

1975

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Recommended Citation

Robert O. Williams Jr., *Developments in Actions for Breach of Implied Warranties of Habitability in the Sale of New Houses*, 10 Tulsa L. J. 445 (1975).

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DEVELOPMENTS IN ACTIONS FOR BREACH OF IMPLIED WARRANTIES OF HABITABILITY IN THE SALE OF NEW HOUSES

Robert O. Williams, Jr.

*Little boxes, little boxes,
Little boxes made of ticky-tacky*
Pete Seeger

INTRODUCTION

This article will examine the scope, reasoning, and recent developments in the doctrine of implied warranty of habitability¹ in the sale of a new house by a builder-vendor. In 1963, the Supreme Court of Oklahoma in *Jones v. Gatewood*² held that an implied warranty of habitability applies to the sale of a new dwelling house. In this article, emphasis will be placed on the developments of this doctrine to the exclusion of alternative theories of recovery under analogous factual circumstances.³

If factual circumstances can ever be termed "typical," the facts of *Gatewood* will, for purposes of this article, sufficiently serve as representative of the class. The plaintiffs entered into a written contract with the defendant for the sale of a lot and house. The contract was made prior to the completion of the construction of the house. A few months after the plaintiffs moved into their newly constructed home, the floors of the concrete-slab house were damaged by water seepage. This damage was caused either by the defendant's failure to place a

1. Implied warranties impressed on the sale of new houses have been variously denominated, e.g., implied warranty of fitness, implied warranty of proper construction, implied warranty of merchantability, implied warranty of workmanlike construction. Inasmuch as the term "habitability" occurs most commonly, this warranty will hereinafter be referred to as the implied warranty of habitability.

2. 381 P.2d 158 (Okla. (1963)).

3. For a discussion of alternative theories of recovery, such as fraud, misrepresentation, negligence, strict liability see Bixby, *Let the Seller Beware: Remedies for the Purchaser of a Defective Home*, 49 J. URBAN LAW 533 (1971-72). See also Annot., 25 A.L.R.3d 383 (1969).

waterproof membrane under the concrete floor or by a puncture in the waterproof membrane if such membrane was, in fact, installed by the defendant. The Supreme Court of Oklahoma affirmed the judgment for the plaintiffs on the grounds of implied warranties of (1) fitness, and (2) construction in a workmanlike manner.⁴ The court termed the legal issue to be one of first impression in Oklahoma, and, therefore, relied on the reasoning of the two American jurisdictions which had previously decided cases involving implied warranties in the sale of new houses.⁵

Both of the previously reported American decisions adopted the English rule as developed in *Miller v. Cannon Hill Estates, Ltd.*⁶ and *Perry v. Sharon Development Co.*⁷ *Miller* was ultimately decided on the grounds of an express warranty made by the builder-vendor.⁸ The Court of Kings Bench division commented in *dicta* that an implied warranty of habitability could be used to find the builder liable for the defects in the construction of the house.⁹ The court determined that an implied warranty of habitability could be impressed on the sale of a new house only if the contract of sale was entered into by the parties prior to the completion of the construction. If, however, construction was complete at the time the contract was made, the warranty of habitability could not be implied.¹⁰ In 1937, the Court of Appeals of England in *Perry* accepted the reasoning of the *Miller* decision, and thereby raised the before-and-after construction distinction to the status of controlling authority.¹¹

In adopting the *Miller* rule, the Oklahoma court quoted from the Washington court's opinion in *Hoye v. Century Builders, Inc.*¹² and stated that:

The reason is nowhere better explained than by the King's Bench division in *Miller v. Canon Hill Estates, Ltd.* (1931), 2 K.B. 113, in the following passage from the opinion in that case:

4. 381 P.2d at 158.

5. *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957); *Hoye v. Century Builders, Inc.*, 52 Wash. 2d 830, 329 P.2d 474 (1958).

6. *Miller v. Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113.

7. *Perry v. Sharon Dev. Co.*, [1937] 4 All E.R. 390 (C.A.).

8. [1931] All E.R. at 96.

