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Property: Builder-Vendors' Broadened Liability for Selecting an Unsafe Homesite - Homeowner-Sellers' Duty to Warn - ABC Builders, Inc. v. Phillips

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CASE NOTES

PROPERTY: Builder-Vendors' Broadened Liability For Selecting an Unsafe Homesite. Homeowner-Sellers' Duty to Warn. ABC Builders, Inc. v. Phillips, 632 P.2d 925 (Wyo. 1981).

In May, 1978, a house in Sheridan, Wyoming, owned by William and Cynthia Phillips, was severely damaged when a hill located on an adjacent lot slid into the Phillips' home. The damage was so extensive that only the top floor was salvageable. In 1979, the Phillips sued ABC Builders, Inc., which, in 1969, had built the home. The Phillips' cause of action was based upon the theories of breach of implied warranty and negligence.¹ The district court dismissed this action because it was brought after the statute of limitations set forth under Section 1-3-111 of the Wyoming Statutes² had run. On appeal to the Wyoming Supreme Court, this statute was held to be in violation of the Wyoming Constitution and the case was sent back to district court.³

Upon remand, ABC impleaded Kenneth and Virginia Kaster, Gary and Betty Benson, and the City of Sheridan. The Kastars were the original owners of the house who bought it from ABC in 1969. During the time the Kastars owned the house they added a covered patio and installed a drain pipe to deposit water from the roof to the lot adjacent to the house. In 1971, the Kastars sold the house to the Bensons who made no improvements and, in 1977, sold it to the Phillips. The Kastars and the Bensons moved for summary judgment on the pleadings. The grant of summary judgment for the Bensons was unopposed, but ABC objected to summary judgment for the Kastars. The Kastars' motion was granted by the trial judge in spite of ABC's objections, because he was "unable to come up with any theory of liability on their part. . . ."⁴

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1. ABC Builders, Inc. v. Phillips, 632 P.2d 925, 928 (Wyo. 1981) [hereinafter cited in text as ABC].
2. This statute, in essence, set a limitation of 10 years after a house is substantially completed within which to bring an action against the architect or builder for defective construction. WYO. STAT. § 1-3-111 (1977) (amended 1981).
3. Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980). See Note, *Statute of Limitations for Architects and Builders as Special Legislation*, 16 LAND & WATER L. REV. 313 (1981).
4. ABC Builders, Inc. v. Phillips, *supra* note 1, at 929.

The action by the Phillips against ABC proceeded to trial where evidence showed that ABC should have known at the time it built the house that the hill behind it was unstable. Evidence further showed that the slide was due to the combined effects of extensive rainfall, poor upkeep of a drainage ditch by the City of Sheridan and perhaps water deposited to the soil by the drain pipe installed by the Kastors.⁵

While the Phillips brought the action on both the theories of implied warranty and negligence, the judge put the case to the jury on the issue of negligence. The jury found ABC to have been 80% negligent, the City of Sheridan 15%, the Phillips 5%, and the Kastors 0% negligent in causing the damage and returned a \$40,000 verdict for the Phillips.⁶ ABC appealed claiming that the verdict imposing liability on it was in error since the hill which caused the damage was not located on land owned by it and that it could not be responsible for the condition of surrounding property.⁷ The Wyoming Supreme Court, however, held that the evidence supported the finding that ABC had reason to know of the unstable nature of the adjacent hill and affirmed the lower court's finding of negligence.⁸ In so doing, the court laid down the rule that builder-vendors have a duty to furnish safe sites for the homes it builds.⁹ The court also suggested that liability may be imposed upon builder-vendors for their selection of an unsafe site on the basis of implied warranty.¹⁰ Moreover, the court went on to hold that a homeowner has a duty upon resale to warn his buyer of conditions which the seller knows or should know of and which represent an unreasonable risk of harm.¹¹

5. *Id.* at 930.

6. *Id.* at 928-29. While the Kastors were not parties to the suit, due to the earlier grant of summary judgment in their favor, their names did appear on the verdict form. On appeal, the Wyoming Supreme Court held this to be in error. *Id.* at 934.

7. Brief of Appellant ABC Builders, Inc. at 29, ABC Builders, Inc. v. Phillips, 632 P.2d 925 (Wyo. 1981).

8. ABC Builders, Inc. v. Phillips, *supra* note 1, at 938.

9. *Id.*

10. *Id.* at 937.

11. *Id.* at 932.

