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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 31888-5-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

PEGGY MONTGOMERY, and DWIGHT MONTGOMERY and LISA MONTGOMERY, husband and wife,

Appellants,

vs.

GLEN L. ENGELHARD, JANE DOE ENGELHARD, and their marital community,

Respondents,

and

WILLIAM M. ADAMS, JANE DOE ADAMS, and their marital community; and TB ADAMS REALTY, LLC, a Washington real estate firm,

Defendants.

**APPEAL FROM BENTON COUNTY SUPERIOR COURT
Honorable Carrie Runge, Judge**

BRIEF OF RESPONDENTS

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I. NATURE OF THE CASE

Glen Engelhard hired a general contractor to build a house for him. He lived in it for two years before selling it to plaintiffs. Now plaintiffs claim that Engelhard is liable for breach of the implied warranty of habitability, even though that warranty applies only to commercial builder-vendors and then only if the plaintiff was the first occupant of a new residence built for the purpose of sale. The trial court granted Engelhard summary judgment.

II. ISSUES PRESENTED

Did plaintiffs present genuine issues of fact whether the implied warranty of habitability should apply to Engelhard where—

A. Engelhard had lived in the residence in question for two years before selling it to plaintiff Peggy Montgomery more than four years after its completion?

B. Engelhard retained a general contractor to build the residence in question, where no Washington reported decision has ever held that the implied warranty of habitability applies to a vendor or developer who was not also in fact or in law the general contractor or builder?

C. It is undisputed that Engelhard intended to and did live in the residence for two years before selling it more than four years after its completion?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

Defendant/respondent Glen Engelhard was a real estate broker. (CP 58) In 1997 he purchased an undeveloped parcel at 625 Meadows Drive South in Richland. At his request, an architect modified stock plans for a house that Engelhard had bought to add a half basement and a covered patio. (CP 38, 54) In May 1998 the City of Richland issued a building permit for a single family dwelling. (CP 38, 48)

Engelhard retained Castle Builders as his general contractor. (CP 39, 48) Castle Builders built the house. (CP 39, 48, 476) The City issued a certificate of occupancy in January 1999. (CP 39. 51) Engelhard moved in and lived there for as long as two years. (CP 39, 64, 464) Indeed, plaintiff Dwight Montgomery would later sign a declaration in which he stated that Mr. Engelhard was "living in the upstairs" of the house in question and that when he met Mr. Engelhard "at the house" before going to play golf, Mr. Engelhard was "going through his mail and paying bills" there. (CP 464)

In April 2002 plaintiff/appellant Peggy Montgomery entered into a purchase and sale agreement to buy the house from Engelhard. (CP 66-69) She elected not to have an inspection, later saying, "I didn't think that it was necessary." (CP 83)

In May 2002, before the sale closed, Peggy Montgomery's son and daughter-in-law, plaintiffs/appellants Dwight and Lisa Montgomery, moved in as renters. The sale closed on July 17, 2003, more than four years after completion of construction. (CP 3, 39, 70-79, 83, 90) Dwight and Lisa continued to live at the house; Peggy moved into the basement in 2004. (CP 40)

Although Peggy Montgomery was the actual buyer, she had not really seen the house. Her son, Dwight—who was a golfing buddy of Engelhard's—had handled the purchase negotiations and details. (CP 83-84, 463) Peggy Montgomery had no direct dealings with Engelhard. (CP 82)

B. STATEMENT OF PROCEDURE.

In 2012 the Montgomerys sued Engelhard as well as TB Adams Realty, LLC, the real estate firm where he worked, and its principal. Plaintiffs made claims for (1) breach of contract including breach of the implied warranty of habitability; (2) fraudulent concealment; (3) negligent

construction; (4) breach of real estate professional duties; and (5) violation of the Consumer Protection Act. (CP 1-10)

The trial court granted Engelhard summary judgment on the breach of contract/implied warranty, negligent construction, and breach of real estate professional duties claims. (CP 481-83, 508-09) Plaintiffs' motion for reconsideration was denied. (CP 511-12) The parties stipulated to a dismissal without prejudice of plaintiffs' remaining claims. (CP 506-07)

IV. ARGUMENT

This is an appeal from summary judgment. The purpose of summary judgment is to avoid a useless trial where there is no genuine issue of material fact. *Nielson v. Spanaway General Medical Clinic*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). This Court reviews summary judgments by engaging in the same inquiry as the trial court. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 295, 996 P.2d 582 (2000).

