



Caveat Venditor

South Carolina's Implied Warranties and Tort Liability in Residential Construction

By Joshua D. Spencer

John Taylor decides to build a house on a vacant lot he owns. Taylor is building the home for himself and his family, and he has no intention to sell the house in the future. Despite not having any experience in the construction industry or as a general contractor, Taylor decides he will oversee the construction himself. He contracts with Arnold Architecture to prepare plans and specifications for his home. Taylor directly enters into contracts with various subcontractors and suppliers for the labor, services and materials necessary to construct his home. All of the applicable permitting lists Taylor as the general contractor, as does the final certificate of occupancy.

Several years later, necessity requires that Taylor move to another

city to care for his ailing mother. Accordingly, he puts his self-built home up for sale, eventually entering into a sales contract with Mary K. Gallagher. A standard form buyer's contract provided to Gallagher by her real estate agent states that the buyer has inspected the property and is buying the home "as is." Gallagher signs the contract and, through her real estate agent, offers it for acceptance to Taylor. Taylor accepts the offer, signs the contract and, shortly thereafter, the house is sold to Gallagher. After moving into the home, Gallagher discovers several construction defects. Gallagher then files suit against Taylor, alleging that Taylor acted as the general contractor during the construction of the home and that the construction was defec-

tive and negligently performed. While South Carolina law protects homebuyers vis-à-vis several warranty theories, as well as a negligence and breach of contract theories, South Carolina courts will likely not be sympathetic to Gallagher's claim.

Implied warranty of workmanship/workmanlike service

The implied warranty of workmanship, also known as the implied warranty of workmanlike service, was first recognized generally in *Hill v. Polar Pantries*, 219 S.C. 263, 374 S.E.2d 885 (1951), and later in the specific context of homebuilding in *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970). In 2008, the Supreme Court of South Carolina addressed the extent of the implied warranty of workmanship in *Smith*

v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008). In that case, Breedlove constructed a home on a lot he owned with the intention that the house would be a permanent home for his family. *Id.* at 418, 661 S.E.2d at 69. Instead of hiring a general contractor, Breedlove directly contracted with various subcontractors and suppliers. *Id.* Breedlove then moved to Atlanta to help attend to his son's health needs and, when maintaining two homes became cost-prohibitive, he sold the house he had built to Smith. *Id.* at 419, 661 S.E.2d at 69. Years later, Smith found defects in the house's construction and filed suit against Breedlove for negligence and breach of the implied warranty of workmanship. *Id.* at 419-20, 661 S.E.2d at 70. However, the *Breedlove* court held that no such warranty was breached—despite the fact that Breedlove may have been acting as his own general contractor—and clarified the implied warranty of workmanship and its application. *Id.* at 423-24, 661 S.E.2d at 71-72.

The implied warranty of workmanship arises when a builder contracts to construct a dwelling and, by implication, warrants that the dwelling will be constructed “in a careful, diligent, workmanlike manner.” *Id.* at 422, 661 S.E.2d at 71. This warranty arises from the construction contract itself, and the duty it imposes extends from the builder to his buyer and any subsequent buyers, even without privity. *Id.* The court's rationale behind the implied warranty of workmanship is that the buyer and seller are not on an equal footing in the transaction, as the builder holds himself out as an expert in construction, and the buyer is forced to a large extent to rely on the skill of the builder. *Id.* The implied warranty of workmanship's reach is limited in that it applies only to work done by builders who are “in the business of constructing homes” (e.g. licensed residential builders). *Id.* at 424, 661 S.E.2d at 72. The policy of protecting buyers from their reliance upon their builders' expertise was not implicated in *Breedlove* because Smith knew that Breedlove had

built the house for himself (i.e., that he was not “in the business of constructing homes”). *Id.*

Summary of the Implied Warranty of Workmanship/Workmanlike Service

- Warrants that the home will be built with the quality one would reasonably expect for a careful, diligent workman
- Arises from the contract for construction of a new home
- Applicable only to a builder who “is in the business of constructing homes”

Implied warranty of habitability/fitness for a particular purpose/merchantability

In *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970), the Supreme Court of South Carolina held that the doctrine of implied warranty of fitness for an intended use—that use being habitation—applied to the sale of homes. *Id.* at 414, 175 S.E.2d at 795. Of course, the normal intended purpose of a residential dwelling is habitation. Any defect in the condition of the house that renders the house non-habitable may subject a builder-vendor to liability. *See id.* at 414, 175 S.E.2d at 795.