This note will review the doctrines of caveat emptor and merger as they apply to the sale of realty and how, in recent years, their application in the sale of new housing has been disfavored by many jurisdictions, including Wyoming. A discussion of the *ABC*¹² decision imposing liability on builder-vendors for their negligent selection of an unsafe home site, and the soundness of applying the law of implied warranty to home sites will be included. In conjunction with this discussion, some basic differences between negligence and implied warranty and how each may affect homeowners' recovery or builders' liability will be analyzed. The focus will then shift to a discussion of the rule adopted by the *ABC* court imposing a duty upon homeowner-sellers to warn buyers of unreasonable risks existing on the premises, and how one might allocate liability between a homeowner-seller held liable for negligence and a builder-vendor held liable for breach of implied warranty.

CAVEAT EMPTOR AND MERGER

Historically, the doctrines of caveat emptor ("let the buyer beware") and merger have shielded vendors of realty from lawsuits by unhappy buyers. The doctrine of caveat emptor is premised upon the ground that the sale of realty¹³ is an arms length transaction between the parties involved and that the buyer is as able as the seller to inspect the premises and make a determination as to its soundness. Once the buyer accepts the deed to the land, he is deemed to have accepted the land "as is" and thus becomes responsible for all defects existing at the time of sale as well as those which later become manifest. The doctrine of merger operates to merge all prior negotiations between the parties into the final written expression of the parties' intent—the deed.¹⁴ Since the deed rarely contains any express warranties as to the condition of the land or improvements upon the land, the seller is not liable for any defects in either the land or improvements upon the land. The only

12. *ABC Builders, Inc. v. Phillips*, *supra* note 1.

13. Caveat emptor had its birth in the sale of chattels, but was soon extended to realty. See Niro, *Let the Seller Beware! Illinois Adopts the Implied Warranty of Fitness in the Sale of a New Home*, 68 ILL. B.J. 770 (1980).

14. See generally 12 AM. JUR. PROOF OF FACTS 2d 108 (1977).

relief for the buyer was a possible action against the seller for fraud.¹⁵

During the post World War II years the housing market began to boom and new homes were being built in a manner likened to mass production.¹⁶ Heavy equipment cleared large tracts of land upon which extensive home developments came into being. While caveat emptor had to a large extent met its death in the sale of personalty, it remained applicable to the sale of realty. The ironic result was that a buyer of an inexpensive item of personalty received significant legal protections through the judicial and legislative impositions of implied warranties, while the buyer of a much more expensive item of realty was at his own peril.¹⁷ Realizing the unjust results of caveat emptor and merger, many courts began abandoning those doctrines in favor of implied warranties and actions based in negligence.¹⁸

A major turning point came in 1964 when the Colorado Supreme Court, in *Carpenter v. Donaho*,¹⁹ held that an implied warranty of habitability and good workmanship existed in the sale of a new house. Since that time almost every other jurisdiction has adopted a similar rule.²⁰ In 1975, Wyoming was given its first opportunity to address the issue of caveat emptor as it applied to the sale of new housing.

CAVEAT EMPTOR AND THE SALE OF NEW HOUSING IN WYOMING

In 1975, in the case of *Tavares v. Horstman*,²¹ the Wyoming Supreme Court held that the doctrine of caveat

15. See Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965).

16. *Tavares v. Horstman*, 542 P.2d 1275, 1279 (Wyo. 1975).

17. See Haskell, *supra* note 15, at 633.

18. "The significant purchase of a new home leads logically to the buyer's expectation that he be judicially protected. Any other result would be intolerable and unjust. . . ." *Tavares v. Horstman*, *supra* note 16, at 1279.

19. 154 Colo. 78, 388 P.2d 399 (1964).

20. For a list of jurisdictions applying some form of implied warranty to new housing, see Note, *The Implied Warranty Comes of Age in Illinois New Housing*, 13 J. MAR. 769 (1981).

21. *Tavares v. Horstman*, *supra* note 16 [hereinafter cited in text as *Tavares*]. See Note, *Partial Death of Caveat Emptor in Wyoming*, 11 LAND & WATER L. REV. 633 (1976).

emtor does not apply in Wyoming to the sale of new housing by builder-vendors. In *Tavares*, a builder sold a tract of land to the plaintiff and subsequently built a house upon the lot under an oral contract. Within one year the septic system backed up and deposited sewage in the basement of the house. The builder was unable to remedy the situation so the plaintiff contacted a septic tank contractor who determined that the existing system was too small and installed a larger septic system. The court noted that builders today hold themselves out as being skilled in home construction and that buyers should be able to rely on builders' representations.²² In allowing the plaintiff to recover the cost of the new septic system, the court held that the sale of a new home by a builder-vendor "carries with it an implied warranty that it is constructed in a reasonable workmanlike manner and is fit for habitation."²³ The court also held that a builder-vendor may be held liable for his negligence in the design and construction of a home.²⁴ Thus, *Tavares* established that the original buyer of a home could maintain an action against the builder-vendor upon the legal theories of negligence and implied warranty. However, whether the same rights extended to subsequent owners was an open question until four years later when the court decided the case of *Moxley v. Laramie Builders, Inc.*²⁵

