Residential Construction: The Covenant of Habitability and Implied Warranties

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Introduction

The area of residential construction has under gone a number of changes in recent years. In Arkansas, this has become a regulated and licensed industry where in the past this was a largely unregulated industry. As houses have increased in cost and complexity, the liability that can be associated with residential construction has grown to a considerable degree. Another change that has come into focus in recent years is the proliferation of building codes in many areas that formerly were not covered. These codes enacted by local government and inspected by local government, are intended as safety codes, but they can have far reaching effects on both consumers and builders.

Another issue is the actual way that this industry operates, which is at odds with the view taken by the courts. Many residential contractors operate with little in the way of contracts or plans. In most situations there are no designed professionals, other than a set of plans drafted by a non-engineer or non-architect. A common means of operation in the residential industry is for the builder to purchase the lot, either with a particular customer in mind or not, and the transaction is conducted as if it were a real estate sale using real estate sale contracts and documents. It is my impression that builders feel that the lack of specifications plans and

complicated contract documents protect them from responsibility for compliance with these documents and spare then the difficulties in working with engineers and architects. Contractors and even building officials will confidently, state that 90% of residential construction is conducted without these complications or that use of an engineer would lead to unreasonable requirements.

The difficulty is that when things go wrong in a residential construction project, the actual industry practices and standards are not treated by the courts as valid. The lack of specifications or plans do not relieve the contractor of a burden, but result in the contractor being subjected to strict liability should the home not meet ANY of the homeowner's expectations, real or imagined. The misconception on the part of builders comes from an over simplification of the law=s requirements. Virtually every problem that this topic will deal with can be cured by adequate and detailed contract documents. Apparently many builders believe that so long as they do not have a construction contract but merely sell a new house to an owner, that the owner has limited recourse. That might have been true a generation ago; it is a dangerous myth today. At ancient[1] common law the doctrine of privity of contract and Caveat Emptor or "let the buyer beware" was the rule in real estate cases. For most of the twentieth century, the law of products liability for personal property developed on a completely different tangent from real estate law. However, the two have now merged with regard to the sale and construction of new residential housing.

What is it?

Most are familiar with the concept that when a product is purchased, if it fails to work as expected, the item can be simply returned and it will be repaired or replaced. Most contractor=s who would think nothing of returning a saw, or any other item, under the warranty, do not realize

that they are treated by the law as a manufacturer and that each new home as built is covered by an implied warranty of habitability, that is that the home will comply with all normal expectations of the average home buyer and that they are strictly liable, that is to say liable without fault, in the event that there is any dangerous condition in the home, whether or not the builder is aware of any such danger. This liability extends not only to the first consumer buyer but to subsequent buyers. Not only is this the law, but it has been the law for more than 40 years in Arkansas and in most other states. It is not the buyer, but the builder who must beware.

This situation has developed from a one two punch in the development of the law. First, even though the contract with the owner establishes no standards or conduct, the law implies standards. This point is well made in the Construction Law Handbook:

> "Implied obligations arise out of every contractual relationship. These obligations are every bit as real and enforceable as explicit contractual rights and duties. Thus, for example, implied in every contract is that each party will do nothing to interfere with the performance of the other. Furthermore, for example, it has often been held that there is an **implied duty of good faith in every contractual undertaking**. In the context of construction failure disputes, the implied obligation that arises the most is **the contractor's implied duty to perform all work in a good and workmanlike manner.** While certain contracts for construction will state this duty explicitly, even absent such a contract provision, it is almost universally recognized that implied in every contract for construction is the contractor's obligation to perform the contract scope of work in a good and workmanlike manner**. If failure to do so results in a construction failure, the contractor will be held accountable notwithstanding the implied nature of the**

obligation.@[2]

Thus the law has implied a standard of conduct the extent of which is very broad and vague. This is followed by a second development, which extends the duty from the contractor=s customer to subsequent purchasers as well. The concept is succinctly stated in the Construction Law Hand book:

> "At common law, **only a party to a contract** to purchase goods **could sue** for breach of warranty. Section 2-318 abandoned the concept of privity and affords the jurisdictions adopting the UCC three alternatives to extend to third-party beneficiaries the right to make warranty claims. The first two alternatives extend breach of warranty remedies to ordinary consumers. **The third alternative extends the warranty provisions to "any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty."** Thus, in those states that have adopted the third alternative, subsequent purchasers, such as businesses, may be able to successfully sue the original seller for breach of warranty.@[3]

Now, having looked at the general law, we will examine the Arkansas case that first reached these issues, a concept now embraced in most all of the 50 states.

