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BUILDER-VENDOR LIABILITY FOR CONSTRUCTION DEFECTS IN HOUSES

I. INTRODUCTION

Although the liability of builder-vendors for construction defects in houses has lagged behind tort liability of manufacturers of chattels, an increasing number of recent cases have applied the reasoning of the products liability cases to cases involving defects in new houses sold by a builder. Originally, the common law doctrine of "caveat emptor" protected vendors of real property as well as builder-vendors from actions based upon implied warranties or upon promises made in the sale contract but not contained in the deed.¹ Within the past two decades, however, the courts have been increasingly willing to find liability in this area based upon various tort and contract theories. Thus builder-vendors have been held liable on theories of negligence,² fraud or deceit,³ breach of contract,⁴ breach of warranty (express⁵ or implied⁶), and, most recently, strict liability.⁷ This article will consider the liability of builder-vendors for construction defects based upon warranty and strict liability principles only.

II. WARRANTY

A. Express Warranty

Some courts have held a builder-vendor liable for oral statements held to constitute an express warranty. For example, in *La Bar v. Lindstrom*⁸ a statement that the house was "first class

1. For a discussion of the development away from "caveat emptor" see W. PROSSER, LAW OF TORTS § 104, at 680-82 (4th ed. 1971); Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967); and Valore, *Product Liability for a Defective House*, 18 CLEV.-MAR. L. REV. 319 (1969). See also *Druid Homes, Inc. v. Cooper*, 272 Ala. 415, 131 So. 2d 884 (1961); *Levy v. C. Young Constr. Co.*, 46 N.J.S. 323, 134 A.2d 717 (1951); and Annot., 25 A.L.R.3d 383 (1969).

2. *Rogers v. Scyphers*, 251 S.C. 124, 161 S.E.2d 81 (1968). See also cases discussed in *Liability of Builder-Vendor of Homes*, 12 FOR THE DEFENSE 113 (1971).

3. *Boriss v. Edwards*, 262 Ala. 172, 77 So. 2d 909 (1955).

4. *Caparrelli v. Rolling Greens, Inc.*, 39 N.J. 585, 190 A.2d 369 (1963).

5. *Jackson v. Buesgens*, 186 N.W.2d 184 (Minn. 1971).

6. *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

7. *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966).

8. 158 Minn. 396, 197 N.W. 756 (1924). See also *Jackson v. Buesgens*, 186 N.W.2d 184 (Minn. 1971); and *Caparrelli v. Rolling Greens, Inc.*, 39 N.J. 585, 190 A.2d 369 (1963).

throughout in materials and workmanship" was sufficient warranty to cover defects in the roof appearing two years after purchase. The obstacles to an action based on oral statements are many, however, and it would seem that a fraud or deceit theory would be preferable if warranted by the facts. The Statute of Frauds requires a conveyance of real property to be in writing.⁹ Because of this the "parole evidence" rule has prevented the assertion of oral warranties in some cases.¹⁰ The common law doctrine that a deed executed in performance of a contract of sale of real property merges the contract, thus holding the vendor only to the provisions in the deed, also prevents the assertion of prior oral warranties.¹¹ Another problem presented by oral statements is the extent to which they are merely part of a sales pitch or "puffing," as is seemingly allowed by the Uniform Commercial Code.¹² Therefore an issue of fact may arise as to whether a vendee could reasonably rely on the oral statements as warranties.

A stronger case can be made for express warranties which are based on statements made in writing. Most problems in this area arise when warranties have been written into a contract of sale but left out of the deed. Since such a situation would generally avoid the Statute of Frauds and "parole evidence" obstacles, the remaining hurdle is the merger doctrine.¹³ Whether merger is avoided or ignored, builder-vendors have been held liable based on written warranties such as: that the cellar would be free from water;¹⁴ that the house was constructed in a skillful and workmanlike manner;¹⁵ and that the builder would stand behind all workmanship and materials for one year from the date of closing.¹⁶ Once a warranty is found, recovery would seem to be allowable for either property damage or personal injuries proximately caused by the breach.¹⁷

9. See WIS. STAT. §§ 706.01-706.02 (1969).

10. See *Eastman v. Britton*, 175 App. Div. 476, 162 N.Y.S. 587 (1916); *Shapiro v. Kornicks*, 103 Ohio App. 49, 124 N.E.2d 175 (1955); and *Moore v. Werner*, 418 S.W.2d 918 (Tex. Civ. App. 1967).

