

**FILED**

APR 28 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 318885

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

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

v.

GLEN L. ENGELHARD, and 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

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**REPLY BRIEF OF APPELLANTS**

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Honorable Carrie L. Runge, J.  
Benton County Superior Court No. 12-2-00030-9

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## I. INTRODUCTION

The Montgomery family is not asking for an expansion of the law. As discussed below, under the existing scope of the implied warranty of habitability common law developed by our State Supreme Court, there are material questions of fact that should be decided by a jury.

The inquiry before this Court is whether, in viewing all of the evidence in the light most favorable to the Montgomery family, a reasonable jury could find by a preponderance of the evidence that Engelhard was a sophisticated, commercial builder-vendor, who was regularly engaged in building, who built the home for the purpose of selling it as part of a sequential build and sell plan, and who sold a new home to Peggy Montgomery.

As discussed below for each element, the Montgomery family presented specific facts, which if believed by the jury, would justify finding for the Montgomery family on their claim against Engelhard for breach of the implied warranty of habitability. Accordingly, the Montgomery family's implied warranty of habitability claim should be decided by a jury. This reply brief is submitted to respond to arguments made in respondents' brief.

## II. ARGUMENT

### A. Plaintiffs' facts are correct.

Mr. Engelhard does not dispute that he maintained his condominium on the same golf course while he owned the property at 625 Meadows Drive South in Richland, Washington or that he had a conversation with Dwight Montgomery on the golf course regarding a sequential build and sell plan involving the property. Mr. Engelhard simply does not recall the conversation. CP 442, *accord* CP 463.

### B. There is no exception in Washington that allows a vendor-builder to avoid the implied warranty of habitability by hiring a contractor to construct the home.

Engelhard does not cite to a single case in Washington that holds a vendor-builder may avoid the implied warranty of habitability by hiring a contractor to construct the home. Nor does Engelhard cite to a single case in Washington that limits the implied warranty of habitability to a defendant that personally drives the nails.

“The implied warranty of habitability protects purchasers from latent construction defects.”<sup>1</sup> *Atherton Condominium Apartment Owners Assoc. Board of Directors v. Blume Development Co.*, 115 Wn.2d 506, 521, 799 P.2d 250 (1990). The claim was first recognized in Washington in *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969). The claim in *House* was against a vendor-builder, who, like Engelhard, was a real estate agent who had a contractor build a home on a lot that the vendor-builder owned and then sold it to the plaintiff. *Id.*

Since *House*, our State Supreme Court has looked to and approvingly cited cases from other jurisdictions in which the implied warranty of habitability claim was upheld against vendor-builders who hired contractors to construct the homes at issue. See e.g., *Atherton*, 115 Wn.2d at 521 (citing *Smith v. Old Warson Development Co.*, 479 S.W.2d 795 (Mo. 1972) (vendor-builder hired contractor to construct home))<sup>2</sup> and (citing *Degnan v. Executive Homes, Inc.*, 215 Mont. 162, 696 P.2d 431 (Mont. 1985)

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<sup>1</sup> It is undisputed that latent foundation defects (CP 381-419) rendered the home uninhabitable (CP 365) and that the Montgomery family has lived in a rental for years (CP 418).

<sup>2</sup> Copy of opinion attached as Appendix A.

(vendor-builder hired contractor to construct home)).<sup>3</sup> The *Klos* court approvingly cited a case directly on point. *Klos v. Gockel*, 87 Wn.2d 567, 570, 554 P.2d 1349 (1976) (citing *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (Vt. 1975)).<sup>4</sup> The *Frickel* court also approvingly cited *Bolkum*. *Frickel v. Sunnyside Enterprises, Inc.*, 106 Wn.2d 714, 718, 725 P.2d 422 (1986) (claim only applies when vendor-builder builds a new dwelling for purpose of sale) (citing *Bolkum*, 346 A.2d 210 (Vt. 1975)).

The *Bolkum* opinion, approvingly cited by *Klos* and *Frickel*, specifically addresses the issue of whether a vendor-builder who hires a contractor to build the home can be liable for the implied warranty of liability. In *Bolkum*, the defendant hired a contractor to build a home on a tract of land the defendant owned, and then the defendant sold it to the plaintiff. The *Bolkum* court noted the distinction between (1) a builder building (or having built) a home for himself and (2) a seller, in the business of selling houses, having a home built for sale as part of a business plan. The *Bolkum* court reasoned the implied warranty of habitability arises from the business activity and “[t]hat the defendants did not

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<sup>3</sup> Copy of opinion attached as Appendix B.

<sup>4</sup> Copy of opinion attached as Appendix C.

personally drive the nails has no effect on the principle involved, any more than it does in the case of chattels. The implied warranty of habitability arises from the business of selling, rather than the business of manufacture." *Bolkum*, 346 A.2d at 211; accord *Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 569, 772 P.2d 1018 (1989) (holding statute of repose is not applicable because implied warranty of habitability claims stem from the activity of selling the home, not a defendant's activity building the home); see also *Vigil v. Spokane County*, 42 Wn. App. 796, 799-800, 714 P.2d 692 (1986) (claim stems from seller's breach of duty to supply a structure adequate for the buyer's intended use of living in it).

In this case, it is undisputed that Engelhard was in the business of selling homes as a real estate agent. Engelhard was also in the business of developing commercial properties and a residential subdivision called Country View Estates. It is also undisputed that Engelhard caused the house to be built. And as discussed below, plaintiffs presented specific facts from which a reasonable jury could find Engelhard caused the house to be built for the purpose of selling it as part of a sequential build and sell plan.

The one case cited by respondent, *Boardman v. Dorsett*, 38 Wn. App. 338, 685 P.2d 615, *rev. denied*, 103 Wn.2d 1006 (1984), does not hold or stand for the proposition that one must be a licensed contractor to be a builder-vendor. Nor does *Boardman* support an exception that allows a vendor-builder to avoid the implied warranty of habitability by hiring a contractor to construct the home. Rather, *Boardman* quotes *Klos* and defines a commercial builder as “a person regularly engaged in building ...” *Id.* at 618 (quoting *Klos* 87 Wn.2d at 570). As discussed below, the specific facts in this case upon which a reasonable jury could find by a preponderance of evidence that Mr. Engelhard was regularly engaged in building were not present in *Boardman*.

*House* has not been overruled. *Boardman* does not create such an exception. Moreover, *Klos*, *Frickel*, and *Atherton* approvingly cite cases from other jurisdictions in which the implied warranty of habitability applies to vendor-builders who contracted with others for the construction of homes. Specifically, the *Klos* court approvingly cited the *Bolkum* court’s analysis, which is directly on point, in support of the *Klos* court’s focus on commercial business activity for the implied warranty of habitability to apply. Accord, *Frickel*, 106 Wn.2d at 718.

Thus, it was an error for the trial court below to rule, as a matter of law, that the implied warranty of habitability was not applicable based upon the claim that Engelhard could not be a vendor-builder because he hired a contractor to construct the home that he sold to Montgomery. CP 482. It was also error for the trial court to deny the Montgomery family's motion for reconsideration on these grounds. CP 486-487, and 511-512.

**C. Whether Engelhard was regularly engaged in building is a question of material fact for the jury to decide at trial.**

The *Klos* court looked at opinions by courts around the country and noted that “[t]he essence of the implied warranty of ... habitability requires that the vendor-builder be a person regularly engaged in building, so that the sale is commercial rather than casual or personal in nature.” *Klos*, 87 Wn.2d at 570 (emphasis added) (citing *Bolkum*, 346 A.2d 210 (Vt. 1975)).