Although facts and reasonable inferences must be viewed in the light most favorable to the nonmoving party, plaintiffs here still had to set forth specific facts to create a genuine issue of material fact. *See Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 736-37, 150 P.3d 633 (2007); *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 305-06, 151 P.3d 201 (2006). They could not rely on speculation, conclusory statements, or argumentative assertions that factual issues remain. *Seiber*, 136 Wn. App.

at 736-37. Their affidavits or declarations are not to be taken at face value, and they were required to offer more than merely colorable evidence or a scintilla of evidence. *Id.* at 736. "Ultimate facts or conclusions of fact are insufficient." *Id.* at 737.

Moreover, while credibility issues ordinarily cannot be decided on summary judgment, plaintiffs here—

> "must be able to point to some facts which may or will entitled [them] to judgment, or refute the proof of the moving party in some material portion, and that the opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof."

Laguna v. State Department of Transportation, 146 Wn. App. 260, 266-67, 192 P.3d 374 (2008) (quoting *Howell v. Spokane & Inland Empire Blood Bank,* 117 Wn.2d 619, 627, 818 P.2d 1056 (1991)).

A. NOT ALL OF PLAINTIFFS' FACTS ARE CORRECT.

Preliminarily, correction of some of the "facts" plaintiffs have set forth in their brief is necessary. First, citing CP 463, plaintiffs claim that Mr. Engelhard "either lived in *or received his mail* at the Montgomery home in order to receive a tax advantage when selling the home" (Opening Brief of Appellants 9) (emphasis added). The record shows that Mr. Engelhard lived at the home, and did not merely receive mail there.

First, Mr. Engelhard testified that he lived there. (CP 64) Second, and perhaps even more importantly, plaintiff Dwight Montgomery stated

under oath that Mr. Engelhard was "living in the upstairs" portion of the home, that he met him "at the house" before they went out to play golf, that Mr. Engelhard's "desk was in the living room", and that Mr. Engelhard was not only "going through his mail", but was also "paying bills." (CP 464) And, of course, contrary to the implication that mght be drawn by plaintiffs' statement at CP 463, the home was ***not*** the "Montgomery home" at the time.

Second, citing CP 436, plaintiff claims that Mr. Engelhard lived in the home (a contradiction to their claim that he might have merely received mail there) for two years to obtain a tax benefit before selling it. (Opening Brief of Appellants 7) That is not what CP 436 says. CP 436, a page from plaintiff Dwight Montgomery's declaration, says that ***according to Mr. Montgomery***, Mr. Engelhard told him that he intended to live in the house to obtain a tax benefit before selling it. Mr. Engelhard did not recall making any such statement. (CP 442) As will be discussed, however, that does not create a genuine issue of material fact that entitled plaintiffs to go to trial.

B. THE IMPLIED WARRANTY OF HABITABILITY DOES NOT APPLY.

Plaintiffs have abandoned on appeal all their claims except the claim for breach of the implied warranty of habitability. In Washington, an implied warranty of habitability attaches to (1) the sale of a new residence

(2) if the builder-vendor was a commercial builder, and (3) the residence was built for sale, not personal occupancy. *Atherton Condominium Apartment Owners Association Board of Directors v. Blume Development Co.,* 115 Wn.2d 506, 519, 799 P.2d 250 (1990). If any one of these three conditions is not met, there is no implied warranty of habitability. *See, e.g., Klos v. Gockel,* 87 Wn.2d 567, 554 P.2d 1349 (1976) (no implied warranty where vendor had acted as her own general contractor, but built for her own personal use); *Carlile v. Harbour Homes, Inc.,* 147 Wn. App. 193, 194 P.3d 280 (2008) (no implied warranty where plaintiffs were original purchasers' assignees, even though defendant was commercial builder). In other words, to prevail on appeal, plaintiffs here must show there is a genuine issue of fact with respect to each of the three conditions.

Because they cannot meet this burden, plaintiffs seek to expand the implied warranty far beyond its present boundaries. But the Washington Supreme Court has cautioned that the implied warranty in this state is "a limited one," and that "[t]his court has not been anxious to extend the implied warranty of habitability beyond its present boundaries." *Stuart v. Coldwell Banker Commercial Group, Inc.,* 109 Wn.2d 406, 415, 416, 745 P.2d 1284 (1987). As will be discussed, there is no reason to do so here.