11. The merger doctrine affects all warranties in this area and is discussed in more detail later. See note 28 and accompanying text *infra*.

12. UNIFORM COMMERCIAL CODE § 2-313(2).

13. The merger doctrine and its various exceptions are discussed in the section on implied warranties. See note 28 and accompanying text *infra*.

14. *Riley v. Russ Byington Constr. Co.*, 2 Conn. 382, 199 A.2d 347 (1963).

15. *Hotchner v. Liebowits*, 341 S.W.2d 319 (Mo. App. 1960).

16. *Jacobs v. Korst*, 175 Neb. 639, 122 N.W.2d 760 (1963).

17. *Kennedy-Ingalls Corp. v. Meissner*, 11 Wis. 2d 371, 105 N.W.2d 748 (1960). See

B. Implied Warranty

Significantly, the more recent developments in builder-vendor liability have occurred in the implied warranty area. The leading case is *Miller v. Cannon Hill Estates*,¹⁸ wherein the English court held that the "law will imply a warranty that the house which was to be built by the defendants for the plaintiff should be a house which was habitable and fit for human beings to live in."¹⁹ The decision was specifically limited to the sale of an unfinished house by a builder. The rationale is that there are no implied warranties in the sale of a completed house at common law, but where the plaintiff contracts to have a house built for him it is the very nature and essence of the transaction that the house is intended to be fit as a dwelling place. This same limitation of implying warranties only where the contract for sale is entered into before completion of the house was adopted in the case of *Vanderschrier v. Aaron*,²⁰ one of the earliest decisions implying a warranty in the sale of a house in the United States. In a three page opinion, the only authority cited by the court for implying a warranty was the English case of *Perry v. Sharon Development Co.*²¹

The limitation to cases involving unfinished houses was also subscribed to by the Colorado Supreme Court in *Glisan v. Smolenske*,²² but just one year later, in *Carpenter v. Donohue*,²³ the same court extended implied warranties to completed houses, stating:

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.²⁴

The current trend seems to be toward the extended rule as stated

also Rogers v. Scyphers, 251 S.C. 124, 161 S.E.2d 81 (1968), and UNIFORM COMMERCIAL CODE § 2-715.

18. [1931] 2 K.B. 113.

19. *Id.* at 120.

20. 103 Ohio App. 340, 140 N.E.2d 819 (1957).

21. [1937] 4 All. E.R. 390 (Ch.).

22. 153 Colo. 274, 387 P.2d 260 (1963).

23. 154 Colo. 78, 388 P.2d 399 (1964).

24. *Id.* at _____, 388 P.2d at 402.

in *Weeks v. Slavik Builders, Inc.*,²⁵ where it was held that an implied warranty of fitness "extended only to the purchase of new residential dwelling houses, whether purchased prior to construction, during construction, or are purchased after the dwelling has been constructed but is yet unoccupied."²⁶ The court also held that the statutory merger was not applicable because plaintiff had not alleged that the warranty arose out of the conveyance but out of the contract to buy. While acknowledging the trend in recent cases, the Maryland court, in *Allen v. Wilkinson*,²⁷ refused to extend implied warranties to completed houses and noted that any change would be for the legislature to make.

As stated previously, a troublesome consideration in express or implied warranties arising out of the sale of a house is the doctrine followed by the majority of states that in a contract to convey real property the deed merges the contract and the only redress of a purchaser may be found in the covenants in the deed or in an action to rescind based on fraud or mistake.²⁸ In coping with this doctrine in builder-vendor cases, the courts have used several methods to avoid its application. For example, in *Caparrelli v. Rolling Greens, Inc.*,²⁹ the court held that an oral assertion that the basement of a house was a habitable area for daily activity constituted a covenant *collateral* to the deed. The test was held to be whether the collateral agreement was connected with the title, possession, quantity or emblems of the land which was the subject of the contract to sell. The court in *Staff v. Lido Dunes, Inc.*,³⁰ held that the common law doctrine of merger does not violate public policy as to defects discoverable at the time of closing. The court went on to note that it was a fallacy to apply a collateral agreement test because the delivery of the deed represented full compliance with the contract to sell. Ultimately, however, the court held the builder-vendor liable on the purchase contract because the defects in the house were *latent* and undiscoverable, and the court felt it

25. 24 Mich. App. 621, 180 N.W.2d 503 (1970).

