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Property - Implied Warranties - Partial Death of Caveat Emptor in Wyoming - Tavares v. Horstman

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PROPERTY—IMPLIED WARRANTIES—Partial Death of Caveat Emptor in Wyoming. Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975).

The subject of this note, *Tavares v. Horstman*,[1] is another of the recent nationwide decisions doing away with the ancient doctrine of *caveat emptor* in the sale of new residential housing. The defendant, Tavares, a land developer and builder, sold the plaintiffs a tract of land. The defendant then built a house on the land for the plaintiffs under an oral contract. This transaction carried with it no express warranties. Less than a year later the septic tank system backed sewage into the plantiff's basement. The defendant was informed of this situation, but his attempts to fix the septic system were ineffective. The plaintiffs hired an experienced septic contractor to rebuild the septic system. The contractor determined that the system used by the defendant was not adequate to serve a home the size of plaintiff's. Plaintiffs sued Tavares for damages.[2]

The Wyoming Supreme Court was presented with the choice of adopting a rule of implied warranty or adhering to the doctrine of *caveat emptor*. The court held the rule of *caveat emptor* does not apply to the sale of new residential housing, and that there was an implied warranty running from vendor-builder to vendee. Furthemrome, the court held damages were recoverable for negligent design and construction.[3]

CAVEAT EMPTOR—A TREND TOWARD ABROGATION

The common law rule of *caveat emptor* has long governed the sale of a dwelling.[4] This concept presupposed an arms-length transaction with both parties standing in an equal bargaining position. A buyer was presumed to have had an opportunity to inspect a dwelling and therefore know of existing defects. The vendor was not liable for defects

1. *Tavares* v. Horstman, 542 P.2d 1275 (Wyo. 1975).
2. *Id.* at 1277.
3. *Id.* at 1276.
4. Hamilton, *The Ancient Maxim—Caveat Emptor*, 40 YALE L.J. 1133 (1931); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961). Both of these articles give an excellent history of the *caveat emptor* doctrine.

found after the sale. After World War II, the construction industry took on an assembly line countenance. The equal bargaining positions of the parties disappeared, negating one of the underlying premises of *caveat emptor*. The buyer was presented with a take-it or leave-it proposition with little or no opportunity to adequately inspect the dwelling. This inability to inspect was caused by the concealed nature of much of the new construction, as well as the complexity of the heating, plumbing, and wiring systems. While it may have been evident to the buyer that he was no longer dealing with an equal, but instead, doing business with a construction company, the courts still refused to abandon the *caveat emptor* doctrine. In one such Ohio case, *Shapiro v. Kornicks*,[5] the plaintiff complained of a leaky basement, crumbling front steps, cracked door, and other defects. The court, feeling bound by prior decisions, rejected an implied warranty. Decisions like *Shapiro* were numerous,[6] and as recently as 1972 an Ohio court continued to support *caveat emptor*.[7] One court's argument for the adherence to the doctrine stated:

> Were plaintiffs successful under the facts presented to us, an element of uncertainty would pervade the entire real estate field. Real estate transactions would become chaotic if vendors were subjected to liability after they had parted with ownership and control of the premises. . . . The rule which we impose in the present action works no harshness on the purchasers of real estate. Plaintiffs had an opportunity to protect themselves by extracting warranties or guarantees from the defendant. . . .[8]

In the last 20 years, some courts have recognized that the doctrine of *caveat emptor* in the sale of new housing has become outmoded. Equal bargaining power no longer exists and the vendee is at the mercy of the builder-vendor. As a result, courts began forming remedies to help the vendee and to equalize the positions of the parties. Foremost among

5. Shapiro v. Kornicks, 103 Ohio App. 49, 124 N.E.2d 175, 177 (1955).
6. Dennison v. Harden, 29 Wash. 2d 243, 186 P.2d 908, 912 (1947); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959). *See* Annot., 25 A.L.R.3d 383, 419 (1969), for a further list of cases adhering to the *caveat emptor* doctrine.
7. Benson v. Dorger, 33 Ohio App. 2d 110, 292 N.E.2d 919, 922 (1972).
8. Levy v. C. Young Constr. Co., 26 N.J. 330, 139 A.2d 738, 740 (1958).

these remedies are (1) the implied warranty of habitability[9] and (2) negligence in the construction of the house.[10] The implied warranty theory imposes a contract between buyer and seller that the dwelling is built in a workmanlike manner and is suitable for habitation.[11]

The negligence theory has been used by courts to impose liability on the seller for personal injuries resulting from faulty design and construction as well as for property damage.[12] This theory adopts the position of *MacPherson v. Buick Motor Co.*,[13] which made the manufacturer responsible for injuries to third parties resulting from eminently dangerous defects.

