1966

Marion E. Tibbits and Rose Wheelwright Tibbits v. Rhuel 0. Openshaw and Darlene 0. Openshaw : Appellant's Brief

IN THE SUPREME COUR
OF THE STATE OF UTA

MARION E. TIBBITS and
ROSE WHEELWRIGHT TIBBITS
Plaintiffs and Respondents,

vs.

RHUEL O. OPENSHAW and
DARLENE O. OPENSHAW,
Defendants and Appellants.

APPELLANTS'

APPEAL FROM THE JUD
JUDICIAL DISTRICT for Weber
Honorable John F. Wahlquist,

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Case
No. 10512

APPELLANTS' BRIEF

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT for Weber County,
Honorable John F. Wahlquist, *District Judge*

STATEMENT OF FACTS

The defendants and appellants on or about the 31st day of July, 1962, entered into a Uniform Real Estate Contract wherein they agreed to purchase for the sum of $45,000, two houses on Lot 7 and 8 in the plaintiffs' and respondents' Rainbow Sub-division, Riverdale City, Utah, and a vacant piece of property directly behind the two houses, consisting of two acres. The two houses are called throughout the trial the "white house" and the "brown house". The defendants and appellants lived in the white house and rented the brown house.

The uniform real estate contract provided that a deed to lot 7 would be given after the December 1, 1962 payment, a deed to lot 8 after the April 1, 1963, payment, and a deed to the balance of the property when the final payment was made.

Defendants and appellants refused to make the final payment, of approximately $3,888.65, which represented the balance due on the vacant property. Plaintiffs and respondents, then brought suit claiming breach of contract and sought to foreclase their mortgage upon all three parcels claiming said real estate contract was not divisable. Defendants and appellants defended on the grounds that the plaintiffs and respondents had fraudulently misrepresented the vacant property as being suitable for sub-dividing and could be sold as separate lots for building purpose, when in fact it was "land locked" and did not have access to a dedicated street, except for a narrow 20' strip of land.

Defendants further claimed that the plaintiffs and respondents had fraudently misrepresented the houses to have been completely insulated and misrepresented the roofs of the houses to have been 20 year roofs.

Defendants and appellants counterclaimed against the plaintiffs and respondents for breach of the following implied warranties:

A. That the plaintiff and respondents as builders-vendors impliedly warranted that the houses were constructed in a good and workmanlike manner and reasonably fit for occupancy as a place of abode, and that suitable and proper materials were used therein.

B. That the plaintiffs and respondents as builders-vendors impliedly warranted that the houses constructed by them were constructed in accordance with the building code of the area in which the structure is located.

DISPOSITION OF THE TRIAL COURT

The case was tried in the District Court of Weber County. The burden of going forward with the evidence was placed on the defendants and appellants, since they had acknowledged that the Uniform Real Estate Contract had been signed by them, and that a balance was due thereunder.

Following the presentation of the defendants and appellants case the trial court granted plaintiffs' and respondents' motion to dismiss defendants' and appellants' defense and appeal based upon breach of implied warranties. The trial court permitted the defense of fraud to stand and to go to the jury. The jury found the issues in favor of the plaintiffs and respondents, and awarded judgment for the sum of $4,379.32, interest for $272.25, $867.91 attorney's fees, and court costs for $19.60.

The trial court refused to grant defendants' and appellants' requested jury instruction that the plaintiffs and respondents were liable for breach of implied warranties.

ARGUMENT

POINT I.

A BUILDER-VENDOR IMPLIEDLY WARRANTS TO A PURCHASER OF A NEW HOUSE THAT THE MATERIALS USED THEREIN ARE REASONABLE AND SUITABLE; THAT THE HOME WAS BUILT IN A WORKMANLIKE MANNER AND SUITABLE FOR HABITATION; AND THAT THE BUILDER-VENDOR HAS COMPLIED WITH THE BUILDING CODE OF THE AREA IN WHICH THE STRUCTURE IS LOCATED.

The facts show that the plantiffs and respondents were not licensed contractors, that they had not made application for a contractor's license nor had they taken any examinations normally given to a contractor. Testimony by Mr. Tibbitts on cross examination.