9. *Id.* For a discussion and criticism of the *Miller-Perry* sequence, see Young and Harper, *Quarre; Caveat Emptor or Caveat Venditor*, 24 ARK. L. REV. 245, 249-52 (1970).

10. [1931] All E.R. at 96. The before-and-after construction distinction will hereinafter be referred to as the *Miller* rule.

11. [1937] All E.R. at 393.

12. 52 Wash. 2d 830, 329 P.2d 474 (1958).

The position is quite different when you contract with a builder or with the owners of a building estate in course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come into as a dwelling house. . . .¹³

If the reason for this dichotomy is not clear to the reader, perhaps the additional reasoning of Lord Justice MacKinnon in *Perry v. Sharon* will clarify the rationale of the *Miller* rule. In holding that a warranty of habitability cannot be implied when the construction is completed, the Lord Justice stated that:

In such circumstances, the maxim *caveat emptor* clearly applies to the full when the purchaser inspects the house by himself, or by his surveyor, and makes up his mind as to its condition and fitness for occupation. The other type of house, a house only partly erected . . . is different. . . . [T]he buyer, insofar as the house is not yet completed, cannot inspect it, either by himself or by his surveyor. . . .¹⁴

Criticism of this reasoning will be developed later in this article in the section on recent developments.

Prior to *Gatewood*, the doctrine of *caveat emptor* protected the sellers of new houses in Oklahoma from liability grounded on the theory of implied warranty of habitability. In carving out an exception to the often criticized doctrine of *caveat emptor*,¹⁵ the court left unresolved many difficult and recurring issues. This article will now proceed with a synopsis of (1) the duration of the implied warranty, (2) the standard of liability, (3) the applicable statute of limitations, (4) the merger doctrine, (5) the use of waiver clauses as a defense, and (6) recent developments in the use of implied warranties in actions by purchasers of new houses.

13. 381 P.2d at 159.

14. [1937] All E.R. at 395.

15. See, e.g., Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961); Bixby, *supra* note 3; Haskell, *The Case of an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965); Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L. REV. 835 (1967); Young and Harper, *supra* note 9; WILLISTON, CONTRACTS § 926A (3d ed. 1963); Note, 4 MEMPHIS ST. U.L. REV. 54 (1973); Note, 24 ALA. L. REV. 332 (1972). See also Annot., 25 A.L.R.3d 383, 432 (1969).

I. DURATION OF THE IMPLIED WARRANTY

Clearly some limit must be placed on the duration of the implied warranty of habitability. Some authorities have proposed that a fixed statutory period be established.¹⁶ In this author's opinion, the implied warranty of habitability by its nature demands a more organic and flexible limit than could be provided by the establishment of a fixed duration. A cursory review of the numerous and varied types of defects¹⁷ which occur in the construction of houses supports the argument for flexibility. It is evident that both the builder and the purchaser are protected to a greater degree if the duration of the warranty is left to be determined on an ad hoc basis. Within the general standard of reasonableness, the courts should consider geographical and climatic conditions which may delay the appearance or discovery of the defect. In 1972, in *Gable v. Silver*,¹⁸ the Supreme Court of Florida extended the coverage of the implied warranty of habitability to include a defective air-conditioning system. Obviously, an air-conditioning system in Florida receives greater uses than a similar system operating in a house in Michigan.

Traditionally, defective air-conditioning systems, furnaces, hot water heaters, and similar types of fixtures have been excluded from the coverage of an implied warranty of habitability.¹⁹ However, recent decisions,²⁰ as evidenced by *Gable*, indicate that defective fixtures are covered by the warranty. Latent functional defects may remain dormant for varying durations depending on the type of fixture. While many of the defects may be discovered within an established period after the sale or completion of the house, the courts and legislatures should be wary of any proposed arbitrary limits on the duration of the warranty.²¹

16. See Bearman, *supra* note 17, at 577. Bearman proposes a one year warranty.

17. See, e.g., *Cochran v. Keeton*, 287 Ala. 439, 252 So. 2d 313 (1971) (faulty wiring caused fire damaging house); *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969) (heating pipes in concrete floor disintegrated); *Gable v. Silver*, 264 So. 2d 418 (Fla. 1972) (defective air-conditioning); *Weeks v. Slavick Builders, Inc.*, 24 Mich. App. 621, 180 N.W.2d 503, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970) (leaking roof); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965) (failure to provide safety valve, caused water heater to explode injuring a child); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) (defective chimney caused house to catch fire).