Although only a minority of state supreme courts have discarded the *caveat emptor* doctrine,[14] those recently having occasion to review the problem have almost uniformly rejected it.[15] The motivating force behind these courts' departures from *caveat emptor* is the realization that the doctrine is an anachronism which is totally unfair to the vendee. The Supreme Court of Texas has even suggested the old doctrine hurts the builder-vendor:

9. Bethlamy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).
10. Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81 (1968); Shipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).
11. Thies v. Heuer, 280 N.E.2d 300, 304 (Ind. 1972).
12. Westwood Dev. v. Esponge, 342 S.W.2d 623, 628 (Tex. Cir. App. 1961).
13. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053 (1916).
14. The Wyoming Supreme Court indicates that a majority of jurisdictions have accepted the implied warranty doctrine over *caveat emptor*. Tavares v. Horstman, *supra* note 1, at 1282. However, the commentators agree that only a minority of states have rejected the *caveat emptor* doctrine. McNamara, *The Implied Warranty In New House Construction Revisited*, 8 REAL. EST. L.J. 136 (1975); Williams, *Development In Actions For Breach of Implied Warranties of Habitability In the Sale of New Houses*, 10 TULSA L.J. 445, 452 (1975); Note, *Real Property—Implied Warranty of Workmanlike Quality In New Housing Sales: New Protection for the North Carolina Home Buyer*, 53 N.C. L. REV. 1090, 1091 (1975); Note, *Elderkin v. Gaster—The Pennsylvania Experience With Implied Warranties In Sales of New Homes*, 47 TEMPLE L.Q. 172 (1973). Twenty-two states have so far rejected the old doctrine. *See* note 15 for a list of these jurisdictions.
15. Cochran v. Keeton, 287 Ala. 439, 252 So. 2d 313 (1971); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1968); Carpenter v. Donohue, *supra* note 9; Vernalli v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (1970); Gable v. Silver, 258 So. 2d 11 (Fla.1972); Bethlamy v. Bechtel, *supra* note 9; Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Thies v. Heuer, *supra* note 11; Crawley v. Terhune, 437 S.W.2d 743 (Ky. App. 1969); Weeks v. Slavic Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1970); Schipper v. Levitt & Sons, Inc., *supra* note 10;

> [*Caveat emptor*] does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work.[16]

Possibly underlying these courts' holdings and thereby the demise of *caveat emptor* are several socio-economic theories. One such theory is what Morris in his treatise on torts refers to as risk-bearing.[17] When equal bargaining power was present and neither party in a superior position, both buyer and seller were equally able to bear the risks of faulty construction. After the shift in bargaining power occurred, the risk-bearing ability also shifted. A construction company could bear the loss much easier than one homeowner. The company could prepare for this loss by adding additional costs to other homes sold and in that way pass the loss on to other buyers. A second theory would place liability on the party who can inspect the premises at a lower cost.[18] Under this theory, a construction company, or possibly any builder, would be able to inspect the premises at a lower cost and more effectively. A builder should be in a position to inspect as work develops while a buyer can inspect only a finished house. Any detailed inspection by the buyer would usually necessitate unreasonable costs to reach the area he wished to view. One final theory, which must necessarily follow the cost-inspection analysis, would impose liability on the party most able to avoid the loss. The builder, due to his ability to inspect the premises and his own expertise, would be in a better position to avoid any future trouble. While these theories are seldom, if ever, mentioned, they give some further explanation for the downfall of *caveat emptor*.

Hartley v. Ballou, 20 N.C. App. 493, 201 S.E.2d 712 (1974); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Rothberg v. Olenik, 128 Vt. 295, 262 A.2d 461 (1970); House v. Thorton, 76 Wash. 2d 428, 457 P.2d 199 (1969); Padula v. J. J. Deb-Cin Homes, Inc., 111 R.I. 29, 298 A.2d 529 (1973).