Q. Are you a licensed building contractor Mr. Tibbitts?

A. No. (R123)

Q. But you at no time made application for a contractor's license?

A. No.

Q. Did you take any examinations as a contractor?

A. No.

Q. Have you had any schooling as a contractor?

A. No, I don't think so. I have had, I have worked with contractors and done all cement work and carpenter work, took it in high school classes. (R124)

The facts show that a building permit had been taken out for both houses in the name of Lawrence Lutz as con-

tractor, Mr. Lutz testified he was not the contractor and knew nothing about the building permits and did not give Mr. Tibbitts authority to use his name as contractor. (See Def. exhibit 5 & 6)

Testimony of Mr. Lutz, carpenter, by Mr. Hansen, on direct examination:

Q. Mr. Lutz I show you a building permit, application made to Riverdale City, for Lot 7, the application permit lists your name as the contractor, Lawrence Contractor, 325 Chimes View Drive, Ogden, Utah. Were you the contractor for Lot No. 7.

A. No sir.

Q. Did you authorize Mr. Tibbitts to take this permit out in your name as a contractor?

A. No sir.

Q. Did you sign this permit?

A. No sir.

Q. I show you the writing on that permit and ask you to identify that. Is that your handwriting?

A. No sir.

Q. To your knowledge have you ever indicated your approval to Mr. Tibbits as a contractor for this lot.

A. No sir.

Q. When did you first become aware that your name was listed as the contractor for Lot No. 7.

A. Right now.

Q. Mr. Lutz I show you an application for a building permit regarding Lot No. 8, and ask you again if your name is listed as the contractor, Lawrence

Lutz, 325 Chimes View Drive. Did you make this application?

A. No sir.

Q. Did you authorize anyone to make the application in your name?

A. No sir.

Q. Did you authorize Mr. Tibbitts to make it in your name?

A. No sir. (R15, R16)

Mr. Tibbitts testified as follows on cross examination by Mr. Hansen:

Q. Who went into the office. Did you go in and make application for the permits?

A. I took them in but I don't remember of making them out in there. I know I didn't make this out.

Q. But you took them in. Is that correct?

A. I think I did.

Q. You had forms and took them in, were they blank forms when you took them in?

A. They gave me the forms.

Q. Did you fill in the name of Lawrence Lutz as contractor?

A. No.

Q. Did you tell them he was the contractor?

A. I don't remember.

Q. Did you have permission from Mr. Lutz to make application for a building permit?

A. No. Mr. Lutz told me he would do all the carpenter work on the houses. (R124, 125)

The facts further show that it is extremely questionable whether any inspections were made on the houses as they were constructed. The building permit for both lots do not show that any inspections were made by Riverdale City. (See Defendants exhibit 5 and 6). Mr. Lutz, the carpenter, testified as follows on direct examination by Mr. Hansen:

Q. What experience, if any, can you recall regarding the inspections made on the electrical work, the electrical wiring?

A. Well, I don't recall any inspections ever being made, that I know of.

Q. Can you recall anything that Mr. Tibbitts said regarding the electrical inspections?

A. Well, I know at times that he made his own inspections.

Q. How do you know that he made his own inspections?

A. Well, he told me that he did.

Q. What did he say?

A. *Well, he said I called in my inspections. I don't wait for the inspectors to come.*

Q. *Did he laugh when he said?*

A. *Right.* (Emphasis Added) (R19)

Mr. Lutz's testimony on re-cross by Mr. Handy:

Q. That is what you used?

A. One by eight, either one by eight or plywood meets the building code.

Q. But this wasn't turned down by the inspector, was it?

A. *We had no inspectors.*

Q. *You had no inspectors?*

A. *No.* (Emphasis Added)

Q. Do you know whether or not you had to have an inspector at that time?

A. Well, I figured there should be. On all the other buildings I have always had building inspectors around. (R37)

TESTIMONY AND FACTS CONCERNING THE QUALITY OF THE LUMBER USED IN THE HOUSES.

The testimony clearly establish that the lumber used in the houses was green, poor quality, sub-standard lumber, and that as a result of the lumber, the walls twisted and curved like a "snake" and the beams cracked, bowed, and warped as they dried.

The testimony of Mr. Lutz, the carpenter follows: (Direct examination by Mr. Hansen)

Q. Are you a licensed contractor?

A. Yes sir. (R16)

Q. You did the carpentry work.

A. I done the carpentry work, that is all.

Q. What lumber was supplied by Mr. Tibbitts.

(Objection) Mr. Handy

THE COURT: Answer the question. What type of lumber.

