2d 928, 457 P.2d 199 (1969).

¹³⁴ OHIO REV. CODE ANN. § 5311.25(E) (Page 1981). See generally Blackburn and Melia, *Ohio Condominium Law Reform: A Comparative Critique*, 29 CASE W. RES. L. REV 145 (1978).

¹³⁵ *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 248, 147 N.E.2d 612, 616 (1958).

¹³⁶ *Temple v. Wean*, 50 Ohio St. 2d 317, 320, 364 N.E.2d 267, 270 (1977).