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Vendor and Purchaser-Abrogation of Caveat Emptor in New Home Sales by Builder

Vendor and Purchaser—ABROGATION OF CAVEAT EMPTOR IN NEW HOME SALES BY BUILDER-VENDORS—*Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972); *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972).

Protection against latent defects exists for the purchaser of a forty-nine cent ball point pen under an implied warranty of merchantability,[1] but no such protection prevails for the vendee of a $50,000 home in the absence of fraud, misrepresentation, or an express warranty of condition and habitability.[2] Such is the anomaly created by the doctrine of *caveat emptor*,[3] still ruthlessly applied in a majority of American jurisdictions.[4] In two cases recently adjudicated, *Elderkin v. Gaster*[5] and *Smith v. Old Warson Development Co.*,[6] the courts abandoned *caveat emptor* in the sales of new homes by builder-vendors where latent defects are at issue, adopting the civil law maxim *caveat venditor*.[7]

In *Elderkin* the vendee of a newly constructed home sought equitable relief against the builder-vendor due to the latter's failure to furnish a potable water supply.[8] While both the contract of sale and the deed were

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1 *See* UNIFORM COMMERCIAL CODE §§ 2-314 to 319.

2 *See* 55 AM. JUR. *Sales* § 368 (1946).

3 The maxim *caveat emptor* was based upon the fact that buyer and seller dealt at arm's length, on equal footing, and that the vendee had all the means and opportunity necessary to secure the same knowledge of the subject matter as the vendor. Thus, unless the vendee secured an express warranty as to the quality of the product, he could not look to the law for protection. *See* Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922, 924 (1970); Humber v. Morton, 426 S.W.2d 554, 557 (Tex. 1968). *See generally* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); Roberts, *The Case of The Unwary Home Buyer: The Housing Merchant Did It*, 52A CORNELL L.Q. 835 (1967).

4 *See* Walton v. Petty, 107 Ga. App. 753, 131 S.E.2d 655 (1963); Allen v. Wilkinson, 250 Md. 395, 243 A.2d 515 (1968); Harmon Nat'l Real Estate Corp. v. Egan, 137 Misc. 297, 241 N.Y.S. 708 (1930); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959).

Closely allied with *caveat emptor* is the doctrine of merger of the contract of sale into the deed, so as to extinguish any obligations not expressly provided for in the deed. The majority of jurisdictions invariably apply this common law doctrine in defeating implied warranties. *See* Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 134 A.2d 717 (App. Div. 1957); Harmon Nat'l Real Estate Corp. v. Egan, 137 Misc. 297, 241 N.Y.S. 708 (1930).

5 447 Pa. 118, 288 A.2d 771 (1972).

6 479 S.W.2d 795 (Mo. 1972).

7 The civil law is typified by the Louisiana doctrine of redhibition which implies a warranty of quality to sales of new and used real property as well as to sales of chattels. LA. CIV. CODE ANN. art. 2520 (West 1952).

8 After plaintiff (vendee) moved into the new home, it was discovered that the water from the private well constructed by defendant was unfit for human consumption because it contained an excessive nitrate concentration as well as synthetic detergents. Defendant offered to re-drill only on condition that plaintiff accept his act as full

silent as to warranties of quality,[9] the Pennsylvania court, basing its decision on the vendee's reliance on the builder's skills, abrogated *caveat emptor* in the sales of new homes, thus extending implied warranties of habitability to include all latent defects. The builder-vendor was held not only to warrant impliedly the quality of construction of the well itself, but more important, the quality of the water to be drawn from it. *Smith* involved the applicability of an implied warranty of merchantable fitness and quality where the concrete foundation of a completed house began to settle beyond reasonable limits.[10] Likening the builder-vendor's liability to strict liability in tort, and citing reliance by the vendee,[11] the Missouri court extended to first purchasers of homes from builder-vendors the same protection afforded purchasers of manufactured goods under 402A of the *Restatement (Second) of Torts*.[12]

The growing minority of states extending implied warranties to real estate transactions[13] recognize that the vendee and builder-vendor of mass produced

performance of his duty. This was refused by plaintiff, who demanded potable water. Testimony established the costs of running public water to the Elderkin home to be in excess of $14,000. Elderkin v. Gaster, 447 Pa. 118, —n.—, 288 A.2d 771, 773 n.8 (1972).