16. Humber v. Morton, *supra* note 15, at 562.
17. MORRIS ON TORTS 17 (1953).
18. POSNER, ECONOMIC ANALYSIS OF THE LAW § 3.6, at 50 (1972).

THE *Tavares* DECISION

The Wyoming Supreme Court was very impressed with the logic of the current trend of judicial thought relative to sales of new housing. The court emphasized the outdated nature of *caveat emptor*[19] and its declining usefullness in the present day. The court went on to say, "It ought to be an implicit understanding of the parties that when an agreed price is paid that the home is reasonably fit for the purpose for which it is to be used—that it is reasonably fit for habitation."[20] From this reasoning the court held that in sales of new residential housing a builder-vendor impliedly warrants that the dwelling is constructed in a workmanlike manner and is fit for habitation by the vendee. Although the holding is limited to new housing, the court said that the boundaries of implied warranties may be adjusted at another time.[21] The significance of the *Tavares* decision should not then be limited to the court's narrow holding.

APPLICATION AND SIGNIFICANCE OF *Tavares*

Nonbuilder-vendor: Tavares presently applies only to the builder-vendor. A question arises as to the liability of a nonbuilder-vendor of new housing. In other areas where implied warranties are used, such as the Wyoming Mobile Home Act,[22] it is obvious that the dealer as well as the manufacturer is liable. In *Smith v. Old Warson Development Co.*,[23] a nonbuilder-vendor situation did occur. Several months after purchasing a new house, plaintiff discovered spaces between the baseboards and the floor, cracks in the walls, and a sinking foundation. The defendant was the vendor of the house, the construction having been done by an independent contractor. The court held that plaintiff could recover on an implied warranty of fitness for habita-

19. Tavares v. Horstman, *supra* note 1, at 1278. The court quotes from CARDOZO, THE GROWTH OF THE LAW 136 (1924): "A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by the courts when the *mores* have so changed. . . ."
20. *Id.* at 1279.
21. *Id.* at 1282.
22. WYO. STAT. § 35-550 (Supp. 1975).
23. Smith v. Old Warson Dev. Co., *supra* note 15, at 797.

tion. From an economic risk-bearing point of view this is a logical result. Just like the builder-vendor, a nonbuilder can bear the risk and spread the loss much easier than a homebuyer. The answer is not so clear if a cost of inspection analysis is used. A vendor may not be able to inspect the premises at a lower cost than the buyer. The *Smith* case probably presents the most common nonbuilder-vendor situation, that being the vendor hiring an independent contractor. Under normal circumstances the vendor would still be in close proximity to the on-going construction. The nonbuilder-vendor would be able to inspect the premises as work proceeded and therefore at a lower cost than the buyer. The ability-to-avoid-the-loss theory, relative to *Smith*, would also place liability with the seller because of his superior ability to inspect.

The related implied warranty theories and the *Smith* decision would strongly support the imposition of liability on the nonbuilder-vendor. While the socio-economic theories seem to be inconsistent, the risk-bearing approach would give a buyer a cause of action. For these reasons *caveat emptor* should not protect a nonbuilder-vendor.

Subsequent purchaser: If the plaintiffs, in the *Tavares* situation, had sold the house three months after purchase to another buyer and the septic system had failed, a restrictive application of the court's holding would imply no warranty. Such transactions occur frequently. When a subsequent purchaser does eventually sue the builder-vendor, the court must decide whether or not to extend the warranty. All three socio-economic theories would support extension of the warranty to the subsequent purchaser. This buyer is no more able to bear the risk of loss, inspect the premises at a lower cost, or avoid the damage than was the original purchaser. The builder-vendor has the same ability to protect himself as he always had. From this point of view a subsequent purchaser should be in the same position as the original purchaser so long a the warranty has not expired.

The resolution of the subsequent purchaser problem should be determined by the length of the warranty. As long as the warranty is still in effect the home owner, whether he is the original purchaser or not, should be able to enforce it. The length of the warranty may be judged by the minimum life of the faulty component part, as the court in *Tavares* suggests.[24] Statutory definition of the length of warranties, delineating who will be subject to and benefit by the warranty, may be another alternative. Such a statute would be more certain and easier to apply than a case-by-case judicial approach necessitated by the absence of a statute. Whichever of these two approaches is used, the liability of the builder-vendor should not be limited by the fortuitous sale of a faulty dwelling to an unlucky third party. Finally, it must be remembered, that regardless of the applicability of the implied warranty to the subsequent purchaser, there remains a remedy in tort for injuries resulting from eminently dangerous conditions.[25]

Present applicability of caveat emptor: The doctrine of *caveat emptor* is still a viable defense to a sale of an older house. In Wyoming many houses are still built by individuals not concerned with a residential project. Equal bargaining power and ability to inspect the premises may be present, indeed the construction may be directed by the buyer. Even with all the reasons for *caveat emptor* present, the court in *Tavares* has held this defense no longer valid.[26] A builder faced with this situation may have several arguments in his favor.