A. It was mostly utility and construction. It was all brought in here from Montana by the truck load.

Q. How would you classify the lumber, Mr. Lutz, as an experienced carpenter?

A. *Well, any building code wouldn't accept it.* (Emphasis Added) (R17)

On cross examination Mr. Lutz testified:

Q. (By Mr. Handy) What do you mean by standard or better?

A. Well, that means a better grade of lumber, free from knots and it has got strength to it. You figure the stress and the strength of your lumber for different things like joists and studdings and things like that that should be west coast fir in all houses, that is required.

Q. This lumber that was used here, this was satisfactory as far as you were concerned?

.A Well, no, it wasn't as far as I am concerned. If I had been contracting it myself, I wouldn't have put that lumber in. (R25)

Q. *But you say this type of lumber has been used by you in other construction work and it has worked out satisfactory?*

A. *Not in homes.*

Q. *What kind of construction?*

A. *It is good for barns and things like that.* (R26)
(Emphasis Added)

Testimony of Harvey Hill, a licensed contractor, who testified that he had constructed over 200 houses: Direct examination by Mr. Hansen.

Q. Now in the event that you have green lumber used in framing what results from that?

A. Well, your lumber will *warp* pretty bad if it is *quite green.*

Q. Does it warp immediately, or does it take a period

of time?

A. It takes a while. It takes a while for it to dry out. (R63)

Q. What about the strength of green lumber. Can you describe what the strength would be?

A. It is your utility grade, usually your utility grade has more knots in it and doesn't have the strength in that that you have in the better grade without so many knots. That is what takes the strength out of it, the straightness of it.

Q. What happens when green lumber is placed in a building? What is the result?

A. *It will warp or sag or twist or bend. It will bend out of shape.*

Q. In your opinion, as you observed it, please describe the appearance of the carport as you observed it to be.

A. The face board on the outside was a 2 x 8 it looked like, and it was *warped, twisted* quite a bit in several places and in several places it was *split*. The beams supporting it were *twisted* and also *sagging* quite a bit, I didn't check the span to know whether the span was greater than it should be or not, but it was right up to a maximum at least.

Q. Did you have occasion to examine the siding on the brown house?

A. Yes.

Q. And what was your observation?

A. They have used a rough sawn lumber which is used quite often, but is apparently quite *green* because

it was *warped* and *cracked* quite a bit. At least *split* open. (R64)

Q. And also the exterior deck, on the white and the brown houses, did you examine those?

A. Yes.

Q. And what did your examination show there?

A. For the deck, they had used, it looked like a *utility grade,* 2 x 6 flooring and it was *split* and *warped* a bit, and there is one place in particular where the flooring *hadn't reached the next joist.* It was loose. It had *4 x 4 posts supporting it that were twisted quite a bit.*

Q. And what did you observe at that time?

A. These walls.

MR. HANDY: I object to this, this is two and a half years, three years after the purchase of this home, practically.

THE COURT: This is a circumstance the jury may consider. They decide what weight to give the testimony, if any, in view of the circumstances. (R59)

A. *The lumber used for studs in this bearing partition wall or all of the walls that I examined have warped quite severely. You can look down the wall and see quite a lot of bends.* (R60)

Q. What can you do with a broom handle pressed against the ceiling?

A. Well, you could push it up and down, it was loose. There was no support on it at all. (R60)

Q. Mr.Hill, did you have, while examining the house,

an occasion to notice the condition of the eaves around the house, or the facing board?

A. I noticed the face board. I didn't notice underneath the eaves. The face board *was warped,* most of it that I looked at *was warped.*

Q. Did you estimate the amount of the *warpage* on any of the corners?

A. Of I would say the joint was opened up an *inch and a half or two inches* on the corners. (R67)

(Emphasis Added)

The testimony of Mr. Tibbitts regarding the lumber used in these houses and others that he constructed follows:

Mr. Hansen, cross examination:

Q. You say the first house you built out of the eight was built with used lumber?

A. The first house, yes.

Q. Where did you get the used lumber?

A. I don't remember.

Q. Was this good lumber or what quality was it?

A. Well, we got as I remember most of it from Second Street. I bought *a barracks down at Second Street,* one of these barracks that they had there, war barracks down there and move it, had it moved out there and it had both ends out of it, *and we had an east wind and it blew the barracks flat the first night it set there.* I went out the next morning and it was blown flat. We tore it to pieces. *That is where the lumber came from.* (R125)