The case is known as Wawak V. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970) at pages 1095 - 1099, and addresses and answers the problem as follows in this rather extended quotation of the case:

The defendant-appellant Wawak, a house builder, bought a lot in North Little Rock in the course of his business, built a house on it, and sold it to the appellees Stewart for $28,500. The heating and air-conditioning ductwork had been embedded in the ground before the concrete slab floor was poured above that ductwork. Some months after the Stewarts moved into the house a serious defect manifested itself, in that heavy rains caused water and particles of fill to seep into the ducts and thence through the floor vents into the interior of the house, with consequent damage that need not be described at the moment. The Stewarts brought this action for damages. The great question in the case, overshadowing all other issues, **is whether there is any implied warranty in a contract by which the builder-vendor of a new house sells it to its first purchaser**. The trial court sustained the theory of implied warranty and awarded the Stewarts damages of $1,309. The trial court was right. Twenty years ago one could hardly find any American decision recognizing the existence of an implied warranty in a routine sale of a new dwelling. Both the rapidity and the unanimity with which **the courts have recently moved away from the harsh doctrine of caveat emptor in the sale of new houses** are amazing, for the law has not traditionally progressed with such speed. Yet there is nothing really surprising in the modern trend. The contrast between the rules of law applicable to the sale of personal property and those applicable to the sale of real property was so great as to be indefensible. One who bought a chattel as simple as a walking stick or a kitchen mop was entitled to get his money back if the article was not of merchantable quality. But the purchaser of a $50,000 home ordinarily had no remedy even if the foundation proved to be so defective that the structure collapsed into a heap of rubble. Several law review

articles, of which the earliest was published in 1952, forecast the new developments. Their titles suggest their contents: Dunham, Vendor's Obligation as to Fitness of Land For a Particular Purpose, 37 Minn. L. Rev. 108 (1952); Bearman, Caveat Emptor in Sales of Realty C Recent Assaults Upon the Rule, 14 Vanderbilt L. Rev. 541 (1961); Haskell, The Case For an Implied Warranty of Quality in Sales of Real Property, 53 Georgetown L. Jour. 633 (1965); Roberts, The Case of the Unwary Home Buyer: The Housing Merchant Did It, 52 Cornell L. Q. 835 (1967). In 1963 a new edition of Williston's Contracts added its weight to the movement, pointing out a practical advantage in the new point of view: "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." Williston, Contracts, 926A (3d ed. 1963). In the past decade six states have recognized an implied warranty of inhabitability, sound workmanship, or proper construction C **in the sale of new houses by vendors who also built the structures**. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965); Waggoner v. Midwestern Dev. Co., S.D., 154 N.W.2d 803 (1967); Humber v. Morton, Texas, 426 S.W.2d 554, 25 A.L.R.3d 372 (1968); House v. Thornton, Wash., 457 P.2d 199 (1969). The near unanimity of the judges in those cases is noteworthy. Of the 36 justices who made up the six appellate courts, the only dissent noted was that of Justice Griffin in the Texas case, who dissented without opinion. A few excerpts from those recent opinions will illustrate what seems certain to be the accepted rule of the future. In the Schipper case the New

Jersey court had this to say: **The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times**. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. We consider that there are no meaningful distinctions between Levitt's [a large-scale builder-seller] mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding considerations are the same. Caveat emptor developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. **Buyers of mass produced development homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale.** Levitt expresses the fear of "uncertainty and chaos" if responsibility for defective construction is continued after the builder vendor's delivery of the deed and its loss of control of the premises, but we fail to see why this should be anticipated or why it should materialize any more than in the products liability field where there has been no such result. A similar point of view was expressed in the Rouse case by the Washington Supreme Court: As between vendor and purchaser, the builder-vendors, even though exercising reasonable care to construct a sound building, had by far the better opportunity to examine the stability of the site and to determine the kind of foundation to install. **Although hindsight, it is frequently said, is 20-20 and defendants used reasonable prudence in selecting the site and designing and constructing the building,**

their position throughout the process of selection, planning and construction was markedly superior to that of their first purchaser-occupant. To borrow an idea from equity, of the innocent parties who suffered, it was the builder-vendor who made the harm possible. If there is a comparative standard of innocence, as well as of culpability, the defendants who built and sold the house were less innocent and more culpable than the wholly innocent and unsuspecting buyer. Thus, the old rule of caveat emptor has little relevance to the sale of a brand-new house by a vendor-builder to a first buyer for purposes of occupancy. We apprehend it to be the rule that, **when a vendor-builder sells a new house to its first intended occupant, he impliedly warrants that the foundations supporting it are firm and secure and that the house is structurally safe for the buyer's intended purpose of living in it. Current literature on the subject overwhelmingly supports this idea of an implied warranty of fitness in the sale of new houses.** The Supreme Court of Texas Joined in the widespread criticism of the doctrine of caveat emptor in the Humber opinion: If at one time in Texas the rule of caveat emptor had application to the sale of a new house by a vendor-builder, that time is now past. The decisions Page 1098 and legal writings herein referred to afford numerous examples and situations illustrating the harshness and injustice of the rule when applied to the sale of new houses by a builder-vendor, and we need not repeat them here. Obviously, the ordinary purchaser is not in a position to ascertain when there is a defect in a chimney flue, or vent of a heating apparatus, or whether the plumbing work covered by a concrete slab foundation is faulty. **The caveat emptor rule as applied to new houses is an anachronism patently**