The court further clarified the law with regard to the implied warranty of habitability in *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976), where a seller who was *not* the builder of a home was nevertheless held liable for defects. The court held that implied warranty liability did not apply solely to the builder of a house, but instead sprang from “the sale itself.” *Id.* at 500, 229 S.E.2d at 729. An implied warranty that a home is habitable is founded in the doctrine of *caveat venditor* (“let the seller beware”)—“a sound price” paid by a buyer warrants his receiving from a seller “a sound commodity” (i.e., a habitable dwelling), which fulfills each party's expectations. *Id.* at 502-03, 229 S.E.2d at 730.

In *Terlinde v. Neeley*, 275 S.C. 395, 396, 271 S.E.2d 768, 768 (1981), the Court also used the term “merchantability” in connection

with this warranty when it described the plaintiff's complaint in that case as pleading a cause of action for “breach of implied warranty that the house was ‘merchantable,’ and suitable and fit for its intended purpose.” At least one subsequent plaintiff has pled these implied warranties as distinct causes of action. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 554, n. 1, 658 S.E.2d 80, 85 n.1 (2008) (“the Fields originally asserted claims for breach of the implied warranties of habitability, merchantability, and fitness for a particular purpose.”) Whereas plaintiff in *Arvai v. Shaw*, 289 S.C. 161, 345 S.E.2d 715 (1986), pled the merchantability and fitness for a particular purpose elements as one combined warranty (“[i]n their complaint, the Arvais allege Shaw breached an implied warranty of merchantability and fitness for the intended purpose of habitability.”). Whether these warranties are combined or distinct is not something the courts have directly addressed, though the courts appear to treat them as a combined warranty. *See id.*; *Breedlove*, 377 S.C. 415, 661 S.E.2d 67. This treatment seems consistent with our Supreme Court's holding that the similar UCC warranties are “cumulative.” *Soaper v. Hope Indus.*, 309 S.C. 438, 424 S.E.2d 493 (1992) (“where the particular purpose for which a product is purchased is also the ordinary or intended purpose of the product, the warranties of merchantability and of fitness for a particular purpose merge and are cumulative, such that a plaintiff may proceed upon either theory.”). Because the combination, or non-combination, of these warranties does not appear to be a resolved issue, good practice appears to dictate that the warranties be either pled separately, or in a combined warranty using the key language from each of the possibly distinct warranties (i.e., habitability, fitness for a particular purpose and merchantability).

In *Arvai*, the circuit court held that liability under the implied warranty of habitability depended on whether the house in question was built for speculative or custom



purposes. Our Supreme Court affirmed the lower court's result, but on different reasoning, thus setting out a new rule. The court held that the determinative factor in assigning implied warranty of habitability liability is whether the defendant "places [the defective house], by the initial sale, into the stream of commerce." 289 S.C. at 164, 345 S.E.2d at 717 (The warranty attaches only to the first sale of a home. "[N]o warranty attaches to sales of used homes.").

In *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 340, 384 S.E.2d 730, 734 (1989), the Court held that "a mere lender, even if a party to the sale, is ordinarily not liable under an implied warranty of habitability theory." However, a lender may incur liability: when it is also a developer; when it has participated substantially in the construction; when it has made "express representations" regarding the dwelling to the buyer; in cases of fraud or concealment of defects; or when the lender is closely involved with construction in a

manner that is not normal commercial practice for a lender. *Id.* at 340-41, 384 S.E.2d at 734.

It is important not to confuse the implied warranty of workmanship with the implied warranty of habitability, as these are two distinct warranties. The implied warranty of workmanship, discussed above, arises from the construction contract itself. The implied warranty of habitability, however, arises solely from the sale of the home. *Id.* at 344, 384 S.E.2d at 736. Thus, the implied warranty of habitability can actually be implemented "to impose liability on a seller ...who is not also a builder," a concept which is decidedly foreign to the implied warranty of workmanship. *Id.*

The court in *Breedlove* did not decide whether the implied warranty of workmanship applied to the facts of that case because plaintiff in that case did not plead a cause of action for it. 377 S.C. at 419, 661 S.E.2d at 70. While the warranty might appear to give some hope to Gallagher in the above hypothetical because it arises only from

the sale of the home, and there is no "professional builder" requirement, the "new home" requirement of the warranty probably eliminates this warranty as a possibility for Gallagher.