In *Moxley*, the plaintiff, who was the second owner of the house built by the defendant, became aware that the electrical wiring on the premises was defective and dangerous and as a result had it replaced. The Wyoming Supreme Court held that subsequent owners could maintain an action against builder-vendors for defects in the premises, and that the cause of action could lie in either negligence or implied warranty.²⁶ Thus, *Tavares* and *Moxley* provided a solid foundation upon which aggrieved homeowners could stand, and at the same time, expanded potential liability for builder-vendors.

22. *Tavares v. Horstman*, *supra* note 16, at 1279.

23. *Id.* at 1282.

24. *Id.*

25. 600 P.2d 733 (Wyo. 1979) [hereinafter cited in text as *Moxley*].

26. *Id.* at 736.

THE ABC DECISION

Broadened Builder-Vendor Liability — "Safe Site"

In *Tavares* and *Moxley*, the court established that both the original and subsequent owners of a home could maintain an action against the builder-vendor for defects in construction. In *ABC*,²⁷ however, the Wyoming Supreme Court went one step further and held that "[p]roviding a safe site goes like hand and glove with construction."²⁸ The rule was promulgated, then, that builder-vendors have a duty "[t]o furnish a safe location for a residential structure and it may be negligence to not do so."²⁹ The significance of this holding is that builder-vendors not only may be liable for defects upon the premises, to both the original buyer and subsequent owners, but now may also be liable for damages to the premises which result from forces originating beyond the boundaries of the lot.³⁰ This is a broad rule and its application is problematic. The difficulties seem to lie in determining exactly what conditions a builder-vendor must avoid.

For example, assume that a builder constructs a home at the foot of a hill which has a winding road above it. Assume further that the builder knows that several cars have missed a turn on the road and have ended up on the proposed home site. This could arguably be an unsafe site. For the homeowner it is difficult to distinguish between the damage caused by the hill sliding into the house and that caused by the car sliding into the house. In either event he has been damaged. Would this builder, under the *ABC* rule, be liable? Perhaps the answer lies in the court's reasoning in regard to the caveat emptor question in Wyoming.

In *Tavares*, one of the reasons given by the Wyoming Supreme Court for refusing to apply caveat emptor to the sale of new housing was that builders today hold themselves out as being skilled in home construction and that buyers

27. *ABC Builders, Inc. v. Phillips*, *supra* note 1.

28. *Id.* at 935.

29. *Id.* at 938.

30. *Id.*

should be able to rely on those representations.³¹ Thus, the *ABC* "safe site" rule could be read, in light of *Tavares*, as imposing a duty upon builder-vendors to avoid home sites which they should know, due to their skill, are unsafe. Put another way, the scope of the builder-vendors' duty to provide a safe site is related to those things for which a buyer would normally be expected to rely upon the skilled builder. The ability to determine the safeness of the ground surrounding a home, or the ground upon which it will be built, is an ability peculiar to builders, whereas a determination that a home may be damaged by an auto tumbling from the hill above is one which any lay-person could make by mere observance. Thus, in the "runaway car" example, since the builder is not in a better position due to his skill to realize the unsafe condition of the site, perhaps he will not be liable. While such a reading of *ABC* appears to have some merit, other language in the *ABC* decision may be read as directing a different result. Before adopting the "safe site" rule, the *ABC* court reviewed the definition of negligence³² adopted by the Wyoming Supreme Court in *Endresen v. Allen*.³³

In *Endresen*, the court approved the following definition of negligence:

The broad test of negligence is what a reasonably prudent person would foresee and would do in light of this foresight under the circumstances. Negligence is clearly relative in reference to the knowledge of the risk of injury to be apprehended The most common test of negligence, therefore, is whether the consequences of the alleged wrongful act were reasonably to be foreseen as injurious to others coming within the range of such acts.³⁴

Arguing from this language, the builder-vendor's liability for damage resulting from his negligent selection of an unsafe site could depend not on whether the damage resulted from conditions which the builder-vendor should

31. *Tavares v. Horstman*, *supra* note 16, at 1279.

32. *ABC Builders, Inc. v. Phillips*, *supra* note 1, at 937.

33. 574 P.2d 1219 (Wyo. 1978).