out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of Shoddy work. In 1957 an intermediate New Jersey court refused to recognize implied warranties in the sale of realty. Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 134 A.2d 717, affirmed on other grounds 26 N.J. 330, 139 A.2d 738 (1958). That case is no longer the law in New Jersey, owing to the New Jerky Supreme Court's decision in the Schipper case, but we should add that the intermediate court's arguments were fully answered by the Supreme Court of Idaho in Bathlahmy v. Bechtel, supra: The reasoning of the majority in the New Jersey decision that chaotic uncertainty would pervade the entire real estate field if sellers were subject to liability for implied warranty of fitness, and that the rules of caveat emptor would work no harshness on purchasers of real estate, is fallacious, unrealistic and unjust when applied to the facts of the case before us. In the situation here the imposition of an implied warranty of fitness would work no more uncertainty or chaos than the warranties commonly applied in sales of personal property. Likewise, the statement by the New Jersey court that the plaintiffs had an opportunity to protect themselves by exacting warranties in the contract and reserving them in the deed, has no application to the facts of the case at bar. **A buyer, who has no knowledge, notice, or warning of defects, is in no position to exact specific warranties.** Any written warranty demanded in such a case would necessarily be so general in terms as to be difficult to enforce. It would be like the verbal warranty by defendant in this case, that the house would be a "quality home." As might be

expected, we have been presented with the timeworn, threadbare argument that a court is legislating whenever it modifies common-law rules to achieve justice in the light of modern economic and technological advances. That same argument was doubtless made in a famous case that parallels this one: MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, Ann. Cas. 1916C, 440, L.R.A. 1916F, 696 (1916). There the court, with respect to the sale of automobiles, abolished a requirement of privity of contract that was just as firmly embedded in the common law as is the rule that we are now re-examining. Yet the doctrine of the MacPherson case is now accepted as commonplace throughout the nation. We have no doubt that the modification of the rule of caveat emptor that we are now considering will be accepted with like unanimity within a few years. After the case at bar had been submitted to the court we invited the filing of amci curiae briefs, to avoid the possibility that persuasive arguments might be overlooked. The only brief that urges adherence to the old rule was filed by counsel for the Arkansas Home Builders Association. The AHBA brief makes one point that merits comment. Page 1100 Counsel state that the AHBA "recognizes the need for the imposition of a warranty upon new construction." To that end the Association included a one-year warranty requirement in a bill that it sponsored, unsuccessfully, in the 1967 and 1969 sessions of the legislature. The main purpose of the bill, however, was to regulate the homebuilding industry by the creation of a governing board and the imposition of licensing requirements upon those engaged in the business. We are not impressed by the AHBA's suggestion that we await legislative action, even though the Association concedes that some form of warranty is needed. To begin with, the General Assembly's repeated refusal to enact the proposed

law hardly gives assurance that it will be passed in the near future. Furthermore, whatever decision we reach in this case can have no effect upon the General Assembly's freedom to change the law as it sees fit. To the contrary, a judicial decision may focus legislative attention upon the problem. See, for example, Act 165 of 1969, which was a prompt legislative reaction to our decision in Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968). **To sum up., upon the facts before us in the case at bar we have no hesitancy in adopting the modern rule by which an implied warranty may be recognized in the sale of a new house by a seller who was also the builder**. . . . .There are three subordinate points that require discussion. First, Wawak insists that all warranties, express or implied, were negatived by this paragraph in the offer-and-acceptance agreement that preceded the execution of a warranty deed when the sale was consummated: **ABuyer certifies that he has inspected the property and he is not relying upon any warranties, representations or statements of the Agent or Seller as to age or physical condition of improvements.** Even if we assume that the preliminary contract was not merged in the warranty deed, we think it plain that the quoted paragraph did not exclude an implied warranty with respect to the particular defect now in question, which lay beneath the concrete floor and could not possibly have been discovered by even the most careful inspection. The quitter paragraph does not purport to exclude all warranties. It merely states that the buyer has inspected the property and is not relying on any warranties as to the age or physical condition of the improvements. Construing the printed contract against the seller, who evidently prepared it, we hold that the clause applies only to defects that might reasonably have been discovered in the course

of an inspection made by a purchaser of average experience in such matters.[4]

Had this case remained limited to a first time purchaser from a large contractor, building Aspec@ homes the case might have remained a foot note. However, the case has been expanded over the years to extend the contractor=s covered and the purchasers. The case generated a long and well reasoned dissent, and most of the worries expressed in that dissent have in fact come to fruition.

Not long after this case, the basis of liability was extended from these implied general duties to the application of the strict liability doctrines from the area of products liability. In Blagg V. Fred Hunt Co., 272 Ark. 185, 612 S.W.2d 321 (1981), the Arkansas statute dealing with products liability was applied to residential construction in Arkansas. The court stated: AAfter lengthily consideration, we choose to adopt the view of Justice Francis. We find no valid reason for holding that strict liability should not apply to property damage in a house sold by a builder-vendor. Accordingly, in construing the **Arkansas strict liability statute, we hold that the word "product" is as applicable to a house as to an automobile**.@

The statute is set out as:

A.C.A. 4-86-102. Liability of supplier.

(a) A supplier of a product is subject to liability in damages for harm to a person or to property if:

(1) The supplier is engaged in the business of manufacturing, assembling, selling, leasing, or otherwise distributing the product;

(2) The product **was supplied by him or her in a defective condition which rendered it unreasonably dangerous**; and

(3) The defective condition was a proximate cause of the harm to person

or to property.