26. *Id.* at 627-28, 180 N.W.2d at 506. See also *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

27. 250 Md. 395, 243 A.2d 515 (1968).

28. For a general discussion of the merger doctrine and its avoidance by the courts see *Roberts*, *supra* note 1. See also 3 S. WILLISTON, CONTRACTS § 723, at 2058 (rev. ed. 1936).

29. 39 N.J. 585, 190 A.2d 369 (1963).

30. 47 Misc. 2d 322, 262 N.Y.S.2d 544 (Sup. Ct. 1965).

would violate public policy to merge such terms in the deed.³¹

In *Humber v. Morton*,³² an implied warranty of workmanlike construction was found in a contract to sell a completed house. The doctrine of merger was held to be controlled by the *intent* of the parties, and the implied warranty survived the deed. If a warranty arises by law, the court noted, it would be anomalous to then apply the doctrine of merger to defeat it.³³

As noted in *Staff v. Lido Dunes, Inc.*,³⁴ latent defects, as compared to patent or discoverable defects, have been held to be unaffected by the merger doctrine. The same reasoning was used in *Brisbin v. Scott*,³⁵ where the court held that acceptance of a deed and entry into possession did not act as a waiver of the vendee's rights where defects were latent.

State statutes may also affect the merger doctrine. For example Wisconsin Statutes section 706.10(6) provides:

Except as provided in sub. (7) and except as otherwise provided by law, no warranty or covenant shall be implied in any conveyance, whether or not such conveyance contains special warranties or covenants.

Note, however, section 706.10(7) which states:

Absence of an express or necessarily implied provision to the contrary, a conveyance evidencing a transaction under which the grantor undertakes to improve the premises so as to equip them for grantee's specified use and occupancy, or to procure such improvement under grantor's direction or control, shall imply a covenant that such improvement shall be performed in a workman-like manner, and shall be reasonably adequate to equip the premises for such use and occupancy.

This language seems to give statutory authority for implying warranties in the case of the sale of a house and land by a builder-vendor where the contract of sale is entered into prior to completion of the house. Certainly a contract to construct a house, or even to complete one which has been started, is an undertaking to im-

31. For other cases on collateral covenants in the sale of new houses see Annot., 25 A.L.R.3d 383, 432-34 (1969).

32. 426 S.W.2d 554 (Tex. 1968).

33. See Annot., 25 A.L.R.3d 383, 435-37 (1969).

34. 47 Misc. 2d 322, 262 N.Y.S.2d 544 (Sup. Ct. 1965).

35. 28 Del. Co. 495, 53 York. Leg. Rec. 91 (Pa. 1939), cited in Annot., 25 A.L.R.3d 383, 409 (1969).

prove the premises. Whether this section will be construed to cover such a transaction remains to be seen. A more pertinent question is whether the sale of a completed house will be controlled by subsection (6) or (7). While the trend in other jurisdictions appears to be toward the broad application, subsection (6), which restricts implication of warranties, allows an exception per subsection (7). Subsection (6) also has its own built-in exception—"as otherwise provided by law"—which would also allow the court to make an exception based upon case law.

One of the cases cited by the draftsmen of chapter 706³⁶ as a source of subsection (7) is *Fisher v. Simon*,³⁷ which was a builder-vendor case decided on a negligence theory. The language of the decision, however, indicates the supreme court's willingness to treat builder-vendors as manufacturers of chattels:

Furthermore, since defendants constructed the building as owners but with the intent to sell it upon completion, the situation is analogous to a manufacturer who constructs a chattel, not for his own use, but for sale to others. In *Pastorelli v. Associated Engineers, Inc.* (R.I. 1959), 176 Fed. Supp. 1959, the court discussed the application of the line of products-liability cases, stemming from the landmark case of *MacPherson v. Buick Motor Co.* (1916), 217 N.Y. 382, 111 N.E. 1050, to cases involving real structures. It concluded that the modern and enlightened view is to apply the principles of the *MacPherson Case* to cases involving real structures. This same view is expressed in Restatement, 2 Torts, p. 1030, sec. 385. Therefore, the legal principles relating to a chattel manufacturer's liability for negligence are relevant to the disposition of this case.³⁸