[9] The only mention of water was that it was to be supplied by "individual [private] system." No warranties of quality either for construction of the well or quality of the water were included in the contract of sale or deed. *Id.* at —, 288 A.2d at 773.

[10] Plaintiff moved into his $82,500 home, and within a few months noticed doors sticking and cracks developing in the walls. The problems associated with the settling were limited to two rooms constructed on a concrete slab; evidence showed that they had settled as much as an inch and three quarters in one location. Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972).

[11] The most common reason assigned by those jurisdictions accepting implied warranties in realty transactions is that of reliance by the amateurish vendee on the professional skills and reputation of the builder. *See* Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966). *See also* Haskell, *The Case For An Implied Warranty of Quality In Sales of Real Property*, 53 GEO. L.J. 633 (1965).

[12] RESTATEMENT (SECOND) OF TORTS § 402A (1965). Several jurisdictions have allowed recovery for damages caused by defects in a new home where there is physical injury, but none, prior to *Smith*, have allowed recovery on that basis absent physical injury. *See* Kriegler v. Eichler Homes Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Rothberg v. Olenik, —Vt.—, 262 A.2d 461 (1970).

[13] The number of American jurisdictions applying implied warranties to the sales of new homes by builder-vendors now numbers fifteen, although they accept the warranties in varying degrees. *See* Cochran v. Keeton, 287 Ala. 439, 252 So. 2d 313 (1971) (warranty of fitness and habitability); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970) (warranty of fitness); Kriegler v. Eichler Homes Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969) (warranty of fitness); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964) (warranty of fitness); Bethlahmy v. Bechel, 91 Idaho 55, 415 P.2d 698 (1966) (warranty of fitness); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970) (warranty of fitness); Smith v. Old Warson Dev. Co., 479 S.W.2d

homes do not occupy equal bargaining positions, and that the vendee lacks the sophistication required to protect himself in a contract or deed against latent defects in construction. Implied warranties have now been held to cover defects such as inadequate plumbing,[14] defective chimney flues,[15] and excessively hot water,[16] on the simple basis that a home fit for habitation is necessarily within the contemplation of both parties, and that these defects violate that mutual understanding. Although first applied only to sales of new homes to be constructed or under construction,[17] the implied warranties have been extended to new homes regardless of the stage of completion.[18]

The Pennsylvania court in *Elderkin*, having previously adopted implied warranties of reasonable workmanship,[19] announced a more inclusive implied warranty of *habitability* applicable to new home purchases. Recognizing that the majority of cases accepting implied warranties have done so only

795 (Mo. 1972) (strict liability in tort); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (warranty of fitness where defect results in personal injury); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972) (warranty of habitability); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970) (warranty of workmanlike construction and suitability for habitation); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967) (warranty of workmanlike construction); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) (warranty of proper construction); Rothberg v. Olenik, —Vt.—, 262 A.2d 461 (1970) (warranty of fitness); House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969) (warranty of fitness for habitation); LA. CIV. CODE ANN. art. 2520 (West 1952) (warranty of merchantability).

[14] Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958). *Contra*, Voight v. Ott, 86 Ariz. 128, 341 P.2d 923 (1959) (holding defective refrigeration and heating systems in new home not to be covered by implied warranties).

[15] Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

[16] In the leading New Jersey case applying implied warranties, the son of the purchaser's lessee was severely scalded by water drawn from bathroom faucets. The builder-vendor was held liable under an implied warranty and strict liability in tort for failure to provide a mixing valve to reduce the water temperature. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[17] The first departure from the strict application of *caveat emptor* in realty sales came in the English case of Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113, which held that an implied warranty of quality existed for homes purchased in the course of construction, for the obvious reason that the purchaser had no opportunity to inspect the finished product at the time of sale.