34. *Id.* at 1221 (quoting 57 AM. JUR. 2d *Negligence* § 58, at 408-09 (1971)).

realize, due to his expertise, as unsafe; rather the ultimate determination of liability might depend simply on the foreseeability of damage resulting from the site selected. Under this interpretation, the builder in the "runaway car" example may be liable. There, the builder is aware of an unsafe condition and should reasonably foresee the possibility of damage from that condition. Under the *Endresen* test, the builder's liability would depend upon whether a reasonably prudent person, given the foresight of damage from a runaway car, would have built a home in this location. If a reasonably prudent person would have built a home in this location, then the builder would not be liable. If, on the other hand, a reasonably prudent person would not have built a home in this location, then the builder may be liable. Of course, the likelihood that a buyer should realize the danger after a reasonable inspection of the premises will have some bearing on the builder's liability.

A further question left unanswered by the *ABC* decision is whether the builder-vendor's duty is merely to avoid a site which he should know is unsafe, or whether he has an active duty to inspect the site for dangers. In *ABC*, the builder was held to have had knowledge, due to soil tests performed on surrounding property, that the hill adjacent to the home was unstable.³⁵ But, assuming the soil tests had never been performed, would the builder have been liable for his failure to inspect the site? The *ABC* holding was that builder-vendors have a duty to "furnish a safe location for a residential structure. . . ."³⁶ The word "furnish," in general, means to supply or provide.³⁷ This seems to impose an active duty upon builder-vendors to search for conditions posing a danger to the site. If this is a correct interpretation of the "safe site" rule, then the question becomes: What conditions does the builder-vendor have a duty to search for? Would the builder in the "runaway car" example have a duty to inquire as to whether any cars had missed the turn on the hill if he was not aware of such occurrences?

35. *ABC Builders, Inc. v. Phillips*, *supra* note 1, at 938.

36. *Id.*

37. *BLACK'S LAW DICTIONARY* 608 (rev. 5th ed. 1979).

It seems that the builder-vendor's duty to inspect should be limited to those things which a builder-vendor would ordinarily anticipate as possible sources of danger, such as the soil upon and surrounding the site. To hold the builder-vendor liable for his failure to discover dangers which he could not reasonably be expected to anticipate would be to make him an insurer. Thus, perhaps the builder in the "runaway car" example would not be liable for his failure to inquire as to whether any cars had missed the turn on the hill above the home site because this is not the sort of danger which an ordinary builder would anticipate, but would be liable for his failure to inspect the stability of the hill itself.

It appears that the *ABC* "safe site" rule may be read as imposing two separate duties upon builder-vendors—a duty to avoid conditions which are foreseeable sources of danger,³⁸ and a duty to inspect the site for conditions which the ordinary builder-vendor would anticipate as possible sources of danger.³⁹ Exactly how the "safe site" rule will be interpreted by the courts is not clear. Whatever the application, though, it seems clear that *ABC* has broadened builder-vendor liability beyond the limits of *Tavares* and *Moxley*. Yet, there remains a question as to whether liability may be imposed only upon a finding of negligence or whether the law of implied warranty may also provide a basis for recovery.

38. Under the first duty imposed by the safe site rule, the test of the builder-vendor's negligence would be whether he has foreseen the danger, and whether a reasonably prudent person, given this foresight, would have built a home in that location. If the danger is one which is discoverable by a reasonable inspection by the buyer, however, then the builder should not be liable. Caveat emptor assumes that the buyer is as able as the seller to discover defects in the premises. Where this is in fact the situation, the doctrine of caveat emptor should remain fully applicable. See *supra* the discussion of caveat emptor in the text accompanying notes 13-20.

39. The application of the second duty is problematic. The court stated that builder-vendors may be liable for damages resulting from forces originating beyond the boundaries of the lot. *ABC Builders, Inc. v. Phillips, supra* note 1, at 938. Thus, it seems that the duty to inspect would also extend beyond the lot boundaries. The problem, then, is to determine how far beyond the lot boundaries the builder-vendor must inspect, and whether he may inspect the surrounding property not owned by him without becoming a trespasser. These questions will undoubtedly be answered in the future on a case-by-case basis, however, a more desirable resolution would be a legislative enactment setting forth the limits of the builder-vendor's duty to inspect. This would provide more predictability for builder-vendors and homeowners as to the liabilities and protections that each may expect.

An Unsafe Site — Negligence or Implied Warranty?

The *ABC* decision made it clear that a builder-vendor could be held liable for his negligence in selecting an unsafe site and suggests that liability may also be imposed upon the basis of implied warranty.⁴⁰ Other jurisdictions have dealt with cases where damage to the structure has resulted from defects in the site and have based liability on both negligence and implied warranty.⁴¹ The Oregon Supreme Court has made a very well reasoned analysis as to when the law of negligence and the law of implied warranty should apply to defects in realty in the cases of *Cook v. Salishan Properties, Inc.*⁴² and *Beri, Inc. v. Salishan Properties, Inc.*⁴³ A review of these cases may, therefore, be of some value.