(b) The provisions of subsection (a) of this section apply although the claiming party has not obtained the product from or entered into any contractual relation with the supplier.

History. Acts 1973, No. 111, '' 1, 2.

A.S.A. 1947, '' 85-2-318.2, 85-2-318.3.@

The net effect of these decisions is to extend the responsibility of builders for the performance of the home. Virtually no residential construction uses soil stability tests in the design of foundations, or utilizes engineer consultants for code compliance, structural decisions or materials. Nevertheless in the event of any failure, or even without a failure in the case of code violations, the contractor is made an insurer of the home=s performance. The issue of code compliance is even more, difficult, because the builder may not rely on the interpretation of local building authorities. Even a foundation that has passed a code compliance inspection can be the source of serious liability if in the opinion of an engineer; the code has not been met.

Finally, and perhaps most important, the type home to which these doctrines have been applied has changed. From AMass Developments,@ the courts have slowly eroded the distinction and the doctrine is now held to apply to every single house project and custom built homes. The legal basis to impose these legal standards might have been correct for mass built subdivisions, but it seems in appropriate in the case of a single home project or a custom built house.

Who Is Covered?

The comments in the earliest cases regarding this duty seemed to key on the fact that the builders in those cases were Amass@ builders rather than smaller builders. As noted, the courts have lost this distinction. The issue is still open in Arkansas. The courts have ruled that a home owner who

was not a >professional= builders but who builds a house then later sells it, is not covered by these warranties. In Morris V. Rush, 77 Ark. App. 11, 69 S.W.3d 876 (2002) the court stated:

> Wawak v. Stewart, 247 Ark. at 1097, 449 S.W.2d at 924. The appellants argue that, while they did not buy a brand-new house, liability should still be on the Rushes because of their opportunity to examine the stability of the site and determine the kind of foundation that was necessary.
>
> AThe instant case is clearly distinguishable from Wawak v. Stewart, supra, because in that case the appellant was a professional house builder and built the house at issue in the course of his business. It is undisputed that the Rushes, on the other hand, are not professional builders. The appellants have cited no cases, and we know of none, which hold that an individual who builds his own house, lives in it, and later sells it, qualifies as a builder-vendor. For this reason alone appellants' final argument fails. Moreover, their argument would fail even if the Rushes had been builder-vendors because an implied warranty of habitability is waived when the buyer purchases the property "as is." See O'Mara v. Dykema[5], supra.@

The next issues concerns the extent of the duty owed.[6] In Wawak, the first consumer purchaser was covered; the home had been constructed and used without problems for more than a year prior to the first sale. Subsequent case law as extended the liability further down the line. In short a builder may be held liable to purchasers from its direct customer. In Wingfield V. Page, 278 Ark. 276, 644 S.W.2d 940 (1983), the court noted:

> AFinally a purchaser may seek relief under the statutory remedy of strict liability which imposes liability, as a matter of public policy, **on the party best able to shoulder it.**
>
> See Defective Housing: Remedies Available to the First and Subsequent Purchasers, 25

So. Dakota L. Rev. 333 (1980); Breach of Warranty in the Sale of Real Property: Johnson v. Healy, 41 Ohio St. L.J. 727 (1980).

In the case at bar the appellees did not seek to recover under the doctrine of strict liability. See Blagg v. Fred Hunt Co., Inc., 272 Ark. 185, 612 S.W.2d 321 (1981). **The case was submitted to the jury on the theories of tort and contract for negligence and breach of implied warranty**. Appellants contend that the instruction on implied warranty was erroneously given. Thus, the first point of this case deals only with the contractual remedies for breach of warranty.

In Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970), an opinion frequently cited in comments and articles, **this Court abandoned the doctrine of caveat emptor, because of stated policy considerations, and adopted the view that, by operation of law, a builder-vendor gives implied warranties of inhabitability, sound workmanship and proper construction. That decision was thought to have raised the question of whether proof of faulty workmanship or construction was required to support a recovery under the theory of breach of warranty of habitability.** Woods, The Personal Injury Action in Warranty - Has the Arkansas Strict Liability Statute Rendered It Obsolete, 28 Ark. L. Rev. 335, 355 (1974). The question was answered when the concept of implied warranties in residential construction was extended by finding a breach of the warranty of habitability based upon faulty design. Coney v. Stewart, 263 Ark. 148, 562 S.W.2d 619 (1978). See also, Contracts - Implied Warranties in Residential Construction Contracts, 2 U. Ark. Little Rock L. J. 166 (1979). **This Court in Coney, supra, emphasized our commitment to the concept of fairness based upon the policy reasons stated in Wawak, supra, and in Blagg,**

supra, we extended the implied warranty on latent defects to subsequent purchasers under some conditions.@

These duties we have discussed have been extended to subsequent purchasers. The extent of this finding is contained in Blagg V. Fred Hunt Co., 272 Ark. 185, 612 S.W.2d 321 (1981)