Summary of Implied Warranty of Habitability/Fitness for a Particular Purpose/Merchantability

- Warrants the home will be fit for habitation
- Arises from the initial sale of a new home, not a used home
- Applicable to the home's first seller only (not necessarily the builder) and not to any subsequent sellers

Liability in tort—negligent construction

In addition to implied warranties, homebuyers may seek recovery in tort under a theory of negligent construction. In *Kennedy*, the court held that a claim in tort would be available "where a builder has violated a legal duty," such as a violation of a building code or

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industry standard, “no matter the type of resulting damage.” 299 S.C. at 347, 384 S.E.2d at 737. In *Breedlove*, the court held that whether a duty is owed is determined by foreseeability. 377 S.C. at 424-25, 661 S.E.2d at 72-73. Breedlove’s house was supposed to be a permanent residence for his family alone without foreseeable subsequent users of the house and, as such, he could not be said to have owed any future purchasers a duty of care. *Id.* Therefore, Smith was left without remedy against Breedlove in tort. *Id.*

Summary of Liability in Tort—Negligent Construction

- Builder is liable for negligence in construction of a dwelling
- Violations of building codes and industry standards give rise to cause of action
- Plaintiff may recover for mere economic loss
- Existence of duty depends on foreseeability of future purchasers

The unimportance of privity

An important issue when discussing any implied warranty is the concept of privity, which may determine whether a duty is owed and to whom. It is obvious, for instance, that a builder owes certain implied warranties to the initial buyer with whom he has contracted. Liability does not end there, though, and builders can be liable even in the absence of contractual privity, such as when a subsequent buyer purchases the house. In sum, South Carolina does not require privity for an owner or subsequent owner to assert his rights against a prior party in the chain.

Early opinions on implied warranties such as *Rutledge* and *Lane* adhered to contract principles, which required that parties be in privity with one another in order for a plaintiff to have standing to sue. In *Terlinde* the circuit court based its decision on *Rutledge* and *Lane* in holding that no action in contract could be brought by a subsequent homeowner against the builder-vendor due to the lack of privity. *Terlinde*, 275 S.C. at 397-98,

271 S.E.2d at 769. Our Supreme Court reversed, stating simply that “the concept of privity is no longer viable in this jurisdiction.” *Id.* at 398, 271 S.E.2d at 769-70. The *Terlinde* court also discussed the application of the privity doctrine in the context of tort law and reached the same conclusion, holding that “[t]he key inquiry is foreseeability, not privity.” *Id.* at 399, 271 S.E.2d at 770. If it is reasonably foreseeable, then, that a home will be used by subsequent purchasers, then the builder owes a duty to them (i.e., potential future purchasers) as well. In most situations, a professional builder can reasonably foresee that the homes he is building may be occupied by multiple subsequent purchasers, though this situation did not present itself in the *Breedlove* case.

Since *Terlinde*, our Supreme Court has held fast to its abolition of the privity doctrine in the residential construction context. In *Kennedy*, the court remained “steadfast in holding that privity of contract as a defense to an implied warranty action is abolished in this State.” 299 S.C. at 344, 384 S.E.2d at 736. In *Breedlove*, the court again reaffirmed the notion that lack of privity is not a valid defense for a defendant’s breach of implied warranty in South Carolina and applied that same rationale to the implied warranty of workmanship as well. 377 S.C. at 422-23, 384 S.E.2d at 71. Thus, neither builders under the implied warranty of workmanship, nor sellers under the implied warranty of habitability, may assert lack of privity to defend themselves from a suit for breach.

Strict liability

Plaintiffs in *Fields* attempted to assert a products liability/strict warranty liability theory against the builder of their house. 376 S.C. 545, 658 S.E.2d 80. The Supreme Court rejected this argument and held that “a general contractor building a home performs a service and does not sell a product ... for th[is] reason[], strict liability is generally inapplicable to a general contractor.” *Id.* at 565, 658 S.E.2d at 91.

The Court then reasoned as follows:

That the application of the strict liability statute to a contractor is unnecessary is exhibited by returning to an examination of this Court’s jurisprudence regarding the implied warranties that attach to the construction and sale of a home. As *Kennedy*, *Lane*, and *Rutledge* recognize, implied warranties ensure that a home-builder in South Carolina is liable for a reasonable period of time for latent defects in the home which impact the home’s suitability as a residence. Given this extension of liability, liability under the strict liability statute seems superfluous in this arena.

Id. at 566, 658 S.E.2d at 91.

Implied warranties and the UCC

It is perhaps not by coincidence that the construction warranties so far discussed resemble the sales warranties found in Article 2 of the Uniform Commercial Code (UCC) pertaining to sales of goods. *See* S.C. Code Ann. § 36-2-101 (2009), et. seq. (South Carolina’s codification of Article 2). Specifically, the home construction implied warranties of habitability and workmanship parallel the Article 2 implied warranties of fitness for a particular purpose and merchantability.