Q. Was it kiln dried?

A. No, they don't kiln dry any construction lumber or

fir lumber in the State of Montana, that I know of, and they have some awful big mills in Montana. It doesn't pay to kiln dry lumber because it chips it. It makes it worse and when lumber is nailed into a house and nailed in there properly it doesn't have to be perfectly dry. This lumber, no lumber is perfectly dry that is put into a house by a long ways. (R127)

Q. What would cause beams like that *to sag?*

A. Well, the only thing I could say that they were *too long a stress* for the material, *they weren't heavy enough beams.* (R128)

Mr. Handy, on direct examination of Mr. Tibbitts:

Q. And the other you used the same type of utility lumber. Is that correct?

A. Well, it was the same kind of lumber, *it was from Montana, and we had it cut down except a little that I cut myself.* (Emphasis Added) (113)

Testimony of Mr. Rhuel Openshaw regarding the condition of the walls when the houses were first purchased and at the time of the trial:

Direct examination by Mr. Hansen

Q. Now as to the walls, then you found them to be quite straight and regular?

A. That is right. Immediately after the purchase.

Q. Now would you describe the condition of those walls as they exist today.

A. Putting a straight edge across them, you will find bulges in the walls now of at least one inch. (R40)

Q. Thank you, Your Honor. I apologize. In connection

with the walls of the brown house, will you please describe the appearance of those walls immediately after the purchase.

A. They were similar to the walls in the white house, however they were of slightly different construction, *but they appeared apparently straight at the time of purchase.*

Q. Will you describe the appearance today as you observed them to be.

A. They are in about the same condition as those in the white house. *They have bows in and out and they are noticeable without straight edging.* (R40)

The testimony of the sub-standard construction and use of inferior quality materials throughout the house continues on and on and on. Reference will be made to specific testimony to substantial other areas testified to during the trial, but on a more limited basis in order to shorten the length of this brief.

FURNACE

No claim is made that the furnace was not properly installed by the heating sub-contractor, but the testimony is unrefuted that plaintiffs and respondents because of their inexperience constructed walls around the furnace after installation. This condition was extremely dangerous and caused the gas company to close the gas off until it was remedied.

Testimony of Mrs. Openshaw (Direct examination, by Mr. Hansen)

Q. Did you do anything to remedy the situation in order to have the gas turned back on?

A. *We had our son, in fact one of the houses we tore*

a whole section because we were told we didn't have enough air.

Q. Did you do that in both houses?

A. Yes sir.

Q. Was the gas turned back on after you did that?

A. Yes sir. (R76)

Testimony of Harvey Hill, licensed contractor, (Direct examination by Paul Hansen)

Q. What happens if the furnace does not have ventilation. Is there any danger, what is the effect?

A. Yes, it is dangerous. Usually the gas company won't hook it up, if you don't have it ventilated. It has to have ventilation or the flame will go out and the gas still be on. *It is dangerous.*

Q. Then what would be the result without adequate ventilation?

A. If the flame went out, you would have gas come into your room at least until the safety valve when the furnace took over, you would have gas coming into the room, and it could get enough to *explode.*
(Emphasis Added) (*R66*)

ELECTRICAL WORK

Testimony of Mr. Lutz, carpenter, Direct examination by Paul M. Hansen.

Q. During the time that you worked on the houses, did have an occasion to observe who put the electrical work in the houses?

A. Well, he done most of the work because he was doing all of it. (R18)

Q. Mr. Tibbitts was doing the electrical work?

A. Yes sir.

Q. Can you recall anything that Mr. Tibbitts said regarding the electrical inspections?

A. Well, I know at times that he made his own inspections.

Q. How do you know that he made his own inspections?

A. Well, he told me that he did.

Q. What did he say?

A. Well, he said I called in my inspections. I don't wait for the inspectors to come. (R19)

Q. Are you familiar with the grounds of the electrical boxes in the kitchens and bathrooms?

A. Well, I remember when they came out to hook the power up, they rejected it, said he would have to have it grounded before they would hook it up, and he grounded it himself. I know in one house in particular, I don't know which one it was. Then he called in and they came out and hooked it up.

