Florida Law Review

Volume 25 | Issue 3 Article 12

March 1973

Implied Warranties in Housing: Let the Buyer Rejoice

Louisa Smith-Adam

Clearly the court in the instant case had little choice between approaches to the treatment problem in Alabama mental institutions. Given the low budget and inadequate facilities of the institutions in question, the sheer number of patients with cause to bring suit on their right to treatment made a subjective approach to each case impracticable, if not virtually impossible. The court reacted in the only way possible to a situation created by legislative abdication of responsibility.

TERESA T. MILTON

IMPLIED WARRANTIES IN HOUSING: LET THE BUYER REJOICE

Gable v. Silver, 258 So. 2d 11 (4th D.C.A. Fla.), *aff'd*, 264 So. 2d 418 (Fla. 1972)

Plaintiff condominium apartment owners attempted to recover in a suit against the condominium builder-seller alleging that an air conditioner for the entire complex was inherently faulty. The builder-seller had requested 555 dollars from each apartment owner to repair the system. Plaintiffs declined, had the system repaired by an engineering company, and sued the defendant to recover the cost of repairs. The trial court held for plaintiffs. On appeal, the Fourth District Court of Appeal affirmed and HELD, that implied warranties of fitness and merchantibility extend to the purchase of new condominiums from builders.[1]

1. 258 So. 2d 11 (4th D.C.A. Fla. 1972). The district court certified the question to the supreme court according to FLA. APP. R. 4.5 (c) (6); that court *affirmed per curiam*. Gable v. Silver, 264 So. 2d 418 (Fla. 1972).

Although the defense of *caveat emptor* has been effectively eliminated in the chattels market,[2] it has lingered on for a later, more dramatic death with respect to real property.[3] In viewing the built-in air conditioning system as realty[4] and by upholding the claim of implied warranty, the instant court joins a growing number of courts[5] and the majority of commentators[6] in rejecting *caveat emptor* as a real property defense.

In England, common law courts applied *caveat emptor* to real property transactions,[7] and the doctrine originally applied in most American jurisdictions. The American courts that adhered to the doctrine[8] have been loath to make "legislative" changes by abandoning it.[9] However, mass produced housing[10] and impersonal relationships between buyers and sellers[11] have created a market totally unsuited to the doctrine.[12]

Courts have recognized the inequities of denying relief to a purchaser who may have invested his life savings in a home[13] that subsequently proved

---

2. *See, e.g.,* Entron, Inc. v. General Cablevision, 435 F.2d 995 (5th Cir. 1970); Sperry Rand Corp. v. Industrial Supply Corp., 337 F.2d 363 (5th Cir. 1964); Manheim v. Ford Motor Co., 201 So. 2d 440 (Fla. 1967); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1961).

3. 258 So. 2d 11 (4th D.C.A. Fla. 1972); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Brief for Appellee at 6, Gable v. Silver, 258 So. 2d 11 (4th D.C.A. Fla. 1972).

4. "Air conditioners can either be fixtures, if they are removable, or realty, if they are fixed . . . . [T]he instant system was attached and immovable . . . . [W]e conclude the instant air conditioning system was realty." 258 So. 2d at 14.

5. Comment, *Implied Warranties in the Sale of New Homes,* 23 U. FLA. L. REV. 626 (1971).

6. 7 S. WILLISTON, CONTRACTS §926A (3d ed. 1963); Bearman, Caveat Emptor *in Sales of Realty — Recent Assaults upon the Rule,* 14 VAND. L. REV. 541 (1961) [hereinafter cited as Bearman].

7. 4 S. WILLISTON, CONTRACTS §926 (rev. ed. 1936); Note, *Warranty of Quality: A Comparative Survey,* 14 TUL. L. REV. 327 (1940).

8. Druid Homes, Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961); Levy v. C. Young Constr. Co., Inc., 46 N.J. Super. 293, 134 A.2d 717 (1957), (New Jersey has now accepted implied warranty, *see* Schipper v. Leavitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959).

9. Allen v. Wilkinson, 250 Md. 395, 243 A.2d 515 (1968); Brief for Appellant at 6, Gable v. Silver, 258 So. 2d 11 (4th D.C.A. Fla. 1972). *But see* Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970), wherein it is stated: "[W]e have been presented with the time-worn, threadbare argument that a court is legislating whenever it modifies Common Law rules to achieve justice in the light of modern economics and technological advances. That same argument was doubtless made in a famous case that parallels this one: *MacPherson v. Buick Motor Co.* . . . . Yet the doctrine of the MacPherson case is now accepted as commonplace throughout the nation. We have no doubt that the modification of the rule of *caveat emptor* that we are now considering will be accepted with like unanimity within a few years." *Id.* at 1099, 449 S.W.2d at 925.