A builder may argue that in this limited situation *caveat emptor* is applicable. Secondly, he may argue contributory negligence on the part of the buyer. Finally, a builder in this situation should use a total disclaimer of all warranties. He would then urge the court to uphold this disclaimer because of the equal bargaining position of the parties. The risk-bearing doctrine would recognize that

24. Tavares v. Horstman, *supra* note 1, at 1282.
25. MacPherson v. Buick Motor Co., *supra* note 13, at 1053.
26. Tavares v. Horstman, *supra* note 1, at 1282.

neither party is better able to bear the loss, so that in this situation the buyer must accept the risk.

While these arguments are valid, there are several equally as valid opposing arguments. There is a question as to when there is actually ever equal ability to inspect the premises. The builder in the rural situation many times is actually in a better position to inspect the house and therefore avoid the loss. Furthermore, if it is argued that a buyer deserves less protection in rural areas, it is possible that he already gets less protection with the absence of housing codes and building inspectors. The question of whether or not to apply *Tavares* in the rural situations is a difficult one.

Landlord-tenant after Tavares: Just as in the construction field, landlord-tenant is governed by *caveat emptor*.[27] Courts have tried on a case-by-case approach to make exceptions to the doctrine.[28] In the last 15 years, a minority of states have rejected *caveat emptor* in favor of an implied warranty of habitability.[29] Nevertheless, as in the construction field, the majority of jurisdictions still have not yet accepted the implied warranty theory.

The question, then, is if the Wyoming court was now presented with a landlord-tenant case, would the court discard *caveat emptor* here also? Both landlord-tenant and new house construction are similar in that they concern the use of a dwelling. The current trend of the law in both areas is solidly away from *caveat emptor*.[30] Finally, the courts that have rejected this doctrine point to its outdated nature

27. Quinn & Phillips, *The Law of Landlord Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969).

28. Young v. Povich, 121 Me. 141, 116 A. 26 (1922). There is no *caveat emptor* rule in the short-term lease of a furnished dwelling.

29. Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Boston Housing Authority v. Hemingway, 293 N.E.2d 831 (Mass. 1973).

30. As in the construction field, few, if any, courts have in recent years failed to imply a warranty in landlord-tenant.

with respect to landlord-tenant relations.[31] This, coupled with the Wyoming Supreme Court's view of *caveat emptor* in *Tavares*, leads to the conclusion that *caveat emptor* should have suffered two defeats by this decision. This conclusion may be illustrated by supposing a builder had constructed several new houses. He then sells one house to a buyer and leases the second house to another party. If the septic system of both homes fails, the buyer would be protected by *Tavares*. The tenant should be equally protected from *caveat emptor*.

One obstacle to the death of *caveat emptor* in landlord-tenant law is a Wyoming statute which disallows any implied covenant in the conveyance of real estate, except in mineral transactions.[32] The court ignored this statute in *Tavares*. It is arguable that the Wyoming Supreme Court did not have to deal with this statute since the land sale was separate from and preceded the construction of the house. Nevertheless, the court could not mean that the holding of *Tavares* only applies when the land sale and construction of the home are separate. The cases interpreting this statute concern covenants and not implied warranties.[33] It therefore should be assumed that the court views this law as applying to covenants and that the statute would not affect any landlord-tenant cases involving warranties.