1. The House Was Not New When Sold to Plaintiffs, the Second Occupants.

The implied warranty of habitability attaches only to the sale of ***new*** houses. *Stuart v. Coldwell Banker Commercial Group, Inc.,* 109 Wn.2d 406, 415, 745 P.2d 1284 (1987). Here, the house was not new when Peggy Montgomery bought it—the sale occurred more than four years after construction was complete, and Mr. Engelhard had lived in the house for two of those years. (CP 3, 39, 64)

In support of their argument that the house was new, plaintiffs argue that Peggy Montgomery was the home's first *purchaser.* But the "new" house rule does not mean that the implied warranty always runs in favor of a house's first *owner* or *purchaser*. Rather, it is the first *occupant* who may bring an action under the implied warranty. *See House v. Thornton,* 76 Wn.2d 428, 436, 457 P.2d 199 (1969) (implied warranty exists when vendor-builder sells "new house" to "its first intended occupant"); *Gay v. Cornwall,* 6 Wn. App. 595, 494 P.2d 1371 (1972) (implied warranty applied to third owner who was first occupant).

Indeed, Washington courts treat the "new house/first occupant" requirement so strictly that even the first occupant's assignee has no right to bring a breach of implied warranty of habitability claim. *Carlile v. Harbour Homes, Inc.,* 147 Wn. App. 193, 202-03, 194 P.3d 280 (2008).

As *Carlisle* recognized, "[w]hat is clear is that the supreme court and other courts in this state have consistently refused to expand liability" "to those beyond the first [occupants] of new homes." *Id.*

In fact, aware that Washington courts have limited the implied warranty of habitability to first purchasers or occupants, the Legislature has several times considered proposed legislation that would have extended the common law implied warranty to subsequent purchasers or owners such as plaintiffs. *See, e.g.,* HB 1045 § 4, 2009 Leg., Reg. Sess. (Wash. 2009); SSB 5923 § 2(7), 2000 Leg., Reg. Sess. (Wash. 2000); SB 5923, §§ 1(3), 2(1)-(2), 1999 Leg., Reg. Sess. (Wash. 1999). None of these measures has been enacted.

In contrast, the Legislature has enacted statutory (1) implied warranties of quality applicable only to condominiums,[1] RCW 64.34.445; and (2) implied warranty of habitability applicable only to residential tenancies,[2] RCW 59.18.060. If the Legislature had intended that implied

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[1] The statutory implied warranties of quality applicable to condominiums include implied warranties that condominium units and common areas will be suitable for ordinary uses, and that any improvements made or contracted for by the condominium declarant or dealer will be free from defective materials and constructed in accordance with sound engineering and construction standards, in a workmanlike manner, and in compliance with all then applicable laws. RCW 64.34.445(2).

[2] The statutory implied warranty of habitability applicable to residential tenancies is limited to the specific items set forth in RCW 59.18.060. *Aspon v. Loomis*, 62 Wn. App. 818, 825-26, 816 P.2d 751 (1991), *rev. denied*, 118 Wn.2d 1015 (1992).

warranties of habitability run to secondary purchasers or occupants of single family residences, it would have passed the proposed legislation or otherwise extended the statutory implied warranties it did enact to secondary purchasers and occupants. It has not.

In the instant case, plaintiffs were not the house's first occupants; Engelhard was. Plaintiffs did not live in the house until more than four years after its construction. Consequently, the house was not new when sold, so plaintiffs cannot sue for breach of the implied warranty of habitability. Summary judgment in Engelhard's favor must be affirmed.

Plaintiffs point out that *Klos v. Gockel,* 87 Wn.2d 567, 554 P.2d 1349 (1976), stated that whether a house is "new" presents a question of fact. This was dicta because the *Klos* court expressly "f[ou]nd it unnecessary to decide if respondents were purchasers of a 'new house.'" *Id.* at 571.

Moreover, *Klos* did not say the issue could ***never*** be decided as a matter of law. There are many legal concepts that generally present questions of fact, but under the right circumstances, can be decided as a matter of law. *See, e.g., Hynek v. City of Seattle,* 7 Wn.2d 386, 398, 111 P.2d 247 (1941) (contributory negligence):*Whaley v. State,* 90 Wn. App. 658, 675-76, 956 P.2d 1100 (1998) (negligence) *cf. Yong v. Heng,* 140 Wn. App. 825, 834, 166 P.3d 1263 (2007) (recognizing causation may

sometimes be decided as a matter of law), *rev. denied*, 163 Wn.2d 1045 (2008).