> Since Wawak, the original homebuyer has been able to place reliance on the builder-vendor's implied warranty. This has protected that investment which, in most instances, represents the family's largest single expenditure.
>
> We find no reason that those same basic concepts should not be extended to subsequent purchasers of real estate. This is an area of the law being developed on a case by case basis. Our ruling is based on the complaint before us and involves a home which had a defect that became apparent to the third purchasers, the appellants, within 9 months of the original sale date. Obviously, there is a point in time beyond which the implied warranty will expire and that time should be based on a standard of reasonableness.
>
> We hold that the builder-vendor's implied warranty of fitness for habitation runs not only in favor of the first owner, **but extends to subsequent purchasers for a reasonable length of time** where there is no substantial change or alteration in the condition of the building from the original sale. **This implied warranty is limited to latent defects which are not discoverable by subsequent purchasers upon reasonable inspection and which become manifest only after the purchase.** Wyoming adopted this rule in a well reasoned opinion. Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo. 1979).

Thus the warranty is extended to future purchasers but subject the limitation noted that the defect must be latent and must have first manifested itself after purchase. So that any defect that can be found by a reasonable inspection or that has exhibited signs, is not covered. This coverage extends for a >reasonable= period of time.[7]

Notice

The courts have thus engrafted the legislative law of warranty for personal property to real property. However, with the concept of warranty also comes the requirement under the UCC of reasonable notice. This concept was addressed in Bull V. Brantner, 10 Ark. App. 229, 662 S.W.2d 476 (1984), which stated:

> AAppellant first **contends appellees did not give adequate notice of all of the claimed defects.** We considered this same issue in Pickler v. Fisher, 7 Ark. App. 125, 644 S.W.2d 644 (1983), and we find that case dispositive here. The Picklers constructed a home which they sold to the Fishers. The Fishers first complained orally to the Picklers about alleged defects in the home; they next sent a **letter setting out eight specific defects**; they then filed an action listing **nineteen defects** in the complaint**. At trial, over the Picklers' objections, the Fishers presented proof on thirty-six defects.** The jury gave a verdict for the Fishers. The Picklers contended on appeal to this Court that in an action based upon an implied warranty on the sale of new housing, the purchaser is required to give timely notice of each and every claimed defect and that failure to do so results in a waiver of any defects not contained in a timely written notice. We said: "We do declare that in such cases the buyer is not required to list each and every objection that he would rely on as constituting the breach**. Notification in such cases need only be with sufficient**

clarity to apprise the vendor-builder that a breach of implied warranty is being asserted and to give him **sufficient opportunity to inspect the premises and to correct the defects**. The sufficiency of the notice and whether it was given within a reasonable time are ordinarily questions for a jury to determine.=@

The practical effect on builders in trial is that the list of defects can grow and change at virtually any stage of the proceeding making the defense of such claims nearly impossible.[8]

What is covered?

The nature of litigation makes it difficult to state with particularity what damages might be found for any particular injury or theory. General black letter laws is that Arkansas law has never required exactness of proof in determining damages, and if it is reasonably certain that some loss occurred, it is enough that damages can be stated only approximately; the fact that a party can state the amount of damages he suffered only approximately is not a sufficient reason for disallowing damages if from the approximate estimates a satisfactory conclusion can be reached. The nature of damages suffered will depend on the very particular facts of each case. In Pennington V. Rhodes, 55 Ark. App. 42, 929 S.W.2d 169 (1996) the court stated a general rule for damages in construction defect cases.

AIn cases involving breach of warranty for a newly constructed house, **Arkansas has recognized two ways of proving damages**. The preferred measure of damages in construction contract cases involving new structures is to use the cost of repairing the defects so that the vendee-owner recovers an amount that will repair the house to the

quality expected when the parties struck their bargain. Daniel v. Quick, 270 Ark. 528, 606 S.W.2d 81 (1980). **The other method is to fix damages as the difference in the house's value as defective versus its value without defects.** See Carter v. Quick, 263 Ark. 202, 563 S.W.2d 461 (1978). In Williams v. Charles Sloan, Inc., 17 Ark. App. 247, 706 S.W.2d 405 (1986), we reversed a judgment based on a jury verdict of $28,000 in favor of purchasers of a defective house because the verdict was not supported by the evidence based on the difference in value measure of damages, and we cited the two methods of determining damages where breach of a construction contract results in incomplete or defective construction. The Restatement (Second) of Contracts, ' 348(2) (1979) defines these methods as follows:

> ' 348. Alternatives to Loss in Value of Performance
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> . . . .
>
> (2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on
>
> (a) the diminution in the market price of the property caused by the breach, or
>
> (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

Comment c to Section 348 speaks to the incomplete or defective performance situation, and is instructive concerning when the cost-of-repairs standard may be

preferred over the diminution-in-value standard:

> Sometimes, especially if the performance is defective as distinguished from incomplete, it may not be possible to prove the loss in value to the injured party with reasonable certainty. In that case he can usually recover damages based on the cost to remedy the defects. Even if this gives him a recovery somewhat in excess of the loss in value to him, it is better that he receive a small windfall than that he be under-compensated by being limited to the resulting diminution in the market value of his property.
>
> Sometimes, however, such a large part of the cost to remedy the defects consists of the cost to undo what has been improperly done that the cost to remedy the defects will be clearly disproportionate to the probable loss in value to the injured party. Damages based on the cost to remedy the defects would then give the injured party a recovery greatly in excess of the loss in value to him and result in a substantial windfall. Such an award will not be made. It is sometimes said that the award would involve "economic waste," but this is a misleading expression since an injured party will not, even if awarded an excessive amount of damages, usually pay to

> have the defects remedied if to do so will cost him more than the resulting increase in value to him. If an award based on the cost to remedy the defects would clearly be excessive and the injured party does not prove the actual loss in value to him, damages will be based instead on the difference between the market price that the property would have had without the defects and the market price of the property with the defects. This diminution in market price is the least possible loss in value to the injured party, since he could always sell the property on the market even if it had no special value to him.