Q. Who called in?

A. Mr. Tibbitts. (R32)

PAINTING

Testimony of Mr. Lutz, carpenter, Direct examination by Paul Hansen.

Q. What do you mean by oil and color?

A. Well, he mixed color in oil and finished the woodwork, most of the woodwork.

Q. What type of color was used.

A. Well, it was brick coloring put in with oil.

Q. You mean cement coloring?

A. Cement coloring and brick coloring. (R21)

Cross examination of Mr. Lutz.

Q. Now, what do you mean by oil and color?

A. Well, linseed oil with color mixed in it to bring out a color on it. He experimented a lot on bringing out colors and especially on paneling and things like that. He experimented quite a lot on bringing out colors.

ROOFS

The testimony is uncontradicted that approximately one year after occupancy the roof's leaked and have leaked continually since that time. The testimony is also uncontradicted that neither houses have gravel to protect the tar from the hot summer sun. One house does was painted with aluminum paint as a poor substitute.

Testimony of Mr. Openshaw, Direct examination by Paul M. Hansen.

Q. When did these first start?

A. Approximately one year after purchase.

Q. Did you try to do anything about the leaks?

A. The first leak I was away at Seattle when it occurred. My wife contacted Mr. Tibbitts who came over and he made an attempt to patch it.

Q. Did you have any difficulty after that?

A. Yes.

Q. How soon after.

A. Almost every rain storm since I have been up patching leaks.

Q. That is, Mr. Openshaw, has been over patching leaks.

A. You mean Mr. Tibbits.

Q. Mr. Tibbitts. Pardon me. (R43)

A. He *has never come over* to patch a leak after that first attempt that I know of.

Q. Are these leaks located in anyone particular room or location of the roof?

A. No sir.

Q. Where are they located?

A. All over the roof.

Q. Does the roof have gravel on it?

A. No sir. (R44)

Q. Does the brown house have gravel on the roof?

A. No sir. (R45)

Testimony of Mr. Harvey Hill, contractor, that gravel and mopping is necessary to keep a roof from checking and drying out. (Direct examination by Paul Hansen)

Q. Then on top of the five layers of felt, what would you have?

A. Then it should have been mopped and gravel put on to *keep it from checking and drying out.* (R63)

AUTHORITIES

There are numerous authorities including Prosser and Williston who have advocated the extension of implied warranties to include the sale of real estate.

Directly in point also are several recent cases from the Supreme Courts of Colorado, Washington, Oklahoma, Illinois, and others. These cases have imposed upon a builder vendor

of new houses an implied warranty that the houses were reasonably constructed with reasonable workmanship and materials, and that the houses were constructed in accordance with the building code where they were located. Reference will be made to each case with citations therefrom.

The Supreme Court of Colorado, January 20, 1964, in Carpenter vs. Donohoe, 388 P2nd 399, at page 402:

> "In 1931 a departure from the rule of caveat emptor in the purchase of a house was announced by a dictum in the case of Miller v. Cannon Hill Extates, Ltd., (1931) 2 K.B. 113. It was said in that case that warranties would be implied in a house, purchased in the course of construction, that it was built in an efficient and workmanlike manner and of proper materials and when finished would be fit for habitation.
>
> A number of states have followed the Miller doctrine. See citations in Glisan v. Smolenske, supra. Indeed, this court in the Glisan case applied the implied warranty doctrine to a house which was nearly completed, aligning its views with Perry v. Sharon Dev. Co., Ltd., supra.
>
> *We hold that the implied warranty doctrine is extended to include agreements between builders-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation.*
>
> (Emphasis Added)
>
> The judgment is reversed with directions to reinstate the second count of the amended complaint and to proceed thereafter in manner consonant with the views herein expressed."

In that case, see page 400, the Donohoes were compelled by the trial court to elect at the conclusion of the evidence whether they *relied on fraud or warranties,* the Donohoes chose the former. In this case the defendants and appellants were required to base their defense on fraud, the trial court having dismissing the defense and counter claim based on implied warranties.