Cook and *Beri* involved a professional land developer who leased seaside land to persons for a term of 99 years. As time passed erosion began destroying the lots, whereupon several of the lessees sued the developer for damages on the theories of negligence and implied warranty.

The Oregon Supreme Court held that while an implied warranty of workmanlike construction and fitness for habitation existed in the sale of new housing by builder-vendors, an implied warranty should not extend to cover "conditions of the associated land which are not caused by the builder-seller's work on the land."⁴⁴ The court recognized that buyers of land from commercial developers can justifiably expect that the land has been chosen for development with reasonable care, but to expect the land to be free from all

40. *ABC Builders, Inc. v. Phillips*, *supra* note 1, at 937. Although the Phillips sued ABC Builders on both negligence and breach of implied warranty, the trial judge put the case to the jury only on the theory of negligence. ABC Builders appealed the finding against them claiming that the finding of negligence by them was wrong. The Phillips cross appealed arguing that even if the court reversed on the issue of negligence it should still hold ABC liable upon the theory of implied warranty. The Wyoming Supreme Court, however, affirmed the finding of negligence and, therefore, did not reach the question of implied warranty. The court did note, however, that "[i]t appears . . . there are two different directions to go in pursuing a developer-builder of new homes for sale by reason of his selection and transfer of a dangerous building site: Implied warranty and negligence. . . ." *Id.*

41. *See cases cited id.* at 935-37.

42. 279 Or. 333, 569 P.2d 1033 (1977).

43. 282 Or. 569, 580 P.2d 173 (1978).

44. *Id.*, 580 P.2d at 175-76.

defects, "including those which could not reasonably have been discovered prior to the sale,"⁴⁵ is not justified. Thus, the court refused to impose an implied warranty because the defect was due to the "inherent nature of the land involved in the transaction; it is in no sense the product of defendants' work on the land."⁴⁶ The court did hold, however, that the developer could be liable for failing to take reasonable precautions to determine whether the lots he offers are fit.⁴⁷ Although *Cook* and *Beri* concerned land developers, rather than builder-vendors, the reasoning of the cases is sound.

The law of implied warranty imposes liability without a showing of fault.⁴⁸ It seems, therefore, that an important consideration affecting the decision to impose an implied warranty should be whether the seller has a better opportunity than the buyer to assure the soundness of that to which the warranty applies. When a builder constructs a home he has an opportunity to check that each board and nail is in place and so is in a better position than the buyer to prevent a defect. Thus, the imposition of an implied warranty to construction is proper. The land surrounding and upon which a home is built, on the other hand, is normally not the product of the builder's work and he does not stand in any better position than the buyer to protect against a defect. Thus, the imposition of an implied warranty may not be proper. The builder is, however, in a better position to make reasonable inquiries into the condition of the site before he builds and perhaps should be liable for his failure to do so.

Thus, while the *ABC* decision suggested that a cause of action against a builder-vendor for damages caused by an unsafe site may lie in negligence or implied warranty, the availability of implied warranty as a basis for recovery should depend on whether the defect is a product of the builder-vendor's work upon the land. For example,

45. *Cook v. Salishan Properties, Inc.*, 569 P.2d at 1035.

46. *Beri, Inc. v. Salishan Properties, Inc.*, 580 P.2d at 175.

47. *Id.* at 177.

48. 8 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 991, at 587 (3d ed. 1964).

where damage results from settling of land filled by the builder-vendor, an action based on implied warranty seems proper since the builder, being the one who filled the land, was in the best position to assure that it was properly compacted. On the other hand, where damage results from the "inherent nature of the land [and] is in no sense the product of [the builder's] work on the land,"⁴⁹ the builder should be liable only if he was negligent in failing to realize the unsafe condition.

The imposition of an implied warranty assumes the buyer's justified reliance on the seller.⁵⁰ Where a builder has performed work on the land the buyer may justifiably expect that the work has been done in a reasonable and workmanlike manner, and an implied warranty is proper. Where, however, the builder has merely picked the site, the buyer cannot reasonably expect the land to be free from all defects, "including those which could not have been discovered prior to the sale."⁵¹ In this situation, the most the buyer can expect is that the builder-vendor has used reasonable care in selecting a safe site. So, while the law of implied warranty may be applicable to the "safe site" rule set forth in *ABC*, its application should be limited to those situations where the defect is a product of the builder's work on the land. It is important whether an action will lie in negligence or implied warranty because the rights and liabilities of homeowners and builders may be different under each.