DEFENSES

Expiration of warranty: One defense raised in *Tavares* was that the implied warranty on the septic system had expired.[34] The court rejected this defense and held that the duration of the warranty was to be determined by a reasonableness standard.[35] Failure of the septic system after one

31. Pines v. Perssion, *supra* note 29, at 413. The court stated: "The need and social desirability of adequate housing . . . is too important to be rebuffed by that obnoxious cliche' *caveat emptor*."
32. WYO. STAT. § 34-36 (Supp. 1975).
33. Ayres Jewelry v. O & S Bldg., 419 P.2d 628, 632 (Wyo. 1966); Laramie Printing Trustees v. Krueger, 437 P.2d 856, 860 (Wyo. 1968). These cases concern specific provisions in the lease relating to rent. A lease in Wyoming is not considered a conveyance of real estate unless its duration exceeds three years. WYO. STAT. § 34-2 (Supp. 1975).
34. Tavares v. Horstman, *supra* note 1, at 1282.
35. *Id.* at 1282.

year was not reasonable, resulting in continued application of the warranty.

The reasonableness standard seems to be the accepted standard in all other courts that have decided this issue.[36] The standard, wisely applied, will put different lengths of warranties on different parts of the house. The court's determination of reasonableness was based on the expected minimum life of the defective part of the dwelling.[37] *Tavares* does make expiration a valid defense and one of the few ways for a builder to avoid the implied warranty. It would be fair to infer that the warranty must clearly have expired for a builder to be successful in using this defense.

Disclaimer of warranty: A builder may try to limit his liability by disclaiming the implied warranty. One court has already completely absolved a builder of liability[38] because of a disclaimer, but other courts have wisely interpreted a disclaimer strictly against the builder. In *Smith v. Old Warson Development Co.*[39] the disclaimer was interpreted to mean only that the builder would perform no additional work, but would still be liable for work which was already completed. Other uses of implied warranties may supply some guidelines as to disclaimers, even though these uses are not applicable to new house construction. The Uniform Commercial Code in Section 2-316[40] allows the disclaiming of warranties. This provision is subject to Section 2-302[41] of the code which invalidates any provision of a contract that is unconscionable. It is very possible that any provision of a contract which totally disclaims all warranties would be unconscionable if no substitute remedy was provided for. The Wyoming Mobile Home

36. Waggoner v. Midwestern Dev., Inc., *supra* note 15, at 809; Padula v. J.J. Deb-Cin Homes, Inc., *supra* note 15, at 532.
37. Tavares v. Horstman, *supra* note 1, at 1282.
38. Tibbits v. Openshaw, 18 Utah 2d 442, 425 P.2d 160 (1967).
39. Smith v. Old Warson Dev. Co., *supra* note 15, at 800; Wawak v. Stewart, *supra* note 15, at 926. The *Wawak* court, as in *Smith*, discounted the disclaimer and allowed recovery under the warranty.
40. UNIFORM COMMERCIAL CODE § 2-316 (1972).
41. UNIFORM COMMERCIAL CODE § 2-302 (1972).
(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract. . . .

Act[42] declares that any disclaimer of an implied warranty as to a new mobile home is void as against public policy.

The total disclaiming of the implied warranty should not be allowed.[43] The warranty has been imposed by law and the builder should not be able to negate *Tavares* by a single sentence in the sales contract. A disclaimer of the warranty would do nothing more than give the buyer a take-it or leave-it contract and thereby result in a return to *caveat emptor*. Where a builder has used a disclaimer he should be obligated to provide an adequate substitute remedy that will protect a buyer as well as the implied warranty does. Finally, even if a disclaimer would be allowed, it would not affect the negligence remedy.[44]

CONCLUSION

The decision in *Tavares* places Wyoming with a growing minority of states that have discarded *caveat emptor* in sales of new housing. The court properly recognized that the common law doctrine of *caveat emptor* no longer serves its purpose. The decision is sound in making the vendor-builder responsible for what he sells. While the court's holding is limited to new housing, future application of *Tavares* will hopefully extend implied warranties to the nonbuilder-vendor and the subsequent purchaser. Other questions as to the special situations in Wyoming and the impact of *Tavares* on landlord-tenant can only be answered by the court. At the very least, *Tavares* indicates a healthy and wise judicial concern for the homebuyers in Wyoming and, most importantly, marks a partial death of the anachronism of *caveat emptor*.

JOHN BROOKS

42. WYO. STAT. § 35-551 (Supp. 1975).
43. A total disclaimer of warranty should be allowed if the ability to inspect the premises and equal bargaining power is found by the court. This situation may be found in the rural circumstances referred to in the text.
44. The disclaimer of damages for personal injuries should always be found unconscionable. This is in accord with UNIFORM COMMERCIAL CODE § 2-719 (1972).