10. *See* Bearman, *supra* note 6, at 542. By 1959 annual construction had reached 18 billion homes, while in 1945 it had only been 2 billion. The huge demand led to hurried construction and skimping on materials.

11. *Id.*

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

13. Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966).

uninhabitable or woefully inadequate as a dwelling.[14] To avoid such harshness, courts have resorted to other legal theories: express warranty, marketable title, fraud, and negligence to circumvent *caveat emptor*.[15]

The first breach in the fortress occurred in England. A sale of a house bought while under construction was considered to contain an implied warranty as to proper workmanship.[16] The opinion was based upon the theory that the builder who sells a house while building it purports to be an expert in construction and therefore impliedly warrants the fitness of his product.[17] Many American courts welcomed such an idea as a further inroad upon *caveat emptor*.[18] For instance, in *Weck v. A:M Sunrise Construction Co.* a purchaser-plaintiff was allowed to rely upon implied warranty when he purchased under a contract for the sale of a residence only seventy-five per cent complete.[19] The facts in the instant case could have supported a similar holding[20] but the court wisely chose not to so restrict its decision, since the "while under construction" dichotomy has proved meaningless.[21]

Subsequent to *Weck* a court in *Carpenter v. Donohoe* allowed recovery on implied warranty in a sale by a builder-vendor to the purchaser of a completed home.[22] The *Carpenter* court and others placed primary importance upon the reliance fostered by the seller and the reasonable expectations of the purchaser.[23] The question is no longer one of timing, but rather one of rela-

---

14. *See, e.g.*, Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969). Implied warranty was found to apply to a leasehold when premises were infested with rats.

15. Bearman, *supra* note 6, at 554-56. Louisiana seems singular in having a legislative answer to the problem—a redhibitive statute, the history of which dates back to 1641. The pertinent article reads: "*Redhibition* is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice." LA. CIV. CODE ANN. art. 2520 (West 1952). The statute applies to sales of realty as well as to sales of personalty. *See* Rodriguez v. Hudson, 79 So. 2d 578 (La. 1955), in which faulty plumbing was to be repaired by vendor in accordance with such statute.

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

17. *Id.*

18. Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Vanderschrier v. Aaron, 103 Ohio App. 340, 184 N.E.2d 728 (1957); Hoye v. Century Builders, Inc., 32 Wash. 2d 830, 329 P.2d 474 (1958).

19. 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962).

20. Note, *Florida Condominiums—Developer Abuses and Securities Law Implications Create a Need for a State Regulatory Agency*, 25 U. FLA L. REV. 350 (1973). Most condominium apartment owners purchase their apartments from models before construction is completed.

21. Carpenter v. Donohoe, 154 Colo. 78, 83, 388 P.2d 399, 402 (1964). "That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it." Note, *Implied Warranties in the Sale of New Houses*, 26 U. PITT. L. REV. 862 (1965).

22. 154 Colo. 78, 388 P.2d 399 (1964).

23. *E.g.*, Schipper v. Leavitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

tionships between buyer and seller.[24] Discarding the time of sale distinction has led to more complete acceptance of implied warranty.[25]

Caveat emptor has survived in the past upon the no longer viable theory of equal footing between purchaser and seller.[26] However, in *Bethlahmy v. Bechtel*[27] such a theory was succinctly dismissed. The court said it was inequitable to presume equal footing between the average home purchaser and a "builder who is daily engaged in the business of building and selling houses."[28] Viewing trade relations realistically, the purchaser of a new residence is obviously not on such footing with a builder-vendor.[29] To the contrary, the purchaser places great reliance on the builder-vendor.[30]

Furthermore, in *Schipper v. Levitt & Sons, Inc.*[31] the court stated that the builder-vendor is much more capable of absorbing costs.[32] The need for such realism was endorsed by the instant court.[33] Even if the builder-vendor is unaware of any errors, he is still in a better position to know than the purchaser.[34] Consequently, even when inspection will not reveal a fault the remedy of implied warranty should be available.[35] A builder-vendor is now considered liable under implied warranty in the majority of states that have considered the problem.[36]

Although Florida has not dealt extensively with implied warranties for real property,[37] there have been hints of judicial consideration. For example, in *Sorkin v. Rovin*[38] plaintiff brought an action for implied warranty con-

---

24. *E.g.*, Doran v. Millan Dev. Co., 159 Cal. App. 2d 322, 323 P.2d 792 (1st Dist. 1958); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967).