Implied Warranty and Negligence — Some Important Differences

There are some basic differences between the theories of negligence and implied warranty which may affect a builder-vendor's liability or a homeowner's ability to recover. An obvious difference, and perhaps the most important difference to both homeowners and builders, is that recovery for breach of implied warranty does not require a showing

49. *Beri, Inc. v. Salishan Properties, Inc.*, 580 P.2d at 175.

50. 8 S. WILLISTON, *supra* note 48, § 988, at 551.

51. *Cook v. Salishan Properties, Inc.*, 569 P.2d at 1035.

of fault.⁵² To recover for negligence, on the other hand, the homeowner must show that the builder-vendor failed to exercise reasonable care.⁵³ Homeowners, therefore, will have an easier burden of proof when attempting to recover on the theory of implied warranty.

The damages recoverable may also differ depending on whether the action is based on implied warranty or negligence. Generally, in contract⁵⁴ only the damages which are reasonably within the contemplation of the parties at the time of entering the contract are recoverable,⁵⁵ while in tort, the question of recoverability is one of proximate cause.⁵⁶ Thus, a homeowner may be able to recover some damages for negligence which he could not recover in an action based on breach of implied warranty.⁵⁷

Another important difference between negligence and implied warranty is the possible effects of the statute of limitations as a bar to recovery. Normally, the length of the statute of limitations and the time at which it begins to run is different for tort and contract actions. In tort, the statute generally begins to run at the time the damage occurs or is discovered,⁵⁸ while in contract, the statute normally begins to run at the time of the breach.⁵⁹ Therefore, where the dangerous condition is not discovered for many years after the house is built, the cause of action on implied warranty may have run and only a cause of action for negligence would remain. This is an especially likely situa-

52. 8 S. WILLISTON, *supra* note 48, § 991, at 587.

53. "The burden of proving negligence of another is upon him asserting it." *Tavares v. Horstman*, *supra* note 16, at 1278.

54. There is some debate as to whether implied warranty is a contract or a tort theory. For the purposes of this discussion, it is assumed to be a contract theory and therefore subject to general contract law.

55. See generally J. CALAMARI & J. PERILLO, *CONTRACTS* § 14-5 (2d ed. 1977).

56. See generally 22 AM. JUR. 2d *Damages* § 80, at 115 (1965).

57. It should be noted that whether in contract or tort, the doctrine of avoidable consequences generally applies so that homeowners will not be able to recover for any damages which they could have avoided. See generally 11 S. WILLISTON, *supra* note 48, § 1353; *RESTATEMENT (SECOND) OF TORTS* § 918 (1979).

58. W. PROSSER, *LAW OF TORTS* § 30, at 144-45 (4th ed. 1971).

59. Some jurisdictions have held that an implied warranty is breached, if at all, at the time of sale, while others hold that the statute does not begin to run on implied warranty until the breach is discovered. See 18 S. WILLISTON, *supra* note 48, § 2021A, at 697, § 2025C, at 781-82.

tion where subsequent homeowners are bringing an action for damages.

Wyoming currently has a statute which bars actions against builders not initiated within 10 years after the structure is substantially completed, *whether the action is based in negligence or implied warranty*.⁶⁰ Therefore, a distinction between negligence and implied warranty may not be important in Wyoming as affecting the limitation of actions against builders-vendors. An earlier version of this statute, however, was declared unconstitutional by the Wyoming Supreme Court, in the case of *Phillips v. ABC Builders, Inc.*, as violating the equal protection clause under the Wyoming Constitution.⁶¹ After *Phillips*, the Wyoming legislature attempted to correct the defective language and reenacted it in 1981, but the constitutionality of this new statute has not yet been tested. Because of this uncertainty, it is questionable whether builders-vendors should rely on W.S. § 1-3-111 as a limitation to actions for selection of an unsafe site.

Duty of Homeowners Upon Resale

The *ABC* decision, in addition to laying down the new "safe site" rule with respect to builder-vendors, also adopted a new rule imposing liability upon homeowner-sellers under certain circumstances. In *ABC*, the builder appealed the trial court's grant of summary judgment for the Kastors (who originally purchased the house from ABC Builders and installed a patio and drain pipe before selling to the Bensons, who subsequently sold to the Phillips), arguing that builders should be held liable only for the damages caused by their negligence and not for the ultimate damage caused by modifications to the structure or lot.⁶² In resolving the issue in favor of the Kastors, the *ABC* court adopted Restatement (Second) of Torts § 353 as the applicable rule.⁶³ The court went on to note: "There is no showing . . .

60. WYO. STAT. § 1-3-111 (Supp. 1981).

61. See *supra* note 3 and accompanying text.

62. Appellant's Reply Brief to Brief of Kenneth R. Kaster and Virginia R. Kaster at 5, *ABC Builders, Inc. v. Phillips*, 632 P.2d 925 (Wyo. 1981).