The first American cases held along the same lines as the English case, holding that the builder-vendor warranted that the incomplete house would be completed in a workmanlike manner. Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957). *See also* Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962).

[18] The precedent setting case of Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964) held "[t]hat a different rule should apply to the purchaser of a house which is near competion than would apply to one who purchases a new house, seems incongruous." *Id.* at —, 388 P.2d at 402.

[19] Koval v. Country and Town, Inc., 9 Cumb. L.J. 109 (C.P. 1958).

as to structural defects,[20] the court held the builder-vendor liable for defects resulting from the unsuitable nature of the building site,[21] including within this liability the failure to furnish a potable water supply. But, while adopting the implied warranty of habitability, the court failed to adopt a standard for determining "habitability," leaving the extent of the builder-vendor's liability unknown.

Whereas the Pennsylvania court broadened existing implied warranties, the Missouri court in *Smith* ruled for the first time that implied warranties of merchantable quality and fitness do exist in new home purchases. The court evidenced its unwillingness to go to the extreme of the *Elderkin* case by declaring the builder-vendor to be liable under an implied warranty only for those defects developing in the manufactured product, and not for any defects in the realty.[22] More important, the purchaser of a new home was held entitled to the same protection afforded the purchaser of any manufactured goods as set forth in 402A of the *Restatement (Second) of Torts*.[23]

[20] Crawley v. Terhune, 437 S.W.2d 743 (Ky. Ct. App. 1969) held an implied warranty of workmanlike construction using good materials to cover "major structural features," including within that category underground water permeating plaintiff's basement floor and walls because of the builder's failure to waterproof.

[21] The *Elderkin* court relied on several cases which held the builder-vendor liable for defects in the soil. *See* Mulhern v. Hederich, 163 Colo. 275, 403 P.2d 469 (1967) (failure to protect against soil defects causing excessive settling); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967) (basement leakage due to underground spring); House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969) (instability of the land causing the foundation to crumble).

[22] The court also addressed itself to the question of the builder-vendor's liability to the vendee for defects caused, not by his negligence, but by the negligence or fault of a supplier of defective materials used on the job. In reversing Whaley v. Milton Constr. & Supply Co., 241 S.W.2d 23 (Mo. 1951), which held the builder not to be liable for defective materials supplied him, the *Smith* court held that "fault or negligence of the warrantor is no longer required for recovery under implied warranty." Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 800 (Mo. 1972).

[23] The Restatement rule establishes strict liability on a seller of products, making him liable to the consumer, or user even though the seller has exercised the highest degree of care in the preparation and sale of the product. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment *a*, at 348 (1965).

Prior decisions have applied strict liability to builder-vendors under this provision, but only where the defect by the builder resulted in physical injury. 402A had not been used, prior to *Smith*, to establish the builder-vendor's liability for the actual defect. *See, e.g.*, Kriegler v. Eichler Homes Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); Rothberg v. Olenik, —Vt.—, 262 A.2d 461 (1970).

In commenting on the trend toward allowing recovery for physical injuries suffered as a result of defects in new homes, an excellent article on the rule of *caveat emptor*, Bearman, *Caveat Emptor In Sales of Realty—Recent Assaults Upon The Rule*, 14 VAND. L. REV. 541 (1961) said:

> The extension of the *McPherson* theory to realty in effect places upon the builder-vendor an implied warranty against structural defects upon which the

Although the purchase of a new home is considered a real estate transaction, the court reasoned that it is in fact the purchase of a "manufactured product," [24] and the purchaser should have the protection accompanying such a purchase.[25]

The importance of *Elderkin* is that the defect, an impure water supply, was not in the buildings and furnishings ordinarily associated with the builder's liability, but rather in the condition of the land itself. Thus, the builder-vendor was held to warrant the quality of the subsurface water over which he had no control under normal circumstances. While it is desirable that the vendee be protected in his bargain, by this application the builder-vendor becomes an insurer of the land he sells as well as the house he builds.[26] The builder then is clearly in a position to lose the bargain for which he has contracted, for example, because of the added expense incurred by more extensive drilling, or pumping water from another source.[27] While it is true that the vendee has contracted for a habitable home, necessarily intending potable water, an expedient means of acquiring it must also be within the contemplation of the parties. If an implied warranty is adopted to the injury of the builder-vendor, then the rationale for the warranty has been completely overlooked, resulting in the vendee now occupying a potentially