Restatement (Second) of Contracts ' 348 cmt. c (1979).

Although the Restatement approach to determining if the repair costs are disproportionate looks to the probable loss of value caused by the defective construction, Arkansas looks to whether the repair costs are disproportionate to the results to be obtained from curing the defects where the building is a dwelling built on the owner's property for his occupancy. Carter v. Quick, 263 Ark. 202, 563 S.W.2d 461 (1978). In that case the Supreme Court addressed the proper measure of damages applicable in cases involving a suit by a vendee-owner against a vendor-builder alleging defective construction of a new house, and observed that the underlying purpose in awarding damages for breach of contract is to place the injured party in as good a position as he would have been had the contract been performed. Id. (citing Rebsamen Companies, Inc. v. Arkansas St. Hosp., 258 Ark. 160, 522

S.W.2d 845 (1975)). However, the Court also observed that the difference in the value of a building as erected and its value if it had been constructed according to the contract is not always appropriate where the contractor's performance is defective, particularly where a house is built on the owner's property for his own occupancy and the aesthetic value of enjoying a properly constructed home is involved. Carter, supra.

> **We stated in Williams that although judicial preference for the cost-of-repairs measure and the economic-waste exception is an effort to avoid the situation where the contractor is required to tear down a structure or otherwise commit economic waste to correct a defect that does not detract from the market value as much as it would cost to repair it, this preference for the cost-of-repair measure and the economic-waste exception does not limit the injured buyer to only one measure of damages.** 17 Ark. App. at 251, 706 S.W.2d at 407.

There are also other types of damage to consider such as loss of use or even rescission in proper cases.[9]

Defenses

How can a builder protect itself from these types of liability and conversely what must a consumer do to preserve these rights. The most obvious is a disclaimer of warranty such as is now common in every consumer purchase of personal property. The courts in Arkansas have yet to actually find a disclaimer to be effective but they have described in detail what type of disclaimer would be required. Usually an express warranty replaces all implied warranties, but the case law severely limited this concept in residential cases. In Bullington V. Palangio, 345 Ark. 320, 45 S.W.3d 834 (2001) the court gave an extensive

statement on this point:

> "We next consider whether it was error for the trial court to submit the issue of waiver of implied warranties to the jury. Appellant contends that the trial court erred by not finding as a matter of law that the contract between the parties constituted a waiver of implied warranties by the appellee.
>
> As authority for his argument, appellant relies on Carter v. Quick, 263 Ark. 202, 563 S.W.2d 461 (1978), where we held that where a contract contains an express warranty on the subject of an asserted implied e ruling in Carter, supra, was that an implied warranty for materials and workmanship was replaced by a specific contractual warranty as to materials and workmanship. The expressed contractual warranty in Carter, supra, was that the builder promised that "he would build the house with the same quality and be as good as his own," and stated, "If you want to look at my house look it over. I'll build you one just like it with the same material and workmanship as my house." Id. At trial, Carter moved for a directed verdict on the ground that Quick failed to show a breach of the contract because no evidence was presented as to the quality of workmanship of appellant's residence. Id. **In determining the effect of an express warranty upon an implied warranty in building contracts, we concluded that implied warranties are not applicable when there is an express warranty.** Id. We further concluded that where a contract contains an express warranty on the subject of an asserted implied warranty, the former is exclusive and there is no implied warranty on that subject. Id. (citing Reed v. Rea-Patterson Milling Co., 186 Ark. 595, 54 S.W.2d 695 (1932); Earle v.

Boyer, 172 Ark. 534, 289 S.W. 490 (1927); Elder Grocery Co. v. Applegate, 151 Ark. 565, 237 S.W. 92 (1922); C.B. Ensign & Co. v. Coffelt, 119 Ark. 1, 177 S.W. 735 (1915)). Based upon these principles, we held that because Carter's testimony was the only evidence pertaining to the quality of the workmanship on his own house, the evidence was not sufficient to show a breach of warranty and that Carter's motion for a directed verdict should have been granted. . . . .

Since Carter, supra, **we have made it clear that implied warranties of habitability, sound workmanship, and proper construction are given by operation of law and are intended to hold a builder-vendor to a standard of fairness.** We addressed this issue in O'Mara v. Dykema, 328 Ark. 310, 942 S.W.2d 854 (1997), where we stated:

> In Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970), we adopted the view that by operation of law, a builder-vendor gives implied warranties of habitability, sound workmanship, and proper construction. The implied warranty does not rest upon an agreement, but arises by operation of law and is intended to hold the builder-vendor to a standard of fairness. Wingfield v. Page, 278 Ark. 276, 644 S.W.2d 940 (1983). However, implied warranties may be excluded when the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention

to the fact that no implied warranties are made or that a certain implied warranty is excluded. See Carter v. Quick, 263 Ark. 202, 563 S.W.2d 461 (1978); 77A CJS Sales ' 266 (1994).. . . . .