The Supreme Court of Oklahoma, April 16, 1963, in Jones v. Gatewood, 381 P2nd 158, stated in a similar case the following: (page 159, 160)

> "Plaintiffs brought an action for damages against defendants on the theory of breach of two implied warranties, one the warranty of fitness and the other warranty that the house was constructed in a good and workmanlike manner.
>
> In Hoye v. Century Builders, Inc., 52 Wash.2d 830, 329 P.2d 474, wherein Hoye agreed to purchase a lot from Century Builders and the latter agreed to construct a house thereon, the Supreme Court of Washington held that under the circumstances there was an implied warranty the completed house would be fit for human habitation and that the uniform current of decisional law was in accord. The court then said:
>
> "* * * The reason is nowhere better explained than by the King's Bench division in Miller v. Cannon Hill Estates, Ltd. (1931), 2 K.B. 113 in the following passage from the opinion in that case:
>
> "'* * * The position is quite different when you contract with a builder or with the owners of a building estate in course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction

between the parties that he will have a house put up there which is fit for him to come into as a dwelling-house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling. * * *' "

The case of Vanderschrier v. Aaron, 103 Ohio App. 340 N.E.2d 819, had the same question involved as is before us in the instant case. It is said therein:

"In the law of England, we find the rule to be that, upon the sale of a house in the course of erection, there is an implied warranty that the house will be finished in a workmanlike manner. Perry v. Sharon Development Co., Ltd., 4 All E.L.R. (1937) 390.

"In this country, we have found but few cases bearing on the question. We have found none in this state directly touching it. See cases cited in 'Right of Purchaser in Sale of Defective House,' 4 Western Reserve Law Rev. 357.

"In establishing the law for this case, we adopt the law pronounced in the English case cited supra. We believe it to be salutary and based upon sound legal reasoning." (Emphasis Added)

We are of the belief that the above stated reasoning is valid and applicable herein. We approve the rule announced in the cited cases. For the reasons above set forth, we hold that the trial court committed no error in determining that plaintiff were entitled to recover damages against defendant on the theory of implied warranty. Affirmed."

It is worthy of note that although the 1936 edition of Williston, Contracts, stated flatly that there are no implied warranties in the sale of real estate, the 1963 edition took quite a different approach. 7 Williston, Contracts ‡‡ 926, 926A 3d ed.1963). In this edition, Professor Jaeger pointed

out that although the doctrine of *caveat emptor* is still broadly applied in the realty field, some courts have inclined towards marking "an exception in the sale of new housing where the vendor is also the developer or contractor" since in such situation the purchaser *"relies on the implied representation that the contractor possesses a reasonable amount of skill necessary for the erection of a house; and that the house will be fit for human dwelling."* ‡926A, at p. 10. In concluding his discussion of the subject, the author remarked that *"it would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years."* ‡ 936A, at p. 818; see also, Dunham, 37 Minn.L.Rev., at p. 125; Bearman, 14 Vand.L.Rev., at pp. 570-576; cf. Caporaletti v. A-F Corporation, 137 F. Supp., at p. 16. (Emphasis Added)

An Illinois case, Weck v. A. M. Sunrise Construction Co., 36 Ill. App. 2nd 383, 184 reaches the same conclusion. In the Weck case plaintiff entered into a real estate sale contract, and subsequent to that time defects occured in the plumbing, roof leaks in the bedroom, the kitchen cabinets were defective, doors were warped, and other defects.

In sustaining the plaintiff's claim, the court referred to the holdings in the leading English case of Miller v. Cannon Hill Estates, Ltd., supra, and the pertinent American cases, that a contract to purchase a house under construction carries with it an implied warranty of reasonable workmanship and habitability which survives the deed. The court also referred to Professor Dunham's summation of the recent cases as imposing on the building vendor a duty, which continues beyond delivery of the deed, "to make the premises fit for the ordinary purposes for which the building is being constructed and if the sale is from a model there is a duty to make the building

sold conform to the model and to be reasonably fit for its ordinary purposes." Dunham, 37 Minn. L.Rev., at page 125.