Respondents do not argue that the *Klos* definition of a commercial builder does not apply. Nor do Respondents offer any contrary meanings for the *Klos* terms “regularly engaged in building.” Engelhard points to no case in which the terms are narrowly construed to exclude developers like himself. For example, in *Carlile*, the court used the terms “developer” and

“builder-vendor” interchangeably referring to the defendant. *Carlile v. Harbor Homes, Inc.*, 147 Wn. App. 193, 202-03, 194 P.3d 280 (2008).

Plaintiffs presented specific facts from which a jury could find Engelhard is a person who was “regularly engaged in building.” Generally, Engelhard’s profession is real estate. He is a developer of real estate, both commercial and residential; and he was also a licensed real estate professional in the business of selling houses at the time he built and sold the Montgomery home. Engelhard was not retired at the time he built the Montgomery home as part of his sequential build and sell plan. Engelhard’s real estate development projects include the construction of commercial and residential buildings on lots Engelhard purchased. Engelhard also purchased at least two homes that a contractor friend remodeled and Engelhard split the sale proceeds with the contractor. Thus, Engelhard is a person who ordinarily was occupied or involved in the business of constructing office buildings and houses based upon his professional occupation as a developer of real estate.

More specifically, Engelhard was ordinarily involved in the business of constructing the Montgomery home. CP 460 (“Mr. Engelhard was very involved in the project.”). Engelhard and the

contractor built the home together, sometimes with Engelhard on site and sometimes with the contractor on site. CP 459 (“Mr. Engelhard and I built two residential homes together.”); CP 460 (“Sometimes I was on site at the project, and sometimes Mr. Engelhard was on site at the project.”). Both Engelhard and the contractor hired subcontractors and material vendors, but Engelhard paid all contractors and vendors directly. CP 460. Engelhard directed the workers on site without going through the contractor. CP 434 (“[I]f I wanted to change a wall or something like that, instead of going to Bruce, I would just ask them if they would do it, and they would.”). There is ample evidence, *i.e.* specific facts presented by plaintiffs, from which a jury could conclude that Engelhard was “regularly engaged in building,” as those words are ordinarily understood and in light of the *House* precedent and factual context.

**D. Whether Engelhard had the home built for personal use or for sale is a material question of fact for the jury to decide at trial.**

Respondents argue that the declaration of Mr. Montgomery does not create a material question of fact on this issue. Mr. Montgomery’s declaration does not assert conclusory statements or ultimate facts, but rather sets forth specific facts that create a

question of material fact. Moreover, it is not just Mr. Montgomery's testimony that was presented. The testimony of Engelhard at his deposition and the declaration of Mr. Schmidt corroborate Mr. Montgomery's testimony. Based upon the evidence presented by plaintiffs and all the reasonable inferences that can be drawn from the evidence, a jury could find Engelhard built the Montgomery home for the purpose of sale as part of his sequential build and sell business plan.

Engelhard told Dwight Montgomery while golfing that he was building the home with the intent to sell it as part of a sequential build and sell plan. CP 463-464. Engelhard kept his condominium on the same golf course as the Montgomery home. CP 431. Before selling the Montgomery home, Engelhard had purchased the next lot and begun to build the next home in his sequential build and sell plan. CP 464, 430, 460. Engelhard built the home with high end materials so that it could be publicized in the Parade of Homes and he could get a better selling price, and Engelhard listed and marketed the home for sale himself, including advertising the home in *Homes and Land*. CP 426, 438-440, 464. Engelhard was in the business of selling homes and developing real estate. Engelhard lived in the home or received his mail there as part of a

plan to receive a tax benefit before selling, instead of an intention to live in the home indefinitely that was disrupted by personal injuries. Thus, unlike the widow Gockel's conduct in *Klos*, or the undisputed intent of the defendant in *Frickel*, there is sufficient evidence for a reasonable jury to find Engelhard's conduct in this case supports the Montgomery family's belief that this was a commercial sale.

The facts in the *Klos* and *Frickel*, cases on which those courts determined that the implied warranty of habitability was not applicable, do not exist in this case. Rather, the evidence in this case demonstrates how a jury could find Engelhard built the Montgomery home for the commercial purpose of sale.

**E. Whether the home Engelhard sold to Montgomery was a "new house" is a material question of fact for the jury to decide at trial.**

Respondents argue that the home could not have been "new" because Engelhard lived in it for two years before selling it to Peggy Montgomery. There is no evidence that the construction was complete more than two years before the sale to Peggy Montgomery. Respondents point to CP 3, which notes that Engelhard was finishing the construction while living in the home for a tax benefit. Just because a certificate of occupancy was issued, it does not follow or mean that all of the finishes on the home were

complete and that construction of the finishes were not continuing while Engelhard lived in or received mail at the home. Substantial completion is not the same as completion.

Whether a house is a “new house” or not “is a question of fact.” *Klos*, 87 Wn.2d at 571. “The passage of time can always operate to cancel liability, but just how much time need pass varies with each case.” *Id.* If a builder-vendor creates an intervening tenancy for the primary purpose of promoting the sale of the property, the tenancy does not operate to cancel the implied warranty of habitability liability. *Id.* (citing *Casavant v. Campopiano*, 114 R.I. 24, 327 A.2d 831 (1974) (implied warranty of habitability applied where vendor-builder built home with intention to sell and created the tenancy until the home was sold)).<sup>5</sup>

In this case, it is undisputed that Peggy Montgomery was the first buyer of the home at 625 Meadows Drive that Engelhard built. Engelhard acknowledged that “I did know that if you lived there for two years there was tax benefits with regards to not having to pay.” CP 444; see also CP 442 (“Q. Are you aware that there’s a tax benefit to living in a home for two years before selling it? A.

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<sup>5</sup> Copy of opinion attached as Appendix D.

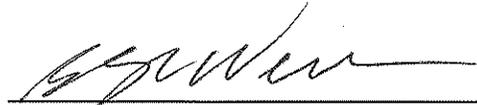
Absolutely.”). He also resided in the next home of his sequential build and sell plan for two years as well. CP 430. While the home was being built, Engelhard told Dwight Montgomery about his plan to build a series of homes, live in them or at least get his mail there for two years, and then sell the homes for a profit based upon savings from his involvement in the construction and the tax advantages of claiming the home as his primary residence for two years. CP 463-464. Viewing the facts, as well as reasonable inferences from the facts, in the light most favorable to the Montgomery family, a reasonable jury could find Engelhard created the intervening tenancy for the commercial purposes of selling the home after obtaining a tax benefit as part of a sequential build and sell plan, and that Engelhard sold Peggy Montgomery a new home.

### **III. CONCLUSION**

Because there are genuine issues of material fact regarding whether Englehard, the vendor-builder, (1) was regularly engaged in building, (2) built the home for sale as part of a sequential build and sell plan, and (3) sold Montgomery a “new house,” the Montgomery family asks the Court of Appeals to reverse the orders granting summary judgment and denying reconsideration. The appellants request that the Court of Appeals remand for further

proceedings consistent with its opinion, and to award Peggy  
Montgomery her reasonable attorneys' fees and costs on appeal.

RESPECTFULLY SUBMITTED this 24 day of April, 2014.