In the present case, **there is an express warranty that covers workmanship and materials**, **but there is no express exclusion of implied warranties of habitability and proper construction to hold a builder to a standard of fairness**. Under the principle set forth in Carter, supra, the fact that the contract contains an express warranty that deals specifically with workmanship supports a conclusion that the implied warranty of workmanship has been waived by the express contractual warranty of workmanship. However, our decision in Carter, supra, did not specifically address the effect of the waiver of the warranty of materials and workmanship upon the more fundamental implied warranties of habitability and proper construction, and we now hold that the principle set forth in Carter, supra, was limited to the effect of an express warranty upon an implied warranty on the same subject. **With regard to implied warranties of habitability and proper construction, the contract in the present case does not disclaim such implied warranties and does not use any language to suggest that the construction is being accepted "as is" or "with faults" so as to waive such implied warranties. In addition, appellant testified that he did not explain to appellee that the language of the express warranty covering workmanship and materials for one year was intended to waive implied warranties for habitability and proper**

construction.@

The question is of course whether a properly worded exclusion that did address the concerns set out above would be held sufficient. If there was such an exclusion it would have to be expressed in the original contract and would need to specifically address the implied warranties.

Time

The only sure defense, if there is no contract or effective exclusion of warranties is the lapse of time. Arkansas has a particular type of statute that applies to construction known as a Statute of Repose, which is a limitation of the period of time liability remains open on construction, absent fraudulent concealment. In Curry V. Thornsberry, 354 Ark. 631, 128 S.W.3d 438 (2003) the curt stated:

> "That statute of limitations is found in Ark. Code Ann. ' 16-56-112 (a) (1987 & Supp. 2003), which provides as follows:
>
> No action in contract . . . to recover damages caused by any deficiency in the design, planning, supervision, or observation of construction or the construction and repair of any improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, supervision, or observation of construction or the construction or repair of the improvement more than five (5) years after substantial completion of the improvement."

However, ' 16-56-112 (d) further states that "[t]he limitations prescribed by this

section shall not apply in the event of fraudulent concealment of the deficiency [.]" In the present case, the residence was constructed in 1987, and the Curry's' suit was not filed until 1995. Therefore, in the absence of fraudulent concealment of the alleged deficiencies in the construction of their home, their suit was barred as of 1992 by the statute of limitations found in ' 16-56-112 (a).

This court has recognized that the effect of ' 16-56-112 (a) is to cut off entirely an injured person's right of action before it accrues, when that action does not arise until after the statutory period has elapsed. Rogers v. Mallory, 328 Ark. 116, 941 S.W.2d 421 (1997); Okla Homer Smith Furniture Mfg. Co. v. Larson & Wear, Inc., 278 Ark. 467, 646 S.W.2d 969 (1983). Thus, ' 16-56-112 (a) is more accurately described as a "statute of repose," rather than a "statute of limitations." Rogers, 328 Ark. at 120. The Rogers court further noted that the General Assembly's purpose in enacting the statute was to "enact a comprehensive statute of limitations protecting persons engaged in the construction industry from being subject to litigation arising from work performed many years prior to the initiation of the lawsuit." Rogers, 328 Ark. at 120 (citing Okla Homer Smith Furniture, 278 Ark. at 470).

When the running of the statute of limitations is raised as a defense, the defendant has the burden of affirmatively pleading this defense. Adams v. Arthur, 333 Ark. 53, 969 S.W.2d 598 (1998); First Pyramid Life Ins. Co. v. Stoltz, 311 Ark. 313, 843 S.W.2d 842 (1992). However, once it is clear from the face of the complaint that the action is barred by the applicable limitations period, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the statute of limitations was in fact tolled. Id. Fraudulent concealment suspends the running of the statute of limitations, and the

suspension remains in effect until the party having the cause of action discovers the fraud or should have discovered it by the exercise of due diligence. Shelton v. Fiser, 340 Ark. 89, 8 S.W.3d 557 (2000); Martin v. Arthur, 339 Ark. 149, 3 S.W.3d 684 (1999); First Pyramid Life Ins. Co. v. Stoltz, supra.

In order to toll the statute of limitations, this court has said that a plaintiff is required to show something more than a continuation of a prior nondisclosure; rather, there must be evidence creating a fact question related to "some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself." Shelton, 340 Ark. at 96 (quoting Adams v. Arthur, supra); see also Meadors v. Still, 344 Ark. 307, 40 S.W.3d 294 (2001). Accordingly, it is clear that not only must there be fraud, but the fraud must be furtively planned and secretly executed so as to keep the fraud concealed. Shelton, supra. Further, if the plaintiff, by the exercise of reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it. O'Mara v. Dykema, 328 Ark. 310, 942 S.W.2d 854 (1997); Wilson v. General Elec. Capital Auto Lease, Inc., 311 Ark. 84, 842 S.W.2d 619 (1992).