18. 264 So. 2d 418 (Fla. 1972).

19. See, e.g., *Voight v. Ott*, 86 Ariz. 128, 341 P.2d 923 (1959), wherein an air-conditioning system was held to be personalty, and, therefore, not covered by the warranty of habitability.

20. See, e.g., *Gable v. Silver*, 264 So. 2d 418 (Fla. 1972); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

21. See, e.g., the bill proposed by the Arkansas house builders association (H.B. No.

II. THE SCOPE OF THE WARRANTY

Few courts have discussed or directly confronted the question of the scope of the builder's liability in an action for breach of the implied warranty of habitability. In establishing the perimeters of the builder's warranty, the Supreme Court of Idaho in *Bethlahmy v. Bechtell*²² made the following assumption:

The implied warranty of fitness does not impose upon the builder an obligation to deliver a perfect house. No house is built without defects, and defects susceptible of remedy ordinarily would not warrant rescission.²³

A number of courts have enunciated a standard of reasonable workmanship.²⁴ This standard allows the individual trial courts to weigh all of the relevant facts in rendering a fair decision.

III. THE APPLICABLE STATUTE OF LIMITATIONS

The opinion in *Gatewood* left unresolved the issue of the applicable statute of limitations in an action seeking recovery under a theory of breach of an implied warranty of habitability.²⁵ The Court of Appeals of England in *Perry v. Sharon*²⁶ held that such an action sounded

606) setting a one-year limit on any implied warranties in the sale of new houses, noted in Young and Harper, *supra* note 9, at 273.

22. 91 Idaho 55, 415 P.2d 698 (1966).

23. 91 Idaho at —, 415 P.2d at 711.

24. See, e.g., Gable v. Silver, 264 So. 2d 418 (Fla. 1972); Shiffers v. Cunningham Shepherd Builders Co., 28 Colo. App. 29, 470 P.2d 593 (1970); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Theis v. Heuer, — Ind. —, 280 N.E.2d 300 (1972); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967).

25. OKLA. STAT. tit. 12, § 95 (1971) provides:

Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

First. Within five (5) years: An action upon any contract, agreement or promise in writing.

Second. Within three (3) years: An action upon a contract express or implied not in writing; an action upon a liability created by statute other than a forfeiture or penalty; and an action on a foreign judgment.

Third. Within two (2) years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

The Supreme Court of Oklahoma in *O'Neal v. Black & Decker*, 523 P.2d 614 (Okla. 1974) held that in the analogous area of products liability, actions based on implied warranties have been merged with the actions of strict liability in tort, and, therefore, a two-year statute of limitations as set out in OKLA. STAT. tit. 12, § 95 (1971), "Third," *supra*, must be applied rather than the three-year statute of limitations on implied contract, as set out in OKLA. STAT. tit., 12 § 95 (1971), "Second," *supra*.

26. [1937] 4 All E.R. 390.

in contract, and that an action sounding in tort could not be maintained based on a breach of duty owed to the purchaser in constructing a house with proper care and diligence.²⁷

In 1974, the Supreme Court of California, in *Pollard v. Saxe & Yolles Development Company*,²⁸ held that builders and vendors of new construction impliedly warrant that their structures are designed and constructed in a workmanlike manner. Further, the court held that such an action sounded in contract. The California court had previously allowed actions to be maintained on theories of fraud, negligence and strict liability. The court indicated that if action is brought for breach of the implied warranty of habitability, the four-year statute of limitations for an action brought on a written instrument should be applied, rather than the three-year statute of limitations for injury to real property.²⁹

Regardless of the statute of limitations ultimately applied to an action for breach of an implied warranty of habitability, it is of obvious significance to the practitioner that a definite rule be established.