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Barbara J. Rhoads-Weaver, WSBA #34230  
Kyle Olive, WSBA #35552  
**Attorneys for Appellant**

**DECLARATION OF SERVICE**

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

Counsel for Respondent John W. Rankin Reed McClure 1215 Fourth Ave. Suite 1700 Seattle, WA 98161	<input checked="" type="checkbox"/> E-Mail
Counsel for Respondent Pamela A. Okano Reed McClure 1215 Fourth Ave. Suite 1700 Seattle, WA 98161	<input checked="" type="checkbox"/> U.S. Mail
Counsel for Appellants Kyle Olive Olive Bearb & Grelish, PLLC 1218 Third Ave. Suite 1000 Seattle, WA 98101	<input type="checkbox"/> Electronic Filing
	<input type="checkbox"/> Legal Messenger
	<input type="checkbox"/> FedEx

Dated this 24th day of April, 2014 at Vashon, Washington.

  
\_\_\_\_\_  
Tiffany Watson

# Appendix A

479 S.W.2d 795 (Mo. 1972), 57020, Smith v. Old Warson Development Co.

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

**Frank J. SMITH and Catherine M. Smith, Appellants,**

**v.**

**OLD WARSON DEVELOPMENT COMPANY, a Corporation, Respondent.**

**No. 57020.**

**Supreme Court of Missouri, En Banc.**

**May 8, 1972**

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John F. Nangle, Clayton, for appellants.

Ludwig Mayer, Clayton, for respondent.

MORGAN, Judge.

We accepted transfer of this cause after the filing of an opinion by the Court of Appeals, St. Louis District, because the result reached therein evidenced a departure, although limited, from a strict application of the doctrine of caveat emptor. The court's reasoning was expressed in an opinion by Smith, J., which was as follows:

This appeal presents squarely the question of whether implied warranties of merchantable quality and fitness exist in the purchase of a new home by the first purchaser from a vendor-builder. We hold such warranties do exist.

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'Plaintiffs received a verdict of \$6,800 from the jury but the court sustained defendant's motion for judgment in accordance with its motion for directed verdict. The court made no ruling on defendant's motion for new trial.

'Defendant was the owner of a tract of land in St. Louis County which it subdivided for sale as residential lots. Certain improvements of the tract were made such as installation of streets and utilities, but it was the plan of defendant to sell the land without homes thereon, and let the buyers construct or have constructed their homes. In order to demonstrate to the public the type of luxury home which could be built on the lots defendant hired a Mr. R. J. Munzlinger to 'act as agent' for defendant in the construction of a house at 'twenty-two Waterbury Drive, Forest Green Estates, Ladue, Mo.' For his 'duties as agent' Munzlinger was to receive a fixed fee. Munzlinger constructed the display home which was thereafter sold by defendant to the plaintiffs. At the time of building the house it was defendant's intention to sell it after using it for publicity purposes. The house was completed in February 1963, and on February 23, 1963, plaintiffs and defendant entered into a sale contract calling for a purchase price of \$82,500. The sale contract contained the following provision: 'Property to be accepted in its present condition unless otherwise stated in contract. Seller warrants that he was not received any written notification from any governmental agency requiring any repairs, replacements, or alterations to said premises which have not been satisfactorily made. This is the entire contract and neither party shall be bound by representation as to value or otherwise unless set forth in contract.'

'There were no special agreements in the contract, which was a standard form contract

adopted by the Real Estate Board of Metropolitan St. Louis. The contract as printed contained the name and address of defendant's sales agent. There is some dispute in the testimony as to whether the house was completed at the time the contract was signed. We find it unnecessary to resolve such conflict. On March 15, 1963, defendant conveyed the property by general warranty deed to plaintiffs, who shortly thereafter moved in.

'Within a few months plaintiffs noticed that the doors in a section of the house containing a bedroom and bathroom were sticking. Soon they they noticed the caulked space between the bathtub and wall was enlarged. Eventually a space developed between the baseboard and the floor, and cracks developed in the wall. All problems were limited to the two rooms, which were constructed on a four-inch concrete slab, completely surrounded by but not attached to, foundation walls. The remainder of the house rested on a foundation and as stated experienced no difficulties. All further discussion refers only to the two room complex.

'There is no dispute that the slab settled or sank resulting in the problems experienced. There was evidence that by trial time in September 1969, the settling (which was not even throughout the two rooms) had reached in one location an inch and three quarters. Some basic attempts to repair the visible problems were made by the builder but there was no attempt to correct the cause of the problems--the settling of the slab. The evidence warranted the conclusion that the settling was beyond the normal that might be expected in a new house.

'Plaintiffs adduced testimony from an engineer that some additional settling was a possibility and that the settling of the slab was the result of improper and unworkmanlike compaction of the soil under the slab. He estimated that proper correction of the problem would cost approximately \$6000. A real estate appraiser testified that in his opinion the house and lot without the defect had a fair market value in 1963 of \$82,500 and with the defect had a fair market value in 1963 of \$69,000 or a difference of \$13,500. He opined that

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even if the problem were fully corrected the reputation of the house as a sound property would still be impaired reducing its market value. Since we review the trial court's action taking the evidence most favorable to plaintiffs, we need not review defendant's evidence. We do note that that evidence did not dispute the fact of the slab settling.

'Although plaintiffs' amended petition was in two counts, implied warranty and negligence, their submission to the jury was under implied warranty only. Defendant contends that no implied warranty exists in the sale of real estate and that if it does the above quoted portion of the sale contract expressly excludes such warranty here.

'As stated in *Keener v. Dayton Electric Manufacturing Company, Mo. (1969), 445 S.W.2d 362, I.c. 364*, 'The law involving products liability has undergone dramatic change in recent years. \* \* \*' In that case our Supreme Court adopted the rule of strict liability in tort stated in 2 Restatement, Law of Torts, Second, § 402A pertaining to sellers of any product in a defective condition. The Reason for adopting such rule was " \* \* \* to insure that the costs of injuries resulting from defective products are borne by the manufacturers (and sellers) that put such products on the market rather than by the injured persons who are powerless to protect themselves. \* \* \*"

'The court also recognized that the difference between 'strict liability' or 'implied warranty'

would not in this state be one of substance " \* \* \* since our courts are clearly recognizing the tort nature of the liability imposed. \* \* \*"

'In *Morrow v. Caloric Appliance Corporation, Mo., en banc, (1963), 372 S.W.2d 41*, the Supreme Court in eliminating the requirement of privity in an implied warranty case rested its decision upon the following grounds: 'Careful consideration of the recent decisions of the courts of other states to the same effect, the inclination of the courts of this state to modify the harsh results flowing from a rule of caveat emptor in analogous fact situations, the logic of the reasoning upon which these cases (and numerous other cases therein cited) are ruled in an effort to afford justice to the vast majority of the 'consumer' citizenry, whose well-being, health and very lives are dependent in great degree upon processed food and manufactured articles and facilities, the fitness or safe use of which the ordinary 'consumer' can know little or nothing other than the fact that the processor or manufacturer holds them out to the public as fit and reasonably safe for use by the 'consumer' when used in the manner and for the purpose for which they are manufactured and sold, lead inevitably to the conclusion that under the facts as found by the jury the appellant is to be held liable as an implied warrantor of the fitness and reasonable safety of the gas cooking range here involved, despite lack of privity of contract.' (I.c. 55).