The doctrine of liability for breach of implied warranties has been extended to builder-vendors in tort cases also. The case of Schipper v. Levitt & Sons, Inc., 207 A. 2nd 314, there the court stated at page 321:

> "When marketed products are defective and cause injury to either immediate or remote users, such manufacturers may be held accountable under ordinary negligence principles (MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696 (Ct.App.1916)) as well as under expanding principles of warranty or strict liability. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69, E5 A.L.R.2d 1 (1960); Putnam v. Erie City Manufacturing Company, 338 F. 2d 911 (5 Cir.1964); Goldberg v. Kollsman Instrument Corporation, 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E. 2d 81 (Ct.App.1963); Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 Sup.Ct.1962); cf. Santor v. A. & M. Karagheusian, Inc., 43 N.J. 52, 207 A.2d 305 (1965). The plaintiffs urge that the MacPherson principle, imposing liability for negligence, should be applied to a builder vendor such as Levitt. We consider their point to be well taken for it is clear to us that the impelling policy considerations which led to MacPherson and its implementations are equally applicable here. See Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517, 533 Sup.Ct.1949); Dow v. Holly Manufacturing Company, 49 Cal.2d 720, 321 P.2d 736 (Sup.Ct.1958); Fisher v. Simon, 15 Wis.2d 207, 112 N.W.2d 705 (Sup.Ct.1961); Leigh v. Wadsworth, 361 P.2d 849 (Okla.Sup.Ct.1961); cf. Inman v. Binghamton Housing Authority, 1 A.D.2d 559, 152 N.Y.S.2d 79 (1956), rev'd. 3 N.Y.2d 137, 164 N.Y.S.2d 699, 143 N.E.2d 895, 898-899, 59 A.L.R.2d 1072 (Ct.App.1957); Pastorelli v. Associated Engineers, Inc., 176 F.Supp. 159, 164 (D.R.I.1959); Caporaletti v. A-F Corporation, 137

F.Supp. 14 (D.D.C.1956), rev'd, 99 U.S.App.D.C. 367, 240 F.2d 53 D.C.Cir.1957); Prosser, supra, ‡ 99, at p. 695."

Dean Prosser in his second edition placed building contractors on the same footing as sellers of goods, and had held them to the general standard of reasonable care for the protection of anyone who might forseeably be endangered by their negligence, even after acceptance of the work. Prosser, Torts ‡ 85, at p. 517 (2d ed. 1955). In Dean Prosser's more recent edition he noted that the reasons which had earlier been advanced against holding general contractors liable in negligence actions by third persons were reminiscent of those which had been advanced in actions against manufacturers of goods and had been rejected in MacPherson; and he concluded that the earlier approach is now in full retreat and that the majority rule now imposes responsibilty to third persons for negligence "not only as to contractors doing original construction work, but also as to those doing repair work or installing parts, as well as supervising engineers and architects." Prosser, supra, at p. 695 (3d ed.1964).

POINT II

ARE THE DEFENDANTS AND APPELLANTS DENIED THEIR CLAIM OF BREACH OF IMPLIED WARRANTIES BY REASON OF THE FOLLOWING PROVISION CONTAINED IN THE UNIFORM REAL ESTATE CONTRACT:

"Buyer accepts the said property in its present condition and that there are no representations, covenants or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto."

The above provision appears to cover two areas.

A. "Buyer accepts the said property in its present condition, AND"

B. "that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached."

PART A: "In its present condition" has generally been interpretated to mean "as is". 46 Am Jur, sales, "as is" paragraph 319, page 501, states, that implied warranties are excluded when sales are made "as is", HOWEVER, THE CASES THERE CITED REFER TO THE SALES OF OLD OR USED PROPERTY, and do not refer to the sales of a new home constructed by the seller for the buyer.

Attention should also be given to the intent of the parties. Did the buyers of the property in question intend to buy a newly constructed home "as is"? Obviously that was not their intent. When one party deals with and relies on the experience and skill of a builder-vendor he is not buying the house "as is", and the builder-vendor is not intending to sell a newly constructed house, "as is". 17 Am. Jur 2nd page 654, paragraph 257, states:

> "It is a general rule that contracting parties are presumed to contract in reference to the existing law; INDEED THEY ARE PRESUMED TO HAVE IN MIND ALL THE EXISTING LAWS RELATING TO THE CONTRACT, OR TO THE SUBJECT MATTER THEREOF. Thus it is commonly said that all existing applicable or relevent and valid statutes, ordinances, regulations, and settled law of the land at the time a contract is made become a part of it *and must be read into it.*"
>
> 17 Am. Jur. 2nd, para. 257 (Citing numerous cases) (Emphasis Added)

It is the position of the Appellants and defendants that

there was an implied warranty at the time of the sale of the newly constructed houses, that they were constructed in accordance with the existing building ordinances and codes of the area where they were built and that the materials used therein complied with the building ordinances and codes.