This case presents the right circumstances for deciding the issue as a matter of law. Plaintiffs were not first occupants, as required by *House* and *Gay*.

As part of their argument that the house was new when sold to Peggy Montgomery, plaintiffs argue that Mr. Engelhard created an intervening tenancy for the primary purpose of promoting the house's sale. (Opening Brief of Appellants 23-24) It is true that *Klos* held:

> It is not enough … that [the builder-vendor] contemplated an eventual sale of the house, for … the sale must be fairly contemporaneous with completion and not interrupted by an intervening tenancy unless the builder-vendor created such an intervening tenancy for the primary purpose of promoting the sale of the property.

87 Wn.2d at 570-71. But this holding has little to do with the "new sale/first occupant" requirement because *Klos* "f[oun]d it unnecessary to decide if respondents were purchasers of a 'new house'." *Id.* at 571. Rather, the above quotation refers to the requirement that the house be constructed for purpose of sale. Many homeowners build houses contemplating eventual sale. But for the house to meet the requirement that it was built for the purpose of sale, the sale must be fairly contemporaneous with completion of construction and not interrupted by

an intervening tenancy unless that tenancy was primarily to promote the sale.

In any event, even if the "no intervening tenancy" requirement were pertinent to the issue of whether the house was "new", the intervening tenancy was Mr. Engelhard's two-year tenancy. There is no evidence that its primary purpose was to promote the house's sale.

Plaintiffs claim that the intervening tenancy was Dwight and Lisa Montomery's occupation of the home as renters between May 2002 until the house sale closed in July 2003. They then claim that a jury could find that Mr. Engelhard created this tenancy for the purpose of promoting the sale.

Plaintiffs are asking this Court to engage in speculation and conjecture. As plaintiffs themselves admit, Peggy Montgomery's purchase and sale agreement was dated April 2002, *before* the younger Montgomerys even moved in. (CP 66) There is not one shred of evidence, let alone reasonable inferences therefrom, that Mr. Engelhard permitted the younger Montgomerys' tenancy prior to closing for the purpose of promoting the sale. In fact, plaintiffs admit the tenancy was Mr. Engelhard's wedding gift to the younger Montgomerys, Dwight having been a golfing buddy of his. (CP 451, 463) In any event, plaintiffs cite no

authority for their implicit claim that Mr. Engelhard's previous 2-year tenancy can be ignored.

Whether the intervening tenancy—regardless of whose it was—caused the defects is immaterial. As *Klos* recognized, for the implied warranty to apply, the purpose of any intervening tenancy must have been to promote the house for sale. 87 Wn.2d at 570-71. There is no evidence of that here. Moreover, nowhere do plaintiffs cite any authority that causation is even relevant. Similarly, they argue without any authority that Mr. Engelhard's knowledge of the tax advantage of living at the home for two years is somehow relevant to whether the home was "new" and whether plaintiffs were "first occupants." Common sense indicates that the tax issue has nothing to do with the "new house"/"first occupants" issue.

Plaintiffs attempt to invoke policy reasons to support their argument. But the Washington Supreme Court has already identified the policy reasons behind the new house/first occupant requirement, and they do not support plaintiffs:

> As a matter of policy, determined by this court, it seems apparent that a builder who puts a house on the market, ***brand new and never occupied,*** has some responsibility to the ultimate buyer. The builder bult the thing. …

Frickel v. Sunnyside Enterprises, Inc., 106 Wn.2d 714, 717, 725 P.2d 422 (1986) (emphasis added). The house here was not "brand new" and had previously been occupied for as long as two years. Moreover, as will be discussed in the next section, Mr. Engelhard was not the "builder" who "built the thing" and was in no better position than plaintiffs to determine whether the house was being built properly.

The implied warranty applies only to benefit first occupants of new homes. Plaintiffs were not first occupants. The home was not new. Summary judgment must be affirmed.

2. Engelhard Was Not a Commercial Builder.

Because the house was not new and plaintiffs were not its first occupants, they cannot sue Engelhard for breach of any implied warranty of habitability. Therefore, this Court need go no further. *See Carlile,* 147 Wn. App. at 202-03.