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> vendee can sue should injury occur because of the defects. It would not seem too great a step for future courts to take, to reason that, if such a 'warranty' exists when an injury has occurred, there is no reason to say that it does not exist when the vendee sues his vendor who is also the builder, not to redress an injury but simply to establish the structural quality and good workmanship in his house. . . . *Id.* at 570.

[24] Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 799 (Mo. 1972).

[25] The problem of the doctrine of merger was solved by reasoning based on tort principles, to which the laws of contract have no application. The court held that the plaintiffs' right to recover arises "as a matter of law from their purchase of the house, not from their sale contract or the deed." *Id.* at 800.

The Pennsylvania court, when confronted with the doctrine of merger in *Elderkin*, neatly applied a corollary to the doctrine of merger, holding that the delivery of the deed does not foreclose inquiry into those matters not intended to be controlled by the deed, or that are collateral to the deed. Elderkin v. Gaster, 447 Pa. 118, —, 288 A.2d 771, 774 & n.11 (1972).

[26] One should note that the majority of the courts adopting implied warranties do not require that a perfect house be built, but rather that the measure of the builder-vendor's liability is reasonableness of quality. This still leaves undetermined the question of what is "reasonable" quality of construction, and to what degree the builder will be held a warrantor of the land. *See, e.g.*, Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972).

[27] In *Elderkin* the evidence showed that the cost to defendant builder of supplying water from a public source would exceed $14,000, illustrating to what extent the builder stands to lose his bargain. Quaere: If plaintiff in *Elderkin* had purchased the lot from someone other than the builder-vendor, and then had contracted with defendant to build the house under the same terms, would the court have held as it did?

superior bargaining position,[28] rather than the equal bargaining positions sought by the courts.

Granting that an implied warranty is beneficial in equalizing vendee and builder-vendor rights,[29] the recognition by the Missouri court of the true nature of new home sales is favored in promotion of fairness between vendee and builder-vendor. By accepting strict liability as applicable to manufactured products, the liability of the builder-vendor is established for defects in his *manufactured* dwelling, while protection against liability for defects in the land is afforded the builder. Under such a policy the rights of the vendee to a habitable home are protected, and the builder-vendor does not come under the inequitable burden of an insurer of the quality of the land, as occurred in *Elderkin.* The abrogation of *caveat emptor* in new home sales should not be extended to include latent defects in the quality of the land. Such a policy will result in infringement on the rights of the builder. By recognizing, as the Missouri court has, the "product nature" of new home sales, the builder-vendor is liable for defects in the new home, and *caveat emptor* remains undisturbed as to land, achieving an equitable solution in insuring the rights of both parties.[30]

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[28] The vendee is not absolutely elevated to a superior bargaining position although he is now receiving by implication of law protection for which he would once have had to pay in the form of an express warranty from the builder. The builder, for example, loses nothing where the defect he is held to warrant is required by statute as in the case of sewer regulations.

The builder who contracts with a purchaser to build according to a set of plans supplied by the purchaser will not be affected by an implied warranty of fitness. By the great weight of authority, a contractor who has followed plans furnished by the vendee is not liable for defects due to the insufficiency of the plans or defects resulting therefrom. *See* Fuchs v. Parsons Constr. Co., 172 Neb. 719, 111 N.W.2d 727 (1961); Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951). *See generally* 6 A.L.R.3d 1393 (1966).

[29] 7 WILLISTON, CONTRACTS § 926A (3 ed. 1963): "It would be much 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 jerrybuilding that has become perceptible over the years."

[30] For an excellent discussion of the problems involving implied warranties as applied to new home sales, and for recommended revisions of the law, see Haskell, *The Case For An Implied Warranty of Quality In Sales of Real Property*, 53 GEO. L.J. 633 (1965).