63. *ABC Builders, Inc. v. Phillips*, *supra* note 1, at 932. RESTATEMENT (SECOND) OF TORTS § 353 (1965) provides:

that the Kastors concealed or failed to disclose . . . a condition of which they knew or should have reason to know which constituted an unreasonable risk underlying the land from the patio drain . . . ,"⁶⁴ and held that "on the application of § 353 . . . we can find no violation of a duty by the Kastors. . . ."⁶⁵ No explanation, however, was given as to how § 353 might be applied beyond the limits of this case.⁶⁶

A finding of negligence under § 353 seems to require the occurrence of three events; first, that the seller know or should have reason to know of a condition threatening the premises; second, that the condition involve an unreasonable risk; and third, that the seller fail to warn his buyer of the condition. The key to determining a seller's negligence under § 353 seems to lie in the second requirement that the condition involve an unreasonable risk. If the condition involves less than an unreasonable risk, § 353 appears not to impose a duty on the seller to warn. The problem, of course, lies in determining what conditions will constitute an unreasonable risk. Does the condition have to threaten

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- (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if
- (a) the vendee does not know or have reason to know of the condition or the risk involved, and
 - (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.
- (2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

64. *ABC Builders, Inc. v. Phillips*, *supra* note 1, at 933.

65. *Id.*

66. Section 353 seems to limit a vendor's liability to physical harm suffered by persons on the premises, rather than physical harm suffered by property upon the premises. Section 7 of the Restatement (Second) Torts defines "physical harm" to include both personal and property damage. However, in conjunction with the words "any condition . . . which involves unreasonable risk to persons on the land," it appears that physical harm was intended here by the Restatement authors to denote personal injury. Furthermore, comment (f) to § 353 states that "[u]nder the rule stated in this section a vendor who conceals a dangerous condition existing on land having no reason to believe that the vendee will discover it is subject to liability for bodily harm. . . ." In spite of this language, the Illinois Supreme Court, in *Century Display v. D.R. Wager Construction*, 71 Ill. 2d 428, 376 N.E.2d 993 (1978), held that § 353 applies to both personal and property damage. This, it appears, was also the intended application of the *ABC* court.

the soundness of the structure or merely be a threat of some possible damage.⁶⁷ The word "unreasonable" seems to require something more than a mere threat of some possible damage.

Section 353 has generally been applied by the courts to conditions on land which involve an unreasonable risk of bodily harm.⁶⁸ Thus, there is little case law defining the conditions which will constitute an unreasonable risk of property damage. One trial court in Nevada, however, in a case involving flood damage sustained by a home built on the flood plain of a nearby stream, did give a jury instruction likened to § 353. In that instruction, unreasonable risk was defined as follows: "A lot is unreasonably dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary purchaser who purchases it, with ordinary knowledge common to the community as to it [sic] characteristics."⁶⁹ This definition suggests that an unreasonable risk involves a condition threatening the structural soundness of the home, or damage which the ordinary purchaser would not contemplate.

Since most homeowner-sellers are probably not experienced in the field of construction, it is likely that they may discover a defect but reasonably fail to realize the risks it poses. Therefore, if unreasonable risk is interpreted to mean a threat to the structural soundness of the home, most homeowner-sellers will probably not be affected by § 353. If the definition of unreasonable risk is broadened

67. In other words, would § 353 impose a duty upon a homeowner-seller who is aware that water is leaking through the home's foundation into the basement, but not aware that the water has weakened the foundation to the point of collapsing? The homeowner-seller in this situation knows that a condition exists which threatens some possible damage (i.e., water damage to rugs, etc. in the basement), but is not aware that the condition threatens the structural soundness of the home. It is possible that a negligent party will be liable for all damages which proximately result from his negligence, whether or not the damages were foreseeable by him. See generally W. PROSSER, *supra* note 58, § 43. Therefore, if the homeowner-seller is held to be negligent for failing to warn the buyer that water is seeping into the basement, he could be liable for the entire damage suffered from the collapsing foundation, even though he did not foresee such damage. Since the key to a finding of negligence under § 353 is that the condition involves an unreasonable risk, the definition of unreasonable risk is important.