But even if the house had been new when plaintiff Peggy Montgomery purchased it, the implied warranty of habitability does not apply to every sale of a new house. *Frickel v. Sunnyside Enterprises, Inc.,* 106 Wn.2d 714, 718, 725 P.2d 422 (1986). The warranty applies only where the new dwelling is built "by a builder-vendor in the business of building such dwellings." *Id.*

Thus, the defendant in a breach of implied warranty of habitability case must be a commercial builder so that the sale is a commercial one, rather than casual or personal in nature. *Klos,* 87 Wn.2d at 570. Hence, even if plaintiffs had been the house's first occupants and the house had been "new" when they first moved in, summary judgment in Engelhard's favor was still proper because although he was the home's vendor, he was not its commercial builder. His general contractor, Castle Builders, was. (CP 39, 48, 476)

This Court's decision in *Boardman v. Dorsett,* 38 Wn. App. 338, 341, 685 P.2d 615, *rev. denied,* 103 Wn.2d 1006 (1984), provides a helpful comparison. In that case, the vendor had built the house he sold to the buyer and had built one other house, his family home. The vendor was not, however, a licensed general contractor. The buyer sued for breach of the implied warranty of habitability. Affirming summary judgment for the vendor, this Court explained:

> A commercial builder is "a person regularly engaged in building ..."... Mr. Boardman was not a licensed building contractor and had only built one other house—his family home. Since it is clear from the evidence presented that Mr. Boardman was not a commercial builder, no factual dispute existed and the court did not err in granting summary judgment on this issue.

38 Wn. App. at 341-42.

Like the vendor-builder in *Boardman,* Engelhard was not a licensed building contractor. Unlike the vendor-builder in *Boardman,* however, Mr. Engelhard did not ***build*** the house at issue. Castle Builders, the general contractor, did. (CP 39, 48, 460, 476) If a builder like the *Boardman* defendant could not be a commercial builder, a vendor like Mr. Engelhard, who did not build the house, cannot be either.

Plaintiffs rely on *House v. Thornton,* 76 Wn.2d 428, 457 P.2d 199 (1969), to claim that a vendor who hires a contractor to construct the home can nevertheless be subject to the implied warranty of habitability. Plaintiffs' reliance is misplaced because they ignore a crucial fact in *House.*

It is true that one of the *House* defendants was a real estate broker who had retained a general contractor. But defendant real estate broker and his general contractor had "entered into a ***copartnership and agreement*** to construct" the residence. 76 Wn.2d at 429 (emphasis added). Under the law then in effect, the partnership was bound by one partner's wrongful act, and each partner was jointly and severally liable therefor. 1955 WASH. LAWS ch. 15, §§ 25.04.130, .150(1). Thus, in *House,* the conduct of the general contractor was imputable to his partner, the real estate broker as a matter of law. *See Poutre v. Saunders,* 19 Wn.2d 561, 565-66, 143 P.2d 554 (1943). Consequently, the Court had no reason to

determine whether the broker, absent the partnership, would have qualified as a vendor-builder subject to the implied warranty of habitability.

Even had there not been such a partnership, the fact remains that the *House* court focused on *whether* to impose an implied warranty of habitability at all, not *upon whom* precisely it should be imposed. "An opinion which assumes a particular proposition is not an authority supporting that proposition." *In re Estate of Bowers,* 50 Wn. App. 691, 696, 750 P.2d 275 (1988), *rev'd on other grounds*, *Safeco Ins. Co. v. Barcom*, 112 Wn.2d 575, 773 P.2d 56 (1989).

It is true that prior to having the house in question built, Mr. Engelhard had ***developed*** two or three small commercial projects. He had not, however, acted as the contractor for any of them. (CP 39, 57-62)

Nonetheless, plaintiffs candidly admit that what they are really claiming is that the implied warranty of habitabilty should be imposed on Mr. Engelhard because he was allegedly "ordinarily …occupied or involved in the business of constructing office buildings and houses based upon his professional occupation ***as a developer*** of real estate." (Opening Brief of Appellants 18) (emphasis added). In other words, they seek to take the "builder" out of the "vendor-builder" requirement. But they point to no Washington case that has held that a developer (or a vendor) can be

liable for breach of the implied warranty of habitability when that developer (or vendor) did not build the buildings. Indeed, to the best of the undersigned's knowledge, there are none.