Whether *Fisher* adequately indicates the intent of the legislature in passing 706.10(7) is questionable, as two other cases were cited as also being a source of this section,³⁹ *Oremus v. Wynhoff*⁴⁰ and *Earl Milliken, Inc. v. Allen*.⁴¹ *Oremus* involved an action against a builder-vendor of an apartment building based upon breach of contract and upon negligent construction. On the one hand, the court held that a "subject to" clause in the offer of purchase requir-

36. Wis. Laws 1969, ch. 285, § 23, at 922, comments.

37. 15 Wis. 2d 207, 112 N.W.2d 705 (1961).

38. *Id.* at 216, 112 N.W.2d at 710.

39. Wis. Laws 1969, ch. 285, § 23, at 922, comments.

40. 20 Wis. 2d 635, 123 N.W.2d 441 (1963).

41. 21 Wis. 2d 497, 124 N.W.2d 651 (1963).

ing three of the apartments to be rented did not survive delivery of the deed. On the negligence issue, concerning defects in construction, the court remanded the case because of error; however, section 235.02 of the Wisconsin statutes, was cited as barring implied covenants in the conveyance of real estate.⁴² In the same context the court stated:

A seller may be liable under an oral agreement concerning the quality of construction even though such understanding is not a part of the contract for sale

. . . .
Therefore, it is possible that plaintiffs have a valid cause of action for negligent performance⁴³

Thus, the language used by the court here seems to favor a negligence theory, not implied warranty as the statute imposes.

In the *Milliken* case, the court, in determining whether completion of construction after the due date resulted in damage to the owner landlord because of his inability to give his lessee possession, stated:

The covenant of possession implies not only that the tenant will be able to physically occupy the premises on the date of delivery of possession, but that he will also be able to use the premises for its intended purpose.⁴⁴

Aside from the *Fisher* decision, *Oremus* and *Milliken* show little intent that 706.10(7) should be applied to a builder-vendor. Chapter 706 of the statutes became effective as of July 1, 1971, so it is still too early to tell what the future impact will be. Considering the trend in other jurisdictions and the *Fisher* decision, the expansion of builder-vendor liability seems likely in Wisconsin in the implied warranty area.

III. STRICT LIABILITY

The term "strict liability" is used here in the same sense as *Restatement (Second) of Torts*, section 402A,⁴⁵ that is, that liabil-

42. WIS. STAT. § 706.10(6) (1969) replaces this section with the addition of the exceptions currently under discussion.

43. 20 Wis. 2d at 643, 123 N.W.2d at 445.

44. 21 Wis. 2d at 501, 124 N.W.2d at 654.

45. RESTATEMENT (SECOND) OF TORTS § 402A (1966):

Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm

ity for harm caused by a defect will be imposed regardless of whether the builder-vendor exercised reasonable care in the construction or sale of the house. The leading case holding that a builder-vendor could be strictly liable for construction defects is *Schipper v. Levitt & Sons, Inc.*⁴⁶ The plaintiff was the child of a lessee of the original vendee of the house. It was a mass produced home and, to cut costs, the defendant builder did not install a mixing valve to reduce the temperature of the hot water at the faucets. The water used in the heating system of the house was also used for domestic purposes. Plaintiff, at the age of 16 months, was scalded and seriously burned by water from a sink faucet. In reversing the lower court's dismissal of the action, the New Jersey appellate court felt that "the warranty or strict liability principles of *Henningsen* and *Santor* should be carried over into the realty field."⁴⁷ The case has been cited many times both for its language on warranty and for strict liability.

Two years later the Mississippi court, in *State Stove Mfg. Co. v. Hodges*,⁴⁸ adopted section 402A "insofar as it applies to a manufacturer of a product and to a contractor who builds and sells a house with the product in it."⁴⁹ The case involved a finding by the court that the thermostats in a hot water heater which exploded were defective. The builder had installed the heater, but he did not follow the manufacturer's directions that a relief valve be installed. In light of this, the court held that the manufacturer was not liable because the heater was not expected to reach the ultimate consumer without substantial change—the addition of a relief valve was expected—as required by section 402A(1)(b).⁵⁰ The builder's failure to install the relief valve was held to be an intervening sole proximate cause of the explosion because the heater would never

thereby caused to the ultimate user or consumer, or to his property, if

- (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
- (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

46. 44 N.J. 70, 207 A.2d 314 (1964).