A sale of property "as is" does not exclude all implied warranties or express warranties. 77 CJS, para. 317 page 1168, states:

> "Sales of property "as is" generally exclude implied warranties, and the buyer takes the property in its then existing condition without warranty as to quality or fitness for a particular purpose. It has BEEN HELD, HOWEVER, THAT THE SELLER IS NOT RELIEVED OF ALL WARRANTIES." See Maddox v. Katz, 8 So. 2nd 749, and other cases cited therein.

The situation and facts of the present case are unique. The plaintiffs-respondents have sub-divided property and are constructing houses for sale to the public. They are holding themselves out as experienced, capable, competent, and trained contractors upon whom the defendants have a right to rely. To permit a builder-vendor in that situation to sell "as is" without regard for the building ordinances, building codes, or other protective devices, adopted not only by the various city counsels but also by the State of Utah, would permit him to defraud the public with impunity.

Surely, there would be no purpose in the careful considerations given to the adoption of building codes and ordinances if a builder-vendor could so EASILY nulify their effect. How and where is the protection afforded to the public? 17 Am Jur 2nd, page 710, paragraph 293:

> "Implied warranties, although they are consensual in the sense that they presuppose that the parties have en-

tered into some kind of contract, are not promises by the warrantor that the fact warranted is true; they are "OBLIGATIONS" IMPOSED IN INVITUM AS A CONSEQUENCE OF MAKING THE CONTRACT, REGARDLESS OF THE WARRANTOR's INTENT."

It is extremely interesting to note that Mr. Tibbitts, the plaintiff and respondent in this case, an inexperienced, unqualified, poorly trained, "do it yourselfer" contractor has been the main reason for many changes and additions to the building code and sub-division ordinances adopted by the City of Riverdale. Will the courts then permit Mr. Tibbitts to by-pass these ordinances by means of an "as is" provision.

Cross examination of Mr. Tibbitts.

Q. You haven't had any trouble with Riverdale City, have you?

A. No.

Q. They didn't pass their sub-division clause because of you, did they?

A. No. No it was time for, those times, well I guess anyway I sold about seventy lots in there to contractors so I guess anyway THEY DID PASS IT ON ACCOUNT OF ME. Let's face it. When you start building they do pass new laws to keep up with it. (Emphasis added) (R131)

PART B: This provision applies to oral or written agreements other than those contained in the written contract. It would cover express warranties. This part of the provision does not, however, expressly disclaim implied warranties.

See 77 CJS para. 317, page 1166, 1167, 1168, where it is pointed out that a disclaimer of express warranties *does not exclude implied warranties.*

"A refusal of express warranties does not exclude implied warranties." page 1166, 77 CJS, supra, paragraph 317, also see page 1167, "It has been held that the mere statement that an express contract contains the entire agreement or all the agreements of the parties does not prevent *the existence of implied warranties not excluded by that expressed.*'

The second part of the provision does not prevent the showing of fraud in the inducement. Many and many cases have held that on the grounds of public policy and morality a party is not precluded by such a provision from showing fraud. See, 17 Am Jur 2nd para. 191, page 560, citing numerous cases to support.

POINT III

THE VERDICT OF THE JURY IS NOT SUPPORTED BY THE EVIDENCE.

The evidence quoted throughout this brief as well as in the record clearly shows that the plaintiffs respondents intended to defraud the defendants and appellants. That they deliberately and intentionally used inferior materials, which did not meet the specifications of the building code; that the roof installed was misrepresented to the defendants and appellants and that they misrepresented the insulation in the houses, representing them to be "fully insulated."

CONCLUSION

The trend is and has been for a number of years to depart from the doctrine that implied warranties do not extend to the sale of real estate. Neighboring states such as Colorado, Oklahoma, Washington, and others have imposed liability upon builder vendors for breach of implied warranties. The State of Colorado in a 1964 case, Carpenter v.

Donohoe, held that the implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where as here, a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation.

If point number 1 is followed should the court then permit a builder vendor to avoid, disregard, circumvent, ignore local and state building ordinances adopted to protect the public, by inserting an *"as is"* provision in the sale of new homes. It would seem that public policy certainly would not be promoted if that were the case.

The court should, therefore, reverse and order a new trial.

Respectfully submitted,

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