For example, in *Atherton Condominium Apartment-Owners Association Board of Directors v. Blume Development Co.,* 115 Wn.2d 506, 799 P.2d 250 (1990), the court pointed out that the defendant was "the original owner, developer, ***construction contractor,*** and vendor" of the subject condominiums. *Id.* at 511 (emphasis added). The court did the same in *Stuart v. Coldwell Banker Commercial Group,* 109 Wn.2d 406, 745 P.2d 1284 (1987), where it was noted that the defendant was "the owner, developer, ***construction contractor*** and vendor" of the apartments at issue. *Id.* at 408-09 (emphasis added). In *Carlile v. Harbour Homes, Inc.,* 147 Wn. App. 193, 194 P.3d 280 (2008), Division I observed that the defendant developer there had "***built*** the homes at issue." *Id.* at 198 (emphasis added). Indeed, later in the opinion, the *Carlile* plaintiffs referred to the developer as "the builder", when they argued that the economic loss rule does not apply to "the claims of subsequent homeowners who did not contract with the ***builder***." *Id.* at 203 (emphasis added). There is no mention of a separate general contractor.

Non-builder developers and vendors retain general contractors to do the actual construction because the vendors simply lack the expertise to

build on their own. That is precisely why Washington courts have said that the implied warranty of habitability applies only to vendor-***builders.*** As the Washington Supreme Court explained—

> As a matter of policy, determined by this court, it seems apparent that a builder who puts a house on the market, brand new and never occupied, has some responsibility to the ultimate buyer. ***The builder built the thing.*** …

Frickel, 106 Wn.2d at 717 (emphasis added).

Thus, as plaintiffs themselves acknowledge, "the defendants who ***built*** and sold the house 'had by far the better opportunity to examine'" the building. (Opening Brief of Appellants 14) (quoting *House,* 76 Wn.2d at 435-36). If a person did not build the house, the fact that he developed or sold it is insufficient to make him liable for breach of the implied warranty of habitability.

Plaintiffs repeatedly emphasize that Mr. Engelhard is and was a licensed real estate agent. But they have failed to make any showing that a licensed real estate agent has any more skill and expertise in construction than anyone else. Nor have they cited a single legal authority that expressly holds that a licensed real estate agent can be liable for the implied warranty unless the three requirements for the implied warranty are met.

Perhaps in recognition that they must show that Engelhard was a commercial builder, plaintiffs claim that, although not licensed, he nevertheless acted as a general contractor in the construction of what eventually became their home. They base this contention on the first declaration of Bruce Schmidt, the principal of Engelhard's general contractor. In this declaration, Mr. Schmidt made such broad and vague statements as that he and Engelhard had "worked together on the project to build a home", that Engelhard was "very involved in the project", that "sometimes Mr. Engelhard was on site at the project". (CP 460)) These are statements that could apply to anyone having a home built for them. "Broad generalizations and vague conclusions are insufficient to resist a motion for summary judgment." *Thompson v. Everett Clinic,* 71 Wn. App. 548, 555, 860 P.2d 1054 (1993), *rev. denied,* 123 Wn.2d 1027 (1994).

In any event, Mr. Schmidt subsequently clarified his first declaration with a second one, in which he testified, among other things, that he had "worked closely with Mr. Engelhard as my customer as he was very interested in the project" and that Mr. Engelhard "was excited about his new home and often came to the jobsite to observe the construction process and progress." (CP 476) Mr. Schmidt further testified that Mr. Engelhard "did not perform or direct any actual construction work on the home" and that Mr. Schmidt's company, Castle Builders, had, "as the

general contractor for the project, directed the construction work, coordinated subcontractors, ensured the home was built to code, and called for and coordinated the multiple city inspections required during construction." (*Id.*)

Finally, Mr. Schmidt averred that Mr. Engelhard "did not have any experience in the construction trade" and "could not have acted as the general contractor or builder on this project." (*Id.*) This was consistent with Engelhard's own deposition testimony:

> Q. What's the significance to you of [Castle Builders] being the contractor of record?
>
> ....
>
> A. I had my very first home built for me and I relied on the general contractor who had a license to build me a home....Therefore, ***I didn't go down to the city and apply to do an owner-builder home because I didn't know what I was doing....That's why you hire a general contractor*** and pay them some kind of profit to do that for you and be responsible for that.
>
> ....
>
> Q. What do you do to make sure the architect's doing what he or she should be doing? What do you do to make sure the work is satisfactory?
>
> A. ...Well, the architect usually is at the beginning and that's the person you hire to then follow through with the day-do-day—Is it being built right or whatever, because I don't know that stuff, you know. ***I'm not a contractor, I don't know that stuff***....