Conclusion

Finally, the most effective means of avoiding extreme results and protecting both builders and home owners is the use of properly constructed arbitration and mediation clauses in residential construction contracts. Arkansas law already mandates the preconstruction notice required by the lien laws and a contractor in preparing its paperwork for a new home should consider alternative dispute resolution. Many of the difficulties and strange results can be avoided when the Trier of fact is experienced in the area of construction. A law judge whose

primary duties deal with personal injury automobile accidents cannot reasonably be expected to understand the operation of the construction industry. The court has slowly eroded the differences between contract and tort. The use of alternative dispute resolution will benefit both contractor and owner in that disputes can be resolved quickly, more economically and in a manner that take into consideration the reality of the home as constructed.

The following represent not all but some of the more pertinent cases on this issue in the state of Arkansas.

Cases

Wawak V. Stewart, 247 Ark. 1093 (1970)

Blagg V. Fred Hunt Co., 272 Ark. 185, 612 S.W.2d 321 (1981)

Wingfield V. Page, 278 Ark. 276, 644 S.W.2d 940 (1983)

Bull V. Brantner, 10 Ark. App. 229, 662 S.W.2d 476 (1984)

Sanders V. Walker, 298 Ark. 374, 767 S.W.2d 526 (1989)

Rogers V. Mallory, 328 Ark. 116,941 S.W.2d 421 (1997)

O'Mara V. Dykema, 328 Ark. 310, 942 S.W.2d 854 (1997)

Bullington V. Palangio, 345 Ark. 320, 45 S.W.3d 834 (2001)

Morris V. Rush, 77 Ark. App. 11, 69 S.W.3d 876 (2002)

Curry V. Thornsberry, 354 Ark. 631, 128 S.W.3d 438 (2003)

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[1]. 40 years ago.

[2]. Construction Law Handbook, Part VIII Contract Performance C Who Is Entitled To What Chapter 29 Construction Failures, ' 29.02 The Law Applicable To Construction Failures ' 29.02[B] Contractor Liability, Volume 1 - Page 1088, A' 29.02[B] [2] Implied Obligations.

[3]. Construction Law Handbook, Part VI Contracting, Chapter 16 Applicability Of The Uniform Commercial Code To Construction, ' 16.04 Article 2 C Warranties.

[4]. Wawak V. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970) at pages 1095 - 1099,

[5]. O'Mara V. Dykema, 328 Ark. 310, 942 S.W.2d 854 (1997) also in accord couple had built one previous home and lived in it then the subject home, the purchase was initiated by the buyers to sellers who do not have the home on the market at the time.

[6]. Renters are beyond this topic but see Sanders V. Walker, 298 Ark. 374, 767 S.W.2d 526 (1989) The decision is not a strong one but the indication is that the warranty may not extend to renters. A Express and implied warranties of habitability. Appellant cites us to nothing that would sustain a finding of an express warranty by Ms. Walker as to the condition of the premises and the record refutes any such contention. As to an implied warranty of habitability, appellant tracks the development of recent changes in the earlier common law of nonliability of landlords, citing cases from our own as well as other jurisdictions: Blagg v. Fred Hunt & Co., 272 Ark. 185, 612 S.W.2d 321 (1981); Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970). Appellant contends, in short, that when Ms. Walker rented the building to Mr. Sanders she impliedly warranted the premises to be fundamentally safe. In Wawak this court did recognize for the first time an implied warranty of fitness in a sale of a new dwelling. A decade Page 379 later in Blagg v. Fred Hunt & Co., supra, the doctrine was extended to a sale involving parties who were not in privity with the original vendor-builder.

Appellee points to the obvious distinction between the case at bar and the Wawak and Blagg cases the dwellings in Wawak and Blagg were newly constructed, both less than a year old, whereas the building in this case is easily twenty years old. In Blagg we specifically observed that an implied warranty will expire after a reasonable time. Without suggesting that on this proof a submissible factual issue existed for breach of an implied warranty, we believe that time had dissolved any warranty of the fitness of these premises.

[7]. See Curry V. Thornsberry, 354 Ark. 631, 128 S.W.3d 438 (2003) AThis court has held that there is an implied warranty of fitness and habitability in the sale of a new house by a seller who was also the builder. See Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970). In Blagg v. Fred Hunt Co., Inc., 272 Ark. 185, 612 S.W.2d 321 (1981), the builder-vendor's implied warranty of fitness for habitation was extended to subsequent purchasers "for a reasonable length of time where there is no substantial change or alteration in the condition of the building from the original sale." Blagg, 272 Ark. at 187. The implied warranty was limited in Blagg to latent defects which are not discoverable by subsequent purchasers upon reasonable inspection and which become manifest only after the purchase. Id.

[8]. See also Pennington V. Rhodes, 55 Ark. App. 42, 929 S.W.2d 169 (1996).

[9]. Cox V. Bishop, 28 Ark. App. 210, 772 S.W.2d 358 (1989) and Economy V. Freeling, 236 Ark. 888, 370 S.W.2d 438 (1963).