Our Supreme Court has further recognized that implied warranties of merchantable quality and reasonable fitness for use are derived from the common law. *Hays v. Western Auto Supply Co., Mo. (1966), 405 S.W.2d 877(4, 5)*. In addition to the use of the theory of implied warranty to recover for personal injuries or property damage, the doctrine has also been successfully utilized to recover the difference between the value of the product as warranted and its actual value. See *Dubinsky v. Lindburg Cadillac Co., Mo.App., 250 S.W.2d 830*; *Mullins v. Sam Scism Motors, Inc., Mo.App., 331 S.W.2d 185*; and *Miller v. Andy Burger Motors, Inc., Mo.App., 370 S.W.2d 654*. Negligence, knowledge or fault of the vendor or manufacturer is not required where recovery is sought for a defective condition under either implied warranty or strict liability. *Keener v. Dayton Electric Manufacturing Company, supra*; *Williams v. Ford Motor Compnay, Mo.App., 411 S.W.2d 443*. Of course, an implied warranty of merchantable quality or fitness for use (often used  
Page 799  
interchangeably by the courts) does not require a perfect product, only one of reasonable quality or reasonable fitness. *Paton v. Buick Motor Divisions, General Motors Corp., Mo., 401 S.W.2d 446*; *Mullins v. Sam Scism Motors, Inc., supra*.

Having in mind the reasons given by our Supreme Court for its decisions in *Keener* and *Morrow*, we cannot see any logical reason for not imposing a similar liability on the facts before us. Although considered to be a 'real estate' transaction because the ownership to land is transferred, the purchase of a residence is in most cases the purchase of a manufactured product--the house. The land involved is seldom the prime element in such a purchase, certainly not in the urban areas of the state. The structural quality of a house, by its very nature, is nearly impossible to determine by inspection after the house is built, since many of the most important elements of its construction are hidden from view. The ordinary 'consumer' can determine little about the soundness of the construction but must rely upon the fact that the vendor-builder holds the structure out to the public as fit for use as a residence, and of being of reasonable quality. Certainly in the case here no

determination of the existence of the defect could have been made without ripping out the slab which settled, and maybe not even then. The home here was new and was purchased from the company which built it for sale. The defect here was clearly latent and not capable of discovery by even a careful inspection. Defendant was the developer of the subdivision in which the house was located, and built this home to demonstrate to the public the type of quality residence which could be erected in the subdivision. <sup>[1]</sup> It was held out to the public as 'luxurious' and was shown as a model to the public. Common sense tells us that a purchaser under these circumstances should have at least as much protection as the purchaser of a new car, or a gas stove, or a sump pump, or a ladder. <sup>[2]</sup>

'Respondent contends that we are foreclosed from reaching this result by four prior appellate decisions in this state. The first of these is *Combaw v. Kansas City Ground Inv. Co.*, 358 Mo. 934, 218 S.W.2d 539. There plaintiff sued for damages she sustained by being hit by falling plaster in her home which she and her husband had recently purchased from defendant. The house was old and at the time of sale was being remodeled. Plaintiff contended that the defendant orally agreed, prior to the written sale contract, to repair and that he had breached this contract to repair resulting in plaintiff's injuries. The court held that the prior oral statements relied on were merged in the written contract of sale, that under the written contract no duty to repair was undertaken and defendant was not liable. The court expressly said that the suit was not based on warranty. There is dicta in the opinion that in the absence of an express agreement to the contrary a seller of real estate cannot be held liable for defective condition of the premises. Such a statement was unnecessary to the decision of the case and we therefore are not compelled to follow it.

In *Gathright v. Pendegrift, Mo.*, 433 S.W.2d 299, a negligence case, the Supreme Court referred to the Combaw case

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and distinguished it. We cannot consider the court's passing reference to Combaw as an approval of the dicta in Combaw discussed above. *Whaley v. Milton Const. & Supply Co., Mo.App. (1951)*, 241 S.W.2d 23, and *Flannery v. St. Louis Architectural Iron Co.*, 194 Mo.App. 555 (1916), 185 S.W. 760, were both cases decided by this Court. In both cases we rejected recovery against a builder, under an implied warranty of fitness, where latent defects existed in materials supplied by a reputable dealer to the builder and where the builder had neither knowledge nor reason to have knowledge of the defects. Although neither case deals with the precise factual situation presented in the case at bar, both cases proceed on the assumption that liability for breach of implied warranty does not lie in the absence of fault or negligence by the warrantor. In view of the cases heretofore mentioned we believe fault or negligence of the warrantor is no longer required for recovery under implied warranty.

We mention briefly a matter not raised by the parties, simply to indicate that we are aware of the doctrine of law involved and have considered it. That is the doctrine of merger of the sale contract into the deed, so that the obligations of the sale contract are extinguished when the deed is delivered. We do not believe such doctrine applies here in view of the declaration of the Supreme Court in Keener that in this state implied warranty is a tort concept not a contract right. Plaintiffs' rights arise as a matter of law from their purchase of the house, not from their sale

contract or the deed.

The trial court apparently granted defendant's motion for judgment on its determination that the house was of reasonable quality and reasonably fit. On the record before us we conclude that the court erred in so doing. The test is, of course, 'reasonableness' and that is essentially a fact issue for the jury. Plaintiffs presented evidence that the decrease in value of the house because of the defect was \$13,500, twenty per cent of the value of the house excluding the land. There was evidence that \$6000 would be required to remedy the defect, and there was considerable testimony and photographic evidence of the condition of the premises as a result of the defect. The problems experienced were not normal. There was sufficient evidence to entitle a jury to find a lack of reasonable quality and fitness.

We turn to the 'present condition' provision of the contract, and respondent's contention that that provision excluded any implied warranties. On its face it does not indicate that it has reference to implied warranties. Respondent contends that the language 'Property to be accepted in its present condition unless otherwise stated in contract' is an exclusion of warranties. We cannot so interpret it. The reasonable interpretation of that provision is that vendor assumes no obligation to do any additional work on the house unless specified. Such a provision would preclude purchasers from insisting that the vendor promised to paint the house a different color, or add a room, or retille a bathroom or correct an obvious defect. We do not believe a reasonable person would interpret that provision as an agreement by the purchaser to accept the house with an unknown latent structural defect. See *Wawak v. Stewart*, (247) Ark.Sup. (1093), 449 S.W.2d 922(4, 5).

'We conclude that the court erred in sustaining defendant's motion for judgment in accordance with its motion for directed verdict.

Respondent suggests that in the event we find the court erred in entering judgment that we remand to the trial court so that it might pass on the motion for new trial. The trial court should have ruled the alternative motion for new trial. Civil Rule 72.02, V.A.M.R. In *Medical West Building Corp. v. E. L. Zoernig & Co., Mo.*, 414 S.W.2d 287, the court stated: '\* \* \* Litigants who elect to take advantage

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of the privilege of combining a motion for judgment with an alternative motion for a new trial have an obligation to see that the trial court act, in accordance with Rule 72.02, at the risk of being held to have waived their motion for new trial.' (8).

In *Zoernig* the cause was remanded in the interests of justice to allow the trial judge to rule on the motion for new trial. We think here it is unnecessary to remand the case. Since the trial and appeal of this litigation the trial judge has died, so action on the motion for new trial cannot be taken by a judge who had the benefit of listening to the testimony and judging its weight. Several of the claimed errors set forth in the motion for new trial have necessarily been passed on by our decision that plaintiffs made a case. Most of the remaining errors claimed deal with the dispute as to whether the 'present condition' provision was waived by defendant. Since we have held that the 'present condition' provision did not exclude the implied warranties, the question of its waiver by defendant is not of consequence. We have carefully examined other errors asserted in the motion for new trial and are not convinced that any prejudicial error was committed which would require a

new trial.'