(CP 54-55, 60) (emphasis added).

Indeed, when testifying about his visits to the site, Mr. Engelhard explained (CP 434):

> Q. When you would check in on the site, what would you do?
>
> A. Well, … at the beginning I wasn't there at all, but like I said, once …the floor was done it was kind of neat to go out there and sit and watch the sunset and have a beer and just hang out.
>
> And then as it . . . the framing went and the roof got on, I'd walk through and just—You know, rooms look smaller when they're finished. Is this really going to be as big as I think?

Thus, the builder of the house was Castle Builders, not Engelhard. This is consistent with the policy reason behind the builder requirement for the implied warranty:

> As a matter of policy, determined by this court, it seems apparent that a builder who puts a house on the market, brand new and never occupied, has some responsibility to the ultimate buyer. ***The builder built the thing.*** …

Frickel, 106 Wn.2d at 717 (emphasis added). The person or entity who builds the home should be responsible for it because that is the person or entity who should have the skill and expertise to properly select the materials and properly construct the home.[3] Mr. Engelhard had no such skill or expertise. He had to rely on Castle Builders' skill and expertise as much, if not more, than plaintiffs.

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[3] In his deposition, plaintiff Dwight Montgomery conceded he had no evidence that Mr. Engelhard had any knowledge, at the time of sale, of almost all of the alleged problems with the house. (CP 357)

It is true that Mr. Schmidt's first declaration also stated that he and Mr. Engelhard had each hired subcontractors and purchased materials, and that Mr. Engelhard paid all the subcontractors and material suppliers. (CP 460) In his second declaration, Mr. Schmidt explained his prior testimony by stating that he had hired the subcontractors, but that like many of his customers, Mr. Engelhard had referred him to subcontractors and materials suppliers. Mr. Schmidt testified that sometimes he hired subcontractors Mr. Engelhard had referred him to, "when I felt they could capably perform the work." (CP 476)

Even had Mr. Engelhard hired and paid subcontractors and purchased materials, it would not make a difference. Why? Because it was undisputed that Castle Builders "directed the construction work, coordinated subcontractors, [and]ensured the home was built to code." (*Id.*)

This type of responsibility is crucial because, without it, the purpose behind imposing liability for the implied warranty of habitability cannot be achieved. It is fair to impose the implied warranty on the person or entity who has been responsible for the construction. It is not fair to impose the implied warranty on someone who was not.

Castle Builders was responsible for the construction of the house. Mr. Engelhard was not.

Plaintiffs also claim that Mr. Engelhard made change orders directly to the crew that worked on the house. Their only evidence is that Mr. Engelhard testified that when he treated the crew to drinks at a bar, he might have asked them to change one or two things, which then might have been done. (CP 434-35) But there is no evidence, one way or the other, to complete the chain of causation. For example, plaintiffs have no evidence whether the crew first got approval from the general contractor before making any change. Thus, plaintiffs are speculating when they claim that Mr. Engelhard directed the workers on site.

Mr. Engelhardt did not build the house. He is not and was not a commercial builder. Castle Builders, a commercial builder, built the house. Summary judgment must be affirmed.

3. The Purpose for Having the House Built Was To Live in It.

Plaintiffs based their breach of implied warranty of habitability theory on Dwight Montgomery's testimony that Mr. Engelhard had once told him that he, Engelhard, was building the home to live in for two years and then planned to sell it to take a tax advantage, and that Engelhard had later built a second house, lived in it for two years, and then sold it for the

tax advantage. (CP 463-64) Even if this were true[4], it would not help plaintiffs because they still cannot meet the new house/first occupant requirement or the commercial builder requirement.

In any event, plaintiffs ignore the ruling in *Klos.* In that case, although defendant said she had built the home only for her personal use, the court found the evidence equivocal:

> Her conduct, however, is somewhat ambivalent because the basement was designed so that a fairly simply conversion could be made from storage space to living quarters, which conversion, if made, might render the house more salable.