IV. THE MERGER DOCTRINE

Generally the terms of a contract for the sale of realty are merged in the deed, and, therefore, upon delivery, the terms of the deed control over the terms of the prior contract. In announcing its decision in *Gatewood*, the Oklahoma court did not discuss the viability of the merger doctrine as a defense to an action for breach of an implied warranty of habitability. The court's recognition of an implied warranty, together with the court's silence on the merger issue, leads to the reasonable assumption that the warranty implied in the contract does not merge in the deed. Decisions in other jurisdictions are divided on whether the implied warranty is excepted from the generally applied merger doctrine.³⁰

Obviously, those jurisdictions which do not recognize implied warranties of habitability are not confronted with the issues presented by the merger doctrine.³¹ A number of cases recognizing the implied warranty of habitability summarily dispose of the merger issue by hold-

27. *Id.* at 393.

28. 12 Cal. 3d 374, 115 Cal.Rptr. 648, 525 P.2d 88 (1974).

29. 12 Cal. 3d at 377 n.2, 115 Cal. Rptr. at 650 n.2, 525 P.2d at 90 n.2 (1974).

30. See Annot., 25 A.L.R.3d 383, 432.

31. The Appellate Court of Illinois in *Coutrakon v. Adams*, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963), *aff'd* on other grounds, 31 Ill. 2d 189, 201 N.E.2d 100 (1964), dismissed the action for breach of implied warranty on the basis of the merger doctrine.

ing that the parties did not intend the warranties to merge in the deed, and, therefore, delivery of the deed does not constitute full performance of the contract.³² Other courts, when confronted with the issue, have held that the contract of sale is tantamount to at least two separate and distinctive contracts.³³ First, the builder agrees to convey the land, and second, the builder agrees to build a new house (and by implication one that is habitable). While the agreement to convey the land is traditionally a part of the subject matter of the deed, the agreement to construct a house is not within the purview of the deed, and, therefore, the agreement to build is collateral to the deed and does not merge therein. Hopefully, the Oklahoma court's silence will allow the merger doctrine, as it is applied to implied warranties of habitability, to reach the status of what the Texas Supreme Court has denominated "a unicorn hunting bow."³⁴

V. THE USE OF WAIVER CLAUSES

At least one court³⁵ has held that the implied warranty of habitability may be defeated by the insertion of an "as is" clause in the contract of sale. However, the Supreme Court of Arkansas in *Wawak v. Stewart*³⁶ specifically limited the viability of a general waiver clause.

Ultimately, the validity of a waiver clause must be decided on the facts of each individual case. Courts should closely scrutinize such waivers in terms and standards at least as stringent as those propounded in the analogous cases of waivers in the sale of personal property.³⁷

32. See Annot., 25 A.L.R.3d 383, 432.

33. See, e.g., *Weck v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); *Lipson v. Southgate Park Corp.*, 345 Mass. 621, 189 N.E.2d 191 (1963); *Casparrelli v. Rolling Greens, Inc.*, 39 N.J. 585, 190 A.2d 369 (1963).

34. *Humber v. Morton*, 426 S.W.2d at 556. As the court noted therein, in hunting this fictitious animal, a broken crossbow is as effective as a weapon that is functioning properly.

35. *Tibbets v. Openshaw*, 18 Utah 2d 442, 425 P.2d 160 (1967).

36. 247 Ark. 1093, 449 S.W.2d 922, 926 (1970). The waiver signed by the purchaser provided:

Buyer certifies that he has inspected the property and he is not relying upon any warranties, representations or statements of the Agent or Seller as to age or physical condition of the premises.

Inasmuch as the defect was not discoverable upon reasonable inspection, the waiver was held to be inapplicable. It remains to be seen what weight a similar type of stipulation will be given if the inspection clause, *supra*, is excised.

37. The Texas supreme court in *Humber v. Morton*, 426 S.W.2d 554, 561 (1968), quoted with approval the Court of Civil Appeals in *Moore v. Werner*, 418 S.W.2d 918, 920 (Tex. App. 1967) stating that:

[W]e see no reason for any distinction between the sale of a new house and the sale of personalty especially in a suit between the original parties to the contract, one of whom constructed the house in question.