68. See generally the cases listed in the RESTATEMENT (SECOND) OF TORTS § 353 appendix (1966).

69. Village Development Co. v. Filice, 90 Nev. 305, 526 P.2d 83, 88 n.6 (1974).

to include risks threatening less than the structural soundness of the home, more homeowner-sellers will likely be affected.⁷⁰

The adoption of § 353 in *ABC* makes it clear that a homeowner who sustains damage may have a cause of action against both the builder-vendor and previous owners. Builder-vendors may be liable upon the theories of implied warranty and negligence with respect to defects in the structure⁷¹ or dangers existing in the site.⁷² Previous homeowners, on the other hand, may be liable for negligence under § 353. Thus, a suit against both the builder-vendor and previous homeowners could involve a combination of implied warranty and negligence.

Causes of Action Combining Implied Warranty and Negligence

The *ABC* court pointed out the possibility of confusion in allocating liability when the builder-vendor is being sued on implied warranty and prior owners are being sued for negligence under § 353.⁷³ The law of implied warranty allows a plaintiff to recover damages without showing fault.⁷⁴ To recover for negligence, on the other hand, the plaintiff must show that the defendant was at fault in causing the damage.⁷⁵ Thus, where a builder-vendor is held liable for breach of implied warranty and a homeowner-seller is held liable for negligence under § 353, there is a question as to how one should allocate the liability between the defendants for the purpose of determining comparative fault.

The best solution may be to allocate liability as though all defendants are being sued in negligence and treat them as joint tortfeasors. This plan would not adversely affect

70. See *supra* note 69 and accompanying text.

71. *Tavares v. Horstman*, *supra* note 16; *Moxley v. Laramie Builders, Inc.*, *supra* note 25.

72. *ABC Builders, Inc. v. Phillips*, *supra* note 1. Although *ABC* did not actually hold that an implied warranty of safe site exists in Wyoming, the court did suggest that an action based on implied warranty may be maintained. *Id.* at 937.

73. *Id.*

74. 8 S. WILLISTON, *supra* note 48, § 991, at 587.

75. *Tavares v. Horstman*, *supra* note 16, at 1273.

the plaintiff's recovery.⁷⁶ In fact, it may even better his position because generally, joint tortfeasors are jointly and severably liable.⁷⁷ Further, treating the defendants as joint tortfeasors would be more equitable for them because they could then have a right of contribution under the Wyoming Statutes.⁷⁸

This scheme could be implemented by requiring the jury to return a special verdict form setting forth its determination of the percentage of damages caused by the prior owners' negligence.⁷⁹ Thus, the builder-vendor would have a right of contribution from the prior negligent homeowners for the percentage of damages ascribed to them and the negligent homeowners would, conversely, have a right of contribution from the builder-vendor for the amount of damages not attributable to their negligence.⁸⁰

CONCLUSION

The holding in *ABC* has broadened builder-vendor liability to a greater extent than any prior Wyoming case. Builder-vendors now may be liable for the selection of an unsafe site which means that they could be responsible for damage resulting from conditions originating beyond the boundaries of the lot. However, exactly which conditions the builder-vendor will be liable for is not clear. The *ABC* decision also established that the law of negligence applies to the selection of an unsafe site but leaves a question as to whether the law of implied warranty will also apply. While an absolute application of implied warranty

76. Treating the defendants as joint tortfeasors for the purpose of determining comparative fault will not affect the plaintiff's burden of proof as to the builder. The plaintiff could still impose liability upon the builder when suing for breach of implied warranty by merely showing that a breach has occurred. The only effect of treating all of the defendants as joint tortfeasors would be to allow a right of contribution among them for damages caused by each other.

77. Comment, *Wyoming Contribution Among Joint Tortfeasors*, 9 LAND & WATER L. REV. 589, 594 (1974). See also WYO. STAT. § 1-1-110(h) (1977).

78. See WYO. STAT. § 1-1-110 (1977).

79. Determining the percentage of damage caused by a negligent homeowner may, however, be a difficult task for a jury. For example, how does one measure the amount of damage caused by a mere failure to warn?

80. There is some debate as to whether implied warranty is a tort or contract theory. See W. PROSSER, *supra* note 58, § 95, at 635-38. Therefore treating implied warranty as a tort theory for the purposes of determining comparative fault is not an inconsistent application of implied warranty.

to the site does not seem proper, where the defect in the site is a product of the builder-vendor's work on the land, implied warranty may be applicable.

The *ABC* court also adopted § 353 of the Restatement (Second) of Torts, which imposes a duty upon homeowners who sell their homes to warn their buyers of unreasonable risks of harm which they know or should know exist. The court failed to explain, however, how this rule is to be applied beyond the limits of that case. It seems that the rule imposes a duty to warn only of risks which threaten harm not contemplated by the ordinary homebuyer. If this is the interpretation given by the Wyoming courts, then § 353 will probably have little impact upon the liability of homeowner-sellers since most homeowner-sellers are probably not experienced in construction and will, therefore, fail to realize the risks posed by defects of which they are aware.

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