We agree with the conclusion of the Court of Appeals that a review of the case law indicates a substantial trend by the courts to abandon the strict rule of caveat emptor in the sale of a new house under the circumstances present in the instant case. Such a trend is not only evidenced by the precedents cited in the opinion quoted but also by many writers on the subject. 'Current literature on the subject overwhelmingly supports this idea of an implied warranty of fitness in the sale of new houses. See *Property--Implied Warranty of Fitness in the Sale of a New House*, 71 W.Va.L.Rev. 87 (1968); *The Case of the Unwary Home Buyer: The Housing Merchant Did it*, 52 Cornell L.Q. 835 (1967); *Caveat Emptor in Sales of Realty--Recent Assaults Upon the Rule*, 14 Vand.L.Rev. 541 (1961); *The Case For an Implied Warranty of Quality in Sales of Real Property*, 53 *Geo.L.J.* 633 (1965).' *House v. Thornton*, 76 Wash.2d 428, 457 P.2d 199, 204. From all of which, it has been said that: 'The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices.' *Humber v. Morton, Tex.*, 426 S.W.2d 554, 562. However, it should be recognized that the rationale for allowing recovery by a purchaser of a new house, on a theory of breach of an implied warranty of habitability or quality, is applicable only against that person who not only had an opportunity to observe but failed to correct a structural defect, which, in turn, became latent, i.e., the buildervendor. Whether or not such latent defects resulted from the sole activities of the builder-vendor or that of an independent contractor used by him would be immaterial in connection with a complaint of the purchaser. Relaxing the caveat emptor rule in this limited area would not require a builder-vendor to construct a perfect house as the test would be one of reasonableness of quality. In addition, the duration of liability would be premised, also, on a standard of reasonableness. We adopt the reasoning of the Court of Appeals and prior opinions of this court to the contrary should no longer be followed.

The judgment is reversed and the cause remanded with directions to enter judgment in accordance with the jury verdict.

All concur.

Notes:

[1] Defendant also constructed one other house in the subdivision.

[2] 'We note in this regard the obvious trend throughout the nation to afford home purchasers the protections now afforded purchasers of chattels. We have not discussed at length the various policy arguments to which the courts have referred in abandoning caveat emptor as it pertains to new homes. For such discussions see *Wawak v. Stewart*, (247) Ark.Sup. (1093), 449 S.W.2d 922; *Crawley v. Terhune*, Ky.Sup., 437 S.W.2d 743; *Weeks v. Slavick, Builders, Inc.*, 24 Mich.App. 621, 180 N.W.2d 503; *Waggoner v. Midwestern Development, Inc.*, 83 S.D.Sup. 67, 154 N.W.2d 803; *Humber v. Morton, Tex.Sup.*, 426 S.W.2d 554; *House v. Thornton, Wash.Sup.*, 76 W.2d 428, 457 P.2d 166; 25 A.L.R.3rd 383 and cases therein cited.'

# Appendix B

215 Mont. 162 (Mont. 1985), 84-387, Degnan v. Executive Homes, Inc.

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**215 Mont. 162 (Mont. 1985)**

**696 P.2d 431**

**Walter C. DEGNAN and Carol W. Degnan, husband and wife,  
Plaintiffs and Respondents,**

**v.**

**EXECUTIVE HOMES, INC., a Montana corp., Charles E. Gamble,  
Mora Bros., Inc., a Montana corp., Defendants and  
Appellants.**

**No. 84-387.**

**Supreme Court of Montana.**

**March 7, 1985**

Submitted Jan. 31, 1985.

APPEAL FROM: District Court of the Thirteenth Judicial District, In and for the County of Yellowstone, The Honorable Charles Luedke, Judge presiding.

**[696 P.2d 432]**

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Moulton, Bellingham, Longo & Mather, Ward Swanser, Billings, for Mora bros.

McGimpsey & Bacheller, Billings, for Executive Homes.

Peterson, Schofield & Leckie, Billings, for Gamble.

Anderson, Brown, Gerbase, Cebull & Jones, Richard F. Cebull, Billings, argued for plaintiffs and respondents.

MORRISON, Justice.

Defendant, Mora Brothers Inc., (Mora Bros.) appeals the March 29, 1984, order of the District Court of the Thirteenth Judicial District, County of Yellowstone, granting Walter and Carol Degnan's (Degnans) motion for summary judgment against Mora Bros. on the issue of breach of the implied warranty of habitability. We affirm the order of the District Court.

Executive Homes, Inc., was established in 1977 by Charles Gamble and Moras. Its purpose was to purchase, develop and sell land for residential construction.

The engineering firm of Christian, Spring, Sielbach & Associates was hired by Executive Homes to design the Oak Subdivision under a rimrock cliff outside of Billings, Montana. Charles Gamble, half-owner and president of Executive Homes and president of ICR Realty, was the chief selling agent of the lots in Oak Subdivision. The Mora brothers, Rene Jr., Robert and Sam own the other half of Executive Homes. Mora Bros. was initially the exclusive builder of homes in Oak Subdivision. Financial realities soon resulted in the use of other builders as well.

In the summer of 1979, Degnans purchased a lot in Oak Subdivision from Executive Homes. Charles Gamble was the selling agent. The sale was contingent upon Degnans agreeing to allow Executive Homes to contract with Mora Bros. for the construction of their home.

The decision to begin construction on the Degnan Home was made on December 12, 1979. Although other contractors had **[696 P.2d 433]** started building homes in Oak Subdivision,

pursuant to the agreement made at the time the lot was purchased, Moras constructed the Degnan home.

Prior to commencing construction, Walter Degnan and Rene Mora discussed the possibility of ground instability in the area. Rene

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Mora stated that Mora Bros. had encountered no such problem while constructing other homes in the immediate vicinity. On the advice of his architect, Degnan considered having the soil tested anyway. However, that idea was ultimately rejected and no such test was performed.

The house was completed and the Degnans moved in during the summer of 1979. Shortly thereafter, problems began to arise. The entire hillside was slowly moving downward, causing the Degnan house severe structural damage. The house is now uninhabitable. The parties agree that the ground under the house is unstable. However, the cause of that instability is unknown.

Degnans filed suit November 30, 1981, against Executive Homes, Inc., Charles Gamble, ICR Realty, Inc., Mora Bros. and the engineering firm of Christian, Spring, Sielbach & Associates. Summary judgment motions were then filed on behalf of all parties.

The motions of Charles Gamble as real estate salesman, ICR Realty and the engineering firm were granted and those parties were dismissed from the suit. Degnans' motion against Executive Homes as builder-vendor on the issue of the breach of its implied warranty of habitability was granted and is not at issue in this appeal.

Degnans' motions against Mora Bros. as builder-vendor on the issues of negligence and the breach of its implied warranty of habitability were denied. The trial court found an issue of material fact to be unresolved--whether or not Mora Bros. was a builder-vendor.

Further discovery was had, after which Degnans filed a second motion for summary judgment against Mora Bros. on the same issues. Mora Bros. was found to be a builder-vendor and the motion for summary judgment on the issue of breach of the implied warranty of habitability was granted March 29, 1984. The motion for summary judgment on the issue of negligence was again denied because material issues of fact remained to be resolved: 1) whether Mora Bros. was negligent in constructing the house; and 2) what exactly caused the house to slide?

On appeal, Mora Bros. raises the following issues:

1. The District Court erred in finding that there was a breach of an implied warranty of habitability.
2. The District Court erred in granting summary judgment against Mora Bros. because there was no privity of contract between plaintiffs and Mora Bros.
3. The District Court erred in finding that Mora Bros. was a builder-vendor.

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4. The District Court erred in granting summary judgment.