25. Jones v. Gatewood, 381 P.2d 158 (Okla. 1963). *But see* Perry v. Sharon Dev. Co., 411 All E.R. 390 [1937].

26. Wawak v. Stewart, 247 Ark. 1093, 1096, 449 S.W.2d 922, 924 (1970).

27. 415 P.2d 698, 710 (Idaho 1966).

28. *Id.*

29. *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

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

31. 44 N.J. 70, 207 A.2d 314 (1965).

32. *Id.* at 91, 207 A.2d at 326.

33. 248 So. 2d at 15, *quoting* Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968): "The *caveat emptor* rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices."

34. House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969).

35. *Id.* at 435, 457 P.2d at 204.

36. Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1963); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (Litchfield County Super. Ct. 1970); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Theis v. Heuer, Ind. App. , 270 N.E.2d 764 (1971); Crawley v. Terhune, 437 S.W.2d 743 (Ct. App. Ky. 1969); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970); Rutledge v. Dodenhoff, 254 S.C. 407, 176 S.E.2d 792 (1970); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1963); Short v. Mitchell, 454 S.W.2d 285 (Tex. Civ. App. 1970); Rothberg v. Olenik, Vt. , 262 A.2d 461 (1970). *But see* Livingston v. Bedford, 284 Ala. 323, 224 So. 2d 873 (1969); Dooley v. Berkner, 113 Ga. App. 162, 147 S.E.2d 685 (1966); Allen v. Wilkinson, 250 Md. 395, 243 A.2d 515 (Ct. App. Md. 1968).

37. Comment, *supra* note 5, at 630.

38. 227 So. 2d 492 (3d D.C.A. Fla. 1969).

cerning a defective seawall. The case was dismissed for procedural failures, but the court indicated it would have accepted a properly pleaded cause of action under implied warranty. Florida has also expressed a policy of protection for the novice home buyer. Allusion to such a policy was made by the court in *Ramel v. Chasebrook Construction Co.*[39] However, recovery was based on deceit and the precedent is, therefore, important only for its result.[40]

The instant opinion presents an interesting question as to the extent of liability imposed. It has been said that overly extensive liability to builder-vendors would be avoided[41] because the Uniform Commercial Code (UCC) does not apply to used goods,[42] and first purchasers alone would have a cause of action.[43] The present court specifically exempted the instant situation from the UCC provision[44] under the theory that the builder-vendor was not a merchant nor was the air conditioner "goods," but realty.[45] In carefully worded dicta, which extends beyond most authority,[46] the court speculated upon the possibility that subsequent condominium apartment owners may have standing to take action against the builder-vendor.[47] Such dicta is particularly timely. A multiple-family building may contain new owners and old owners, and all should have equal standing to sue for a breach of implied warranty that harms every apartment owner. Liability would not be crushing: the test is reasonableness, not perfection.[48]

The instant case is a dramatic decision placing Florida within the ranks of those modern courts that eschew *caveat emptor* with respect to real property. Florida has placed on the implied warranty highway a particularly modern vehicle: the condominium apartment, while appearing to endorse the view that implied warranty would also apply to the builder-vendors of new homes.[49]

---

39. 135 So. 2d 876 (2d D.C.A. Fla. 1961).

40. 258 So. 2d at 17.

41. Note, *Implied Warranties in the Sale of New Houses,* 25 U. PITT. L. REV. 862, 866 (1965).

42. UNIFORM COMMERCIAL CODE §2-314. "[A] warranty that the goods shall be merchantible is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." FLA. STAT. §672.314 (1971).

43. Bearman, *supra* note 6, at 572.

44. 258 So. 2d at 17.

45. FLA. STAT. §692.2-104 (1969): "'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved." FLA. STAT. §692.2-105 (1969): "'Goods' means all things . . . which are movable at the time of identification to the contract for sale."

46. Bearman, *supra* note 6, at 631.

47. 258 So. 2d at 18. "We recognize that liability must have an end, but question the creation of any artificial limits of either time or remoteness to the original purchaser."

48. Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 68, 154 N.W.2d 803, 809 (1967).

49. 258 So. 2d at 18. "The instant case deals with the first purchasers of condominium homes. . . . We . . . realize . . . our facts limit our decision to the *sale of new homes* or condominiums. . . . Thus, we flatly declare that the implied warranties of fitness and merchantibility extend to the purchase of new condominiums in Florida from builders." (Emphasis added.).