The implied warranty of fitness for particular purpose requires that sellers provide goods in accordance with the buyer’s intended purpose for those goods when the seller is aware of such purpose and that “the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods ...” S.C. Code Ann. § 36-2-315 (2009). The court in *Rutledge* used almost identical language and qualifications in holding that the sale of a new house was subject to “an implied warranty that the house ... is reasonably suitable for habitation.” 254 S.C. at 414, 175 S.E.2d at 795. In particular, the court stressed the fact that the buyer was forced to “rely on the skill of the builder,” who had portrayed

himself as an expert in home construction, and that both parties knew “that the essence of the transaction [was] the purchase of a habitable dwelling.” *Id.* The implied warranty of merchantability requires that goods must “pass without objection in the trade under the contract description” and be “fit for the ordinary purposes for which such goods are used” so long as the seller is “a merchant with respect to goods of that kind.” S.C. Code Ann. § 36-2-314. These requirements for adherence to general standards “in the trade” and for “ordinary purposes” can be compared to the construction warranty of workmanlike service, which requires that builders be in the business of building and calls for builders to work in accordance with the expectations a buyer would have for a professional builder. *See Breedlove*, 377 S.C. at 422, 661 S.E.2d at 71.

Given the similarities between the construction warranties recognized by South Carolina courts and Article 2 warranties, courts have, on occasion, looked to Article 2 rationales in the context of home construction. The court in *Lane* recognized the sale of a house as essentially “the sale of a product” and reasoned that the more appropriate body of law for such a transaction is that governing “sales of personalty” as opposed to “ancient doctrines of real property.” 267 S.C. at 501, 229 S.E.2d at 730. However, despite this analogy to the law of sales of products to transactions of homes, the court expressly dismissed the notion that the UCC should govern the sale of buildings. *Id.* at 503-04, 229 S.E.2d at 731; *see also Fields*, 376 S.C. at 565, 658 S.E.2d at 91 (“a general contractor building a home performs a service and does not sell a product.”).

Disclaimers of warranty

The aforementioned warranties and their treatment in South Carolina are intended to be buyer-friendly, invoking the doctrine of *caveat venditor*. It makes sense, then, that home sellers would attempt to disclaim implied warranties in an effort to tip the scales

back in their favor. However, South Carolina cases suggest that a disclaimer is easier said than done. In *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006) our Supreme Court looked at a home sale in which the deed disclaimed the implied warranty of habitability on the seller’s behalf. Ultimately, the court adopted a rule allowing disclaimer of the implied warranty of habitability, but with stringent conditions for doing so—the disclaimer must be “(1) conspicuous, (2) known to the buyer, and (3) specifically bargained for.” *Id.* at 485, 632 S.E.2d at 858. These requirements are to be strictly applied against sellers and exist for the protection of consumers, in that the burden for disclaimers is stringent, but falls short of an outright bar on disclaimers, so that buyers may “purposefully bargain for a price discount or other desired benefit.” *Id.* However, in spite of the pro-buyer rationale embraced by the courts, some standard form home purchase contracts contain provisions similar to the following:

Disclaimer: The Buyer acknowledges the Seller ...gives no guarantee or warranty of any kind, expressed or implied, as to the physical condition of the property or to the conditions of or existence of improvements, services, appliances or system thereto, or as to merchantability or fitness for a particular purpose as to the property or improvements thereof, and any implied warranty is hereby disclaimed by the Seller.

South Carolina Association of Realtors Agreement to Buy and Sell Real Estate—Residential (2008).

Given the buyer fills out many construction contracts and then offers them to the seller, it seems counterintuitive for a buyer to use a standard form contract in which she disclaims any implied warranties given to her by the seller. As such, prospective homebuyers and their realtors should carefully consider whether to offer a contract contain-

ing such a provision when placing an offer on a home.

The effect of statutes of limitation and repose on implied warranties

In 2005, the legislature shortened the statute of repose, which applies to “[a]ctions based upon defective or unsafe condition of improvement to real property.” S.C. Code Ann. § 15-3-640 (2009). The statute places an outer limit of eight years on the ability to bring claims, such as breach of contract claims, tort and warranty claims, related to defective or unsafe conditions in improvements to real property, including dwellings. *Id.* The parties can, however, contract for a longer warranty period. *Id.* The statute of repose “describes an outside limitation of eight years after the substantial completion of the improvement, within which normal statutes of limitations continue to run.” *Id.* The applicable statute of limitations to implied warranties and negligence theories is likely S.C. Code Ann. § 15-3-350, which requires any “action upon a contract, obligation, or liability, express or implied ...” to be brought within three years.

Conclusion

South Carolina has adopted a pro-homebuyer jurisprudence regarding the sale of homes, particularly homes constructed by a professional builder. Buyers and sellers of real estate and residential builders, along with their attorneys, real estate agents and other professionals involved in the sale and purchase of residences in South Carolina, should be aware of the warranties, and the attendant obligations, that arise by virtue of the construction and sale of residential dwellings in this state.

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