#### IMPLIED WARRANTY OF HABITABILITY

The liability of a builder-vendor of a new residence to the first purchaser under an implied warranty of habitability was established by this *Court in Chandler v. Madsen (1982)*, 197 Mont. 234, 642 P.2d 1028. We specifically overruled application of the doctrine of caveat emptor to the builder-vendor/buyer relationship and held "the builder-vendor of a new home impliedly warrants

that the residence is constructed in a workmanlike manner and is suitable for habitation." Chandler, 197 Mont. at 239, 642 P.2d at 1031. The theory behind the implied warranty of habitability is not one of fault or wrongdoing. Rather, it recognizes that when either an innocent builder-vendor or an innocent buyer will suffer, the builder-vendor, as the one in the better position to have prevented the harm, shall be liable to the buyer for that harm. Chandler, 197 Mont. at 240, 642 P.2d at 1032.

The implied warranty of habitability applies to both structural defects and defects [696 P.2d 434] in the land underlying the residence. It does not apply where the defect in the land is not enhanced by construction of a house. Chandler, 197 Mont. at 239-240, 642 P.2d at 1031, citing *Beri, Inc. v. Salishan Properties, Inc.* (Ore.1978), 580 P.2d 173. In *Beri*, the defect was ocean-caused erosion of the soil beneath a condominium. The erosion would have occurred whether the condominium was built or not.

In Chandler, one of the defects was the moisture-sensitive soil on which the residence was constructed. Another defect was the "pooling" of water in a depression created by the builder, Robert Madsen. The "pooling" would not have occurred had construction not taken place. We, therefore, held Madsen to be liable to Chandler under the implied warranty of habitability. Chandler, 197 Mont. at 240, 642 P.2d at 1031-1032.

In the fact situation now before us, the defect is the unstable ground beneath the house. The cause of the instability is unknown. Further, there is no evidence the ground would have slid downhill had Degnan's house not been constructed. The builder-vendor is in a better position than is the buyer to determine the effect, if any, of constructing a house on unstable ground. The rationale behind the implied warranty of habitability requires the builder-vendor to bear the burden of producing such evidence.

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In *Loch Hill Const. Co., Inc. v. Fricke* (1979), 284 Md. 708, 399 A.2d 883, the Maryland Court of Appeals placed the burden of proof regarding whether the defect was furthered by construction on the petitioner, builder-vendor:

"Yet, unless the vendor can satisfy the trier of fact by probative evidence that the absence of a proper water supply following the transfer of title resulted solely from acts of another for which the vendor was not responsible or was caused by a phenomena of such suddenness and magnitude that it can properly be classified as an 'act of God' (i.e., earthquake), establishing such a water shortage entitles the purchaser to a verdict for the damages he suffered." Fricke, 399 A.2d at 890.

That court went on to hold, "[w]ithout any such evidence, petitioner must bear liability for the well's failure." Fricke, 399 A.2d at 890. We do not agree that the burden of proof should actually shift to defendant. However, we do hold that, once plaintiff showed that the house moved, the burden of coming forward with an explanation shifted to defendant. The defendant failed to provide an explanation, so no genuine issue of fact was created.

Mora Bros. contends that since Degnans knew the land under the rims might be unstable, they are precluded recovery under the implied warranty of habitability. This contention is without merit. The doctrine is not premised upon "knowledge." Rather, it is based on the premise that a builder-vendor is in the better position to have prevented the problem. Chandler, 197 Mont. at 239,

642 P.2d at 1032.

#### PRIVITY OF CONTRACT

Next, Mora Bros. contends the District Court erred in finding a contract existed between Degnans and Mora Bros. Since there was no privity of contract, Mora Bros. argues, Degnans are precluded from recovering under the theory of implied warranty of habitability.

We agree with the contention that no contract existed between Degnans and Mora Bros. Rene Mora stated at p. 48 of his deposition that Mora Bros. never had a contract with Degnans. Degnans have neither disputed that contention nor produced such a contract. Degnans in fact contracted with Executive Homes. However, this error in the District Court's findings is harmless as the implied warranty

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of habitability does not depend upon a contract for its existence.

The implied warranty places on the builder-vendor liability for defects in a structure which make it uninhabitable. *Gay v. Cornwall* (1972), 6 Wash.App. 595, 494 P.2d 1371, 1373-1374. The theory is derived from that of a seller's warranty.

**[696 P.2d 435]** "The seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law. In its inception the liability was based on tort.... Thereafter the warranty gradually came to be regarded as a term of the contract of sale, express or implied, for which the normal remedy is a contract action. But the obligation is imposed upon the seller, not because he has assumed it voluntarily, but because the law attaches such consequences to his conduct irrespective of any agreement; and in many cases, at least, to hold that a warranty 'is a contract is to speak the language of pure fiction.'" (emphasis supplied) (citations omitted) W. Prosser, *Law of Torts*, § 95, pp. 634-635 (4th Ed.1982).

The duty to present a buyer with a habitable house is a legal duty placed on the builder-vendor of that house. A breach of a legal duty is a tort. *Gates v. Life of Montana Insurance Co.* (1983), 668 P.2d 213, 40 St.Rep. 1287. Torts do not require privity of contract.

#### BUILDER-VENDOR

Mora Bros. next contends the District Court erred in finding it to be a builder-vendor because: 1) the Degnans contracted with Executive Homes for the lot and construction work; and 2) the Degnans paid Executive Homes, which then paid Mora Bros. If Mora Bros. is not a builder-vendor, it is not liable to the Degnans under an implied warranty of habitability.

We cannot agree with such a technical application of the term builder-vendor. As stated in the previous section of this opinion, privity of contract is irrelevant to the implied warranty of habitability. Therefore, the fact Degnans contracted with Executive Homes rather than Mora Bros. does not affect the finding that Mora Bros. is a builder-vendor. Mora Bros. built the house for Degnans. Degnans paid to have the house built and Mora Bros. ultimately received one hundred percent of that money, less its expenses. The fact the money was paid to Mora Bros. through Executive Homes is a mere technicality, especially in light of the interrelationship between Moras and Executive Homes.

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We affirm the District Court's finding that Mora Bros. was a builder-vendor.

## SUMMARY JUDGMENT

Finally, Mora Bros. contends the District Court erred in granting summary judgment as material facts remain in dispute. Those facts are:

1. Whether Mora Bros. was involved in developing the subdivision?
2. Whether Degnans were in fact required to have Mora Bros. build their house?
3. Whether Mora Bros. was involved in the sale of the lot to Degnans.
4. Whether there was a contract between Mora Bros. and Degnans?
5. Whether Mora Bros. received a profit from the sale of the lot to Degnans?

Our resolution of this matter renders these issues immaterial. Question of fact number four was discussed and resolved in our discussion of the privity issue. The other disputed facts relate to Mora Bros.'s contention that it is not a builder-vendor. Mora Bros. was found to be a builder-vendor because it built Degnan's house pursuant to a series of agreements between Executive Homes, Mora Bros. and Degnans, not because of any connection between Mora Bros. and the sale of the lot by Executive Homes to Degnans.

The order of the District Court finding Mora Bros. liable to Degnans under the theory of implied warranty of habitability is affirmed.

TURNAGE, C.J., and HARRISON, WEBER, SHEEHY, GULBRANDSON and HUNT, JJ., concur.

# Appendix C

346 A.2d 210 (Vt. 1975), 196-73, Bolkum v. Staab

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**346 A.2d 210 (Vt. 1975)**

**133 Vt. 467**

**Forrest W. BOLKUM and Velma E. Bolkum**

**v.**

**John J. STAAB and Cecile D. Staab.**

**No. 196-73.**

**Supreme Court of Vermont.**

**October 7, 1975**

Richard E. Davis Assoc., Inc., Barre, for plaintiff.

John A. Burgess Assoc., Ltd., Montpelier, for defendants.

Before [133 Vt. 467] BARNEY, C. J., and SMITH, DALEY, LARROW and BILLINGS, JJ.