47. *Id.* at _____, 207 A.2d at 325.

48. 189 So. 2d 113 (Miss. 1966).

49. *Id.* at 118.

50. See note 45 *supra*.

have exploded if a relief valve had been used.

In *Kriegler v. Eichler Homes, Inc.*,⁵¹ a California builder-vendor was held strictly liable for defects in the heating system of a house constructed in 1951, sold by an intermediate owner to the plaintiff in 1957, and ultimately damaged as a result of the defects in 1959. A few months later another California case, involving a partial collapse of a lot, held that "the manufacturer of a lot may be held strictly liable in tort for damages suffered by the owner as a proximate result of any defects in the manufacturing process."⁵² Plaintiffs were successors in interest to the original vendee and defendants were the developer and the soils engineer.

As more states adopt *Restatement* section 402A for products liability, it seems likely that those states will eventually extend the rule of strict liability to cover builder-vendors in their sales of new houses. Although section 402A does not expressly refer to houses,⁵³ it is noteworthy that it is addressed to the liability of a seller of "products" and not "chattels" as are generally covered by chapter 14 of the *Restatement*. If "product" is given a broad interpretation so as to include anything which is produced, house construction could be included under section 402A.⁵⁴ At any rate, if not directly within the definition of section 402A, the construction of a house for later sale is analogous to the manufacture of a product. The Wisconsin Supreme Court accepted this analogy in *Fisher*. Since Wisconsin has adopted *Restatement* section 402A in *Dippel v. Sciano*,⁵⁵ the language of *Fisher* lends support to the application of strict liability to builder-vendors of houses in Wisconsin in the future. It should be noted, however, that *Dippel* indicated that such strict liability is the equivalent of negligence per se, and, therefore, a defendant will have the defense of contributory negligence available to him.

51. 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

52. *Avner v. Longridge Estates*, 272 Cal. App. 2d 695, 77 Cal. Rptr. 633 (1969).

53. RESTATEMENT (SECOND) OF TORTS § 402A, comment *d* at 350 (1966) provides: Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

54. Note that RESTATEMENT (SECOND) OF TORTS § 389, comment *e* at 313 (1966), in discussing the liability of a supplier of chattels, refers to a building contractor in its first illustration.

55. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

At least one court has denied the application of strict liability principles where only economic loss was involved.⁵⁶ This does not seem to be a rational distinction, and the *Restatement* specifically refers to harm to the consumer or his property. This position is also supported by the *State Stove*, *Kriegler* and *Avner* decisions which involved only property damage. The Wisconsin court in *Fisher* stated:

Thus far in this opinion we have been considering the liability of a building contractor to third persons and to the owner for negligence where the relief sought is damages for personal injuries. In the instant case, damages are not sought for personal injury but for repairs made necessary to a building constructed by defendants. We see no difference in principle whether the negligence results in personal injury or property damage.⁵⁷

The better rule seems to be that both property damage and personal injuries should be recoverable in strict liability cases.

IV. CONCLUSION

While a trend may be found in the recent cases expanding builder-vendor liability, it is uncertain how far the courts will go. In the case of a builder who constructs hundreds of houses per year, his similarity to a manufacturer of chattels is clear. On the other hand, a low volume builder bears little resemblance to such a mass producer, especially if he works from plans submitted to him by the vendee. Many issues remain to be resolved even after the adoption of the basic premises of liability for breach of warranty or strict liability. Will such liability extend to guests of vendees of such builder-vendors? What about subsequent purchasers from the original vendees? Will a builder who incorporates for special projects, such as a large skyscraper, fall outside the *Restatement* requirement that the product result from a regular activity on his part? Could real estate brokers who dispose of houses in large mass produced developments also be included in the expansion of liability? These are some of the problems still to be faced by those courts attempting to treat builder-vendors in the same fashion as chattel manufacturers.

JAMES L. KIRSCHNIK

56. *Thermal Supply of Texas, Inc. v. Asel*, 468 S.W.2d 927 (Tex. Civ. App. 1971).

57. 15 Wis. 2d at 214, 112 N.W.2d at 709.