87 Wn.2d at 570. Nonetheless, despite this factual issue and despite the fact that defendant had lived in the house only one year before selling it, the court reversed a judgment on a jury verdict in plaintiff buyer's favor and remanded for entry of judgment in favor of defendant vendor-builder. Explaining that the sale had not been a commercial one, the court said:

> ***It is not enough however that appellant contemplated an eventual sale of the house***....[T]he sale must be fairly contemporaneous with completion and not interrupted by an intervening tenancy unless the builder-vendor created such an intervening tenancy for the primary purpose of promoting the sale of the property.

Id. at 570-71 (emphasis added). Thus, the "purposes of sale" requirement is not automatically fulfilled every time a vendor-builder contemplates an

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[4] Engelhard did not recall saying what Dwight Montgomery says he said. (CP 442)

eventual sale of the house at the time of construction. Rather, the contemplated sale must also be "fairly" close in time to completion of construction and not interrupted by an intervening tenancy.

Mr. Engelhard's two-year tenancy (twice the length of the *Klos* defendant's tenancy) means that the sale to plaintiffs four years after construction was complete was not "fairly" close in time to completion and there was an intervening tenancy. Furthermore, as discussed at page 12 *supra*, there is no evidence that Mr. Engelhard's intervening tenancy (or for that matter, the younger Montgomerys') was for the primary purpose of promoting the sale.

Plaintiffs cannot dispute that Mr. Engelhard lived in the house for two years. Even if he did so to obtain the benefit of 26 U.S.C. § 121[5], he still had to make the home his principal residence for at least two years. Thus, the house was built as a principal residence, not for sale.

Plaintiffs' reliance on Mr. Engelhard's awareness of the tax benefits of section 121 does not help them. One does not have to be a

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[5] Section 121(a) of 26 U.S.C. provides in pertinent part as follows:

> Gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more.

commercial builder to appreciate the advantages of excluding gain under section 121. Indeed, to qualify for the exclusion from income under section 121, the taxpayer must have lived in the home as his or her principal residence for two of the previous five years. Many homeowners are aware of section 121's two-year tax rule and plan accordingly. *See, e.g.,* W. Kratzke, *The Defense of Marriage Act (DOMA) Is Bad Income Tax Policy,* 35 U. MEM. L. REV. 399, 433-34 (Spring 2005) (recommending that same sex couples plan ahead to take advantage of section 121). Hence, even if a homeowner intends from the beginning to take advantage of section 121, that alone cannot raise the implication that when the sale is eventually made, however many years later, the sale is a commercial one.

Mr. Engelhard lived in the house for two years. The house was not built for the purpose of sale within the meaning ascribed to that requirement by *Klos.* Summary judgment must be affirmed.

C. MR. ENGELHARD IS ENTITLED TO ATTORNEY FEES ON APPEAL IF HE PREVAILS.

Paragraph 16 of the parties' purchase and sale agreement provides for the recovery of reasonable attorney fees and costs, "including those for appeals," to the prevailing party in any dispute relating to the transaction.

(CP 68) If Mr. Engelhard prevails, he is entitled to his reasonable attorney fees and costs on appeal. RAP 18.1(a)-(b).

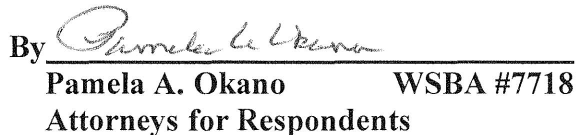
V. CONCLUSION

The implied warranty in this state is "a limited one," and the Washington Supreme Court has recognized that it "has not been anxious to extend the implied warranty of habitability beyond its present boundaries." *Stuart v. Coldwell Banker Commercial Group, Inc.,* 109 Wn.2d 406, 415, 416, 745 P.2d 1284 (1987). Plaintiff's attempt to expand the implied warranty should be rejected.

Under current law, plaintiffs have failed to show a genuine factual issue for each of implied warranty's required elements: The house was not new when sold, and plaintiffs were not its first occupants. Mr. Engelhard was not a commercial builder. The house was built for Mr. Engelhard to live in, not for the purpose of sale. Summary judgment was correctly entered for Mr. Engelhard. This Court should affirm and award Mr. Engelhard his reasonable attorney fees and costs on appeal.

DATED this 25 day of March, 2014.

REED McCLURE



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