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[133 Vt. 468] LARROW, Justice.

The Washington County (now Superior) Court, after trial by court, entered findings of fact and a judgment order awarding plaintiffs damages for defective construction items in a dwelling house sold them by the defendants. Both parties have appealed.

The defendants claim, in substance, that the implied warranty against structural defects in the sale of a newly constructed house by the builder-vendor, first accepted by the Court as the current concept in *Rothberg v. Olenik*, 128 Vt. 295, 262 A.2d 461 (1970), should not apply where the seller is not the builder and does not 'control' the builder. They also claim that the trial court erred in using cost of repair as a measure of damage. Plaintiffs claim the damages to be inadequate,[133 Vt. 469] because a proper item of inspection cost was excluded, and because the judgment entered is at variance with the findings.

In *Rothberg*, the court reviewed at length the case law relating to the ancient doctrine of caveat emptor and the modern concept of implied warranty against structural defects, based upon analogy to the long accepted implied warranty of fitness in sales of personal property. It decided that there was no rational doctrinal basis for differentiating between the sale of a newly constructed house by the builder-vendor and the sale of any other manufactured product. *Rothberg*, supra, 128 Vt. at 305, 262 A.2d 461. Defendants concede the 'salutary effect' of the *Rothberg* holding, but claim it loses that effect when applied to them, because they did not construct the house themselves and the court found they exercised 'no real control' over the construction done by a builder with whom they contracted.

We are somewhat at a loss to understand what the trial court meant by 'real control', a phrase it did not explain. We take it to be equated to actual control, as exercised by master over servant, rather than the general control exercised by an owner over an independent contractor. Whatever may have been intended, it was a not unusual situation presented by the findings. The defendants Staab owned a large tract of land, set out into building lots. Retaining title, they contracted with a builder to build a house on one of the lots, showed it to plaintiffs when it was almost completed, with a check list of items the Staabs agreed to complete. This was done, and the deed passed,

after plaintiff had moved in. The structural defects complained of developed thereafter. Defendants now assert that they should not be encompassed by the Rothberg holding because that holding was based on cases involving 'general builders', which they are not. They cite no cases upholding this claimed distinction.

We do not here reach the case where an individual builds a house by himself or a contractor for his own use and later decides to sell it. In Rothberg we adopted by analogy the implied warranty of merchantability in the sale of goods where 'the seller is a merchant with respect to goods of that kind.' 9A V.S.A. § 2-314(1). This would, arguably, exclude the casual sale made by a seller not in the business of selling [133 Vt. 470] houses, as it would a sale by one not in the business of selling goods. But the facts presented here are vastly different. Defendants caused the house in question to be built expressly for resale and as part of a development plan. This is the 'business' they were in, and it is from the business activity that the implied warranty arises. The sale was commercial in nature, not casual or personal. That the defendants did not personally drive the nails has no effect on the principle involved, any more than it does in the case of chattels. The implied warranty arises from the business of selling, rather than the business of manufacture. *Humber v. Morton*, 426 S.W.2d 554 (Tex.1968); *Smith v. Old Warson Development Co.*, 479 S.W.2d 795 (Mo.1972). Defendants here are not 'intermediate sellers' as they claim; they owned the lot, caused the house to be built expressly for sale, and sold it to the plaintiffs. Even if they were 'intermediate' it

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does not automatically follow that they would be immune from liability. Cf. *Digregorio v. Champlain Valley Fruit Co.*, 127 Vt. 562, 255 A.2d 183 (1969). The trial court was correct in holding defendants upon their implied warranty.

Defendants claim error by the trial court in using reasonable cost of repairs as a measure of the damage sustained by plaintiffs from the structural defects found. They assert the true measure is the difference in market value between the house as built and as it should have been built. This is, as contended, the general rule of damage for breach of warranty. But the argument overlooks what is probably the usual situation, that of remediable defects, where the cost of such remedy, plus in some instances consequential damages, in fact establishes the difference in market value. The test is absolute where repairs cannot remedy the defects warranted against, as where roosters are delivered in lieu of pullets. *Preston v. Montgomery Ward*, 112 Vt. 295, 23 A.2d 534 (1942).

The two rules to which the defendant refers are not necessarily mutually exclusive. Indeed, their application may produce the same result.

If the injury is temporary in the sense that restoration can cure the harm, the reasonable cost of repair may serve the need and provide adequate and fair compensation. [133 Vt. 471] If the damage is permanent and beyond full repair, the variance in value of the property before and after the injury often affords the better guide to a just award. It all depends upon the character of the property and the nature and extent of the injury. (Citations omitted).

*Bean v. Sears, Roebuck & Co.*, 129 Vt. 278, 282, 276 A.2d 613, 616 (1971). No claim is here made that the defects in question were not curable by repair or replacement; an examination by

the record shows that this is what was in fact done. This being so, the reasonable expense of such remedial action is highly probative of the difference in value between the house as warranted and the house as built. *Berlin Development Corp. v. Vermont Structural Steel Corp.*, 127 Vt. 367, 250 A.2d 189 (1968); *Sheldon v. Northeast Developers, Inc.*, 127 Vt. 15, 238 A.2d 775 (1968). No error appears in the general use by the trial court of reasonable remedial expense as a measure of recovery.

Plaintiffs' claims of error with respect to the amounts of damage awarded, however, have more substance. They claim that the court erred in its mathematical calculations, on its own findings, and that it excluded without cause any compensation to plaintiffs for the reasonable cost of expert inspection and advice, completely aside from expert testimony and trial preparation. Both claims appear to have merit.

These claims are tersely covered in Finding No. 10 of the trial court:

10. The Court further finds that the cost of repairs amounted to \$5,562.35 being the estimate submitted by the expert of the defendant. The Court does not find that Mr. Gratiot's bill \$1,410.71 should be included as a charge against the defendants.

Without further clarification, judgment was entered in the first amount, plus taxable costs, and without any interest, despite the fact that the liability attached more than six years before judgment.

Defendants do not brief the mathematical inaccuracy of the judgment, and an examination of the record shows an obvious miscalculation. By stipulation, it was agreed that defendants' [133 Vt. 472] expert witness would have testified that plaintiffs' bills were inflated by 10%. Without going into all details, even applying this formula, as the court indicated it desired to do, yields a result almost one thousand dollars more than the judgment. The cause must be remanded for reassessment of damages.

In such reassessment, apart from the reasonable costs of repair to be found by the court, appropriate attention should also be given to the element of delay in recovery. And, specific findings should be made

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as to the fee paid plaintiffs' professional consultant, retained to identify the structural defects and make recommendations for their remedy. Such matters are quite obviously beyond the knowledge of the average person, and the retaining of an engineer for advice would not seem an unwarranted expense, at least without more than appears from the findings as made. Indeed, under statutory provisions to which we have resorted by analogy in establishing liability for breach of implied warranty, '(i)ncidental damages resulting from the seller's breach include expenses reasonably incurred in inspection . . . .' 9A V.S.A. § 2-715(1). To the extent that such charges are found to be reasonable, and in the absence of any finding that they were not necessarily or reasonably incurred, it would appear that these expert charges not incurred for trial preparation and testimony are a proper item of damage.

The entry of judgment for the plaintiffs is affirmed except as to damages, and the cause is remanded for hearing on that question, consistent with the views herein expressed, plaintiffs to recover their costs in this Court.