VI. RECENT DEVELOPMENTS

With the exception of a distinct minority,³⁸ the majority of jurisdictions, in deciding cases involving an implied warranty of habitability, have discarded the doctrine of *caveat emptor*, and in varying degrees have provided the purchaser with a remedy against the builder-vendor.³⁹

As previously discussed, the Oklahoma court adopted the reasoning of the Ohio and Washington courts,⁴⁰ and accepted the *Miller* rule, which limits the application of an implied warranty to those cases where the contract of sale is entered into prior to the completion of the house.

A number of jurisdictions (including Washington), which originally accepted the *Miller* rule, have announced decisions⁴¹ specifically overruling their prior decisions, thereby rendering the *Miller* rule meaningless. Other jurisdictions in reversing their position to allow recovery based on an implied warranty have discussed the *Miller* rule and specifically rejected the anomalous distinction.⁴² The Supreme Court

See also Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 380, 115 Cal. Rptr. 648, 650, 525 P.2d 88, 92 (1974), wherein the court drew on the analogy to personalty where an action is maintained for breach of implied warranty of habitability. Further, the court held that the purchaser was required to give the builder reasonable notice of the alleged breach. The court grounded its rule on CAL. COMM. CODE § 2607(3). *See also* UNIFORM COMMERCIAL CODE §§ 2-302, 2-316.

38. *See, e.g.*, Amos v. McDonald, 123 Ga. App. 509, 181 S.E.2d 515 (1971); Thomas v. Cryer, 251 Md. 725, 248 A.2d 795 (Ct. App. 1969).

39. *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, 115 Cal. Rptr. 648, 525 P.2d 88 (1974); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (Super. Ct. 1970); Gable v. Silver, 264 So. 2d 418 (Fla. 1972); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Theis v. Heuer, — Ind. —, 280 N.E.2d 300 (1972); Crawley v. Terhune, 437 S.W.2d 743 (Ky. Ct. App. 1969); Weeks v. Slavic Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972); Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 298 A.2d 529 (1973); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); 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); Rothberg v. Olenik, 128 Vt. 295, 262 A.2d 461 (1970); House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969).

40. Cases cited note 5 *supra*.

41. *Compare*, Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963) with Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964). *Compare* Tudor v. Heugal, 132 Ind. App. 579, 178 N.E.2d 442 (1961), with Theis v. Heuer, — Ind. —, 280 N.E.2d 300 (1972). *Compare* Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958) with House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969).

42. *See, e.g.*, Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 380, 115 Cal. Rptr. 648, 651, 525 P.2d 88, 91 (1974).

of Texas, in *Humber v. Morton*, quoted with approval the Supreme Court of Colorado, and in rejecting the *Miller* rule, stated:

That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it.⁴³

Thereafter the Texas court commented on the specious nature of the rationale of the distinction stating that:

Obviously, the ordinary purchaser is not in a position to ascertain when there is a defect in a chimney flue, or vent of a heating apparatus, or whether the plumbing work covered by a concrete slab foundation is faulty.⁴⁴

Returning to the facts of *Gatewood*, clearly the defective membrane under the concrete was not discoverable by a reasonable inspection, regardless of the amount of construction completed in the interim between the pouring of the foundation and the signing of the contract of sale. The basic rationale of the *Miller* rule (that a completed house may be inspected) is obviously fallacious under such circumstances.

Although the Oklahoma court accepted the *Miller* rule in deciding *Gatewood*, the distinction was not basic to the holding of the case and, as such, was in the nature of *dicta*. Inasmuch as the basic holding of the case was the abrogation of the doctrine of *caveat emptor*, and not the acceptance of the *Miller* rule, if an appropriate opportunity is presented, the court could with all due deference to the doctrine of *stare decisis*, extend the scope of the implied warranty of habitability to include sales of completely finished new houses.

CONCLUSION

The *Gatewood* decision was a step forward in providing protection to the consumer in an area which traditionally had been devoid of all protection. Hopefully, as the problems noted in this article come before the court, Oklahoma decisions will continue to reflect this progressive posture. And while the houses made of ticky-tacky are here to stay (at least until the next heavy rain), perhaps the construction industry will take note.

43. 426 S.W.2d 554, 559 (Tex. 1968).

44. *Id.* at 561.