# Appendix D

327 A.2d 831 (R.I. 1974), 73-172, Casavant v. Campopiano

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**327 A.2d 831 (R.I. 1974)**

**114 R.I. 24**

**Donat A. CASAVANT et ux.**

**v.**

**Hazel CAMPOPIANO et al. and Recamp Enterprises, Inc.**

**No. 73-172-Appeal.**

**Supreme Court of Rhode Island.**

**November 13, 1974.**

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[114 R.I. 29] Almonte, Lisa & Pisano, Paul J. Pisano, Providence, for plaintiffs.

Higgins, Cavanagh & Cooney, Gerald C. DeMaria, Providence, for defendants.

OPINION

[114 R.I. 25] ROBERTS, Chief Justice.

This civil action was brought by the plaintiffs, Donat A. and Frances L. Casavant, against Hazel and Remo Campopiano and Recamp Enterprises, Inc. <sup>[1]</sup> to recover damages incurred by the defendants' alleged breach of an implied warranty of habitability. The case was tried to a justice of the Superior Court sitting without a jury, who denied a motion to dismiss the suit as against Hazel Campopiano, the wife of Remo Campopiano, and found that by reason of the defendants' breach of warranty the plaintiffs had been damaged to the extent of \$4,500. From that judgment the defendants are prosecuting an appeal in this court.

It is not disputed that defendant Remo Campopiano had been engaged in the business of building residential structures on speculation for approximately 20 years. The construction of these homes was undertaken without any specific prospective purchasers being in mind. It further appears from the evidence, that, upon completion of the basic structure of the house here involved, defendants rented it to a married couple who intended to purchase the house as soon as they were able to secure the necessary financing. Sometime within a year after taking possession, the tenants vacated the premises, and shortly thereafter defendants sold the house to plaintiffs, the deed thereto being dated October 24, 1968. In April of 1969 plaintiffs discovered that the roof of the house was sagging visibly. An inspection disclosed that the roof construction was defective and that such condition constituted a threat to [114 R.I. 26] the safety of the occupants. The trial justice found that the value of the house in October of 1968 was \$13,000.

The defendants concede that in *Padula v. J. J. Deb-Cin Homes, Inc.*, 111 R.I. 29, 298 A.2d 529 (1973), the court established in this state the rule that a builder-vendor impliedly warrants to a buyer that he constructed the building to be transferred with reasonably good workmanship and that the dwelling is fit for human habitation. They argue, however, that the rule laid down in *Padula* has no

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application in the instant case. In support of this position, they contend that because of the intervening occupancy by others prior to the sale to plaintiffs, the dwelling was at the time of

transfer not a new but a used home, the sale of which is not within the purview of the Padula rule.

We cannot agree. In the first place, the thrust of the Padula rule was to afford protection to home buyers from the overreaching of knowledgeable builder-vendors. That there had been an intervening tenancy should not, standing alone, deprive the buyer of that protection. The defendant, Mr. Campopiano, was in a much stronger bargaining position than plaintiff, Mr. Casavant. The former was an experienced developer who had built and sold many homes. Clearly, Mr. Campopiano, who built the house, was in a far better position to determine the condition of the structure of the roof than was Mr. Casavant. The latter, with a ninth-grade education, had purchased a house only once before the instant transaction. The evidence discloses that there was no access to the open space beneath the roof so that if plaintiffs had been sufficiently knowledgeable to evaluate effectively the condition thereof, the lack of access to make such an inspection would have rendered such expertise of no assistance in these circumstances.

Secondly, defendants' argument, as we understand it, [114 R.I. 27] is that because the house had been occupied prior to the sale to plaintiffs, the warranty should not be implied in the subsequent purchaser's favor because the structure is not a new house as contemplated in Padula. With this we do not agree. This argument might have merit if the intervening occupancy appeared to be causally connected with the defective condition of the roof or was of such extended duration as to make an application of the warranties unreasonable. In the absence of such findings, the court will assume that the builder-vendor was responsible for the existence of the defect and that the structure was a 'new' house as contemplated in Padula.

Thirdly, defendants retained title to the premises for the purpose of selling the house. It is clear that the intention of the builder-vendor was to sell as soon as an advantageous offer was made and that Mr. Campopiano did not intend to use the dwelling as a personal residence or as rental property. Compelling public policy discussed in Padula favors implying such warranties in appropriate cases, and this court will not allow that policy to be defeated solely because of an intervening tenancy, particularly where the builder-vendor created such intervening tenancy for the purpose of promoting the sale of the property. In short, we are of the opinion that the intervening tenancy in this case was merely a device to promote a sale by the builder-vendor and, thus, does not require us to hold that the case is outside the purview of the rule laid down in Padula.

The defendants contend further that the following clause in the purchase and sale agreement constituted an effective exclusion of the implied warranties of reasonable workmanship and habitability:

'Full possession of the said premises, free of all tenants is to be delivered to the party of the second part at the time of the delivery of the deed, the said [114 R.I. 28] premises to be then in the same condition in which they now are, reasonable use and wear of the buildings thereon, and damage by fire or other unavoidable casualty excepted.' (emphasis added)

To effectuate the policies underlying the implied warranties of habitability and reasonable workmanship, the court will construe exclusionary provisions of doubtful meaning strictly against those parties raising such provisions as defenses. The defendants contend that, by reason of

plaintiffs' agreeing to taking the premises 'in the same condition in which they now are,' plaintiffs agreed to accept them 'as is' or

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'with all faults.' Courts have been reluctant to construe 'acceptance in present condition' clauses as providing sufficient grounds for exclusion of implied warranties with respect to the sale of personalty unless the language is used with specific reference to its effect on warranties.

*Compare Hull-Dobbs, Inc. v. Mallicoat*, 57 Tenn.App. 100, 415 S.W.2d 344 (1966), *First Nat'l Bank of Elgin v. Husted*, 57 Ill.App.2d 227, 205 N.E.2d 780 (1965), with *Tibbitts v. Openshaw*, 18 Utah 2d 442, 425 P.2d 160 (1967). The language in the instant case does not meet this standard of specificity of exclusion. For all these reasons, the court holds that plaintiffs' signing the agreement did not constitute a waiver of their rights to the protection of implied warranties.

The defendants argue that plaintiffs' inspection of the premises put plaintiffs on notice of the true condition of the house. It should be noted that plaintiffs had no access to the attic and, thus, even if they had the expertise to determine the quality of construction, they could not have done so. The defendants' argument here is wholly illusory.

General Laws 1956 (1969 Reenactment) § 9-21-10 does not govern cases other than those sounding in tort. *Isserlis v. Director of Pub. Works*, 111 R.I. 164, 300 A.2d 273 (1973).

Consequently, the trial justice properly refused to apply this provision in awarding interest at 6% from the date of the deed. Thus, we reject the argument of both parties that the statute to which they allude controls the assessment of interest in this case.

The defendants contend that the trial court erred in denying their motion to dismiss the suit as against Mrs. Campopiano. The record indicates that Mrs. Campopiano was a hairdresser by occupation and took no part in her husband's business management or dealings. Her only connection with this case was the signing of the deed and the holding with her husband of a joint checking account from which Mr. Campopiano drew checks to pay subcontractors. This evidence is insufficient to establish vicarious liability through either a partnership or agency theory. Thus, it is our opinion that the trial justice erred in denying Mrs. Campopiano's motion to dismiss the plaintiffs' suit against her.

The defendant Hazel Campopiano's appeal is sustained, and the order of the trial justice denying her motion to dismiss from which she appealed is reversed; the defendant Remo Campopiano's appeal is denied and dismissed, the judgment from which he appealed is sustained, and the cases are remanded to the Superior Court for further proceedings.

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Notes:

[1] The action against Recamp Enterprises, Inc. was dismissed at trial.  
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