The WARRANTY of HABITABILITY IN NEVADA

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Currently, there are 249 construction defect cases pending in the Clark County District Court.[1] Among those theories of liability most commonly relied upon by plaintiff-homeowners, is the implied warranty of habitability because of its scope and the protections it affords. While Nevada case law defining this warranty is limited, its scope can be determined by examining those cases relied upon by the Nevada Supreme Court and analyzing trends across the nation.

HISTORY

To properly understand Nevada's warranty of habitability, its scope and purpose, a brief review of its development is helpful.

A. The Warranty of Habitability is Born

The implied warranty of habitability traces its origin to England and was created as a replacement to the age old doctrine of *caveat emptor* in the 1937 case of *Miller v. Cannon Hill Estates, Ltd.*, 2 K.B. 113 (1937). In *Miller*, the builder had failed to complete the home which he contracted to build. The buyer sued, asserting that the builder's failure to complete the residence rendered it uninhabitable. Holding that a developer of residential construction impliedly warrants that the house is reasonably fit for human dwelling, and that it shall be completed in an efficient and workmanlike manner utilizing proper materials, the *Miller* court established the warranty of habitability.

B. The Warranty Comes to the United States.

The warranty of habitability was first adopted in the United States in the 1957 Ohio case of *Vanderschrier v. Aaron*, 103 Ohio App. 340, 342, 140 N.E.2d 819, 821 (1957). The *Vanderschrier* court adopted the warranty as set forth in *Miller*, stating there is an implied warranty that a house will be finished in a workmanlike manner. Like *Miller*, the *Vanderschrier* case dealt with the builder's failure to complete the home. Specifically, the builder had failed to connect the main sewer line, which ended up flooding the front yard and basement.

By 1964, completed homes were brought within the scope of the warranty by the Colorado case of *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964). The *Carpenter* court expand the warranty's scope, stating that there is an implied warranty that builder-vendors have complied with the applicable building codes, that the home was built in a workmanlike manner, and that it is suitable for habitation.

C. The Warranty is Applied to Subsequent Purchasers

In 1976, the Indiana case of *Barnes v. MacBrown & Co., Inc.*, 264 Ind. 227, 229, 342 N.E.2d 619, 620 (1976), extended the warranty to subsequent purchasers, holding that contractual privity was not necessary. The *Barnes* court acknowledged that "[o]ur society is an increasingly mobile one. Our technology is increasingly complex. The traditional requirement of privity between a builder-vender is an outmoded one." The Supreme Court of Illinois in *Redarowizc v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 619, 620 (1976), followed the reasoning of *Barnes*, and expounded upon the same public policy underlying the decision. Since *Barnes*, the vast majority of courts that have addressed the issue have agreed that privity is not necessary.[2]

D. The Warranty Comes to Nevada.

Finally, in the 1993 opinion of *Radaker v. Scott*, 109 Nev. 653, 855 P.2d 1037 (1993), the Nevada Supreme Court adopted the warranty of habitability, expressly following the reasoning of *Miller, Vanderschrier, Carpenter,* and *Redarowicz*. In *Calloway v. City of Reno*, the Court further confirmed that the com-

mon law warranty of habitability exists side-by-side with statutory warranties, stating:

> Buying a house is the largest investment many consumers ever make, and homeowners are an appealing, sympathetic class. If a house causes economic disappointment by not meeting a purchaser's expectations, the resulting failure to receive the benefit of the bargain is a core concern of contract, not tort, law. There are protections for homebuyers, however, such as statutory warranties, the general warranty of habitability, and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects.[3]

SCOPE OF THE IMPLIED WARRANTY OF HABITABILITY

In *Radaker*, the Court does not take the next step of defining the warranty's scope. Instead, the Court indicates its concurrence with the public policy considerations as set forth in *Redarowicz*. It is from these public policy considerations that the warranty's scope can be gleaned.

A. The Warranty of Habitability Guarantees More Than Mere "Habitability"

The warranty of habitability, contrary to what may be suggested by its name, is more than a warranty that a home will be habitable. As stated by the Supreme Court of Illinois, "the mere fact that the house is capable of being inhabited does not satisfy the implied warranty. The use of the term 'habitability' is perhaps unfortunate."[4]

The scope of the warranty varies somewhat from state to state. In Nevada, however, attorneys need to look no further than *Radaker* and the cases it cites. *Miller, Vanderschrier*, and *Carpenter* each discuss the different protections the warranty provides. Reading these three cases together, the warranty provides certain guarantees for homeowners. That is, the house shall be reasonably fit for human occupation; the house shall be completed in an efficient and workmanlike manner; the house shall be constructed of proper materials; and, the builder-vendors shall have complied with the applicable building codes.[5]

Courts in other states have been quite willing to include a wide range of defects within the bounds of the warranty of habitability. Such defects have included the failure of the top window sashes of several windows to stay up properly, the passage of water underneath a garage door whenever it rained fairly hard, water leaks in a basement, exterior wall water leaks, inadequate central heating systems, insufficient hot water systems, improperly installed smoke detection systems, inadequate drainage, corroding plumbing, fire sprinkler heads blocked in violation of local fire codes, trash rooms inadequately ventilated, a well not providing an adequate water supply for house, a chimney and brick walls pulling away from a house; cracks in walls, floor sinking from interior walls, doors not closing properly, exterior brick veneer cracking, pillars under a house sinking away from supporting beams, a basement floor pitched away from a drain, improperly installed siding, a defective and ill-fitting bay window, a defective front door and door frame, and deterioration and nail-popping on interior drywall.[6] Nevada's expansive scope of the warranty appears consistent with this majority trend.[7]

B. The Warranty of Habitability Extends to Subsequent Purchasers

By citing *Redarowicz* with approval, the Nevada Supreme Court appears to have adopted the modern trend, allowing the warranty to stand in the absence of privity.[8] The *Redarowicz* court reasoned:

> Privity of contract is not required. Like the initial purchaser, the subsequent purchaser has little opportunity to inspect the construction methods used in building the home. Like the initial purchaser, the subsequent purchaser is usually not knowledgeable in construction practices and must, to a substantial degree, rely upon the expertise of the person who built the home. If construction of a new house is defective, its repair costs should be borne by the responsible builder-vendor who created the latent defect. The compelling public policies underlying the implied warranty of habitability should not be frustrated because of the short intervening ownership of the first purchaser.[9]

The Nevada Supreme Court has similarly held that contractual privity is not required for other implied warranties. Specifically, in *Vacation Village v. Hitachi America*, 110 Nev. 481, 486, 874 P.2d 744, 747 (1994), the Court found that contractual privity was not required for the implied warranty of merchantibility. In *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 79, 560 P.2d 154, 157 (1977), the Court stated that a "lack of privity between the buyer and manufacturer does not preclude an action against the manufacturer for the recovery of economic losses caused by breach of warranties." Given the modern trend, the Court's willingness to allow warranty claims in the absence of privity, and the Court's approval of *Redarowicz*, it appears that subsequent purchasers in Nevada may assert the same rights against the builder/developer as the original purchaser.

C. A Claim for Breach of the Warranty of Habitability May be Brought Directly Against Subcontractors

Subcontractors contribute to the construction of a home, but are generally not parties to the sale. This raises a question as to whether a homeowner could make a warranty claim directly against a subcontractor. Because contractual privity is not required when a subsequent purchaser brings a warranty claim against a builder/developer, it follows that a lack of privity may not protect a subcontractor from breach of implied warranty claims.

In *Calloway*, the Honorable William Maupin touched upon this issue. In his concurring and dissenting opinion, Justice

continued on page 14

continued from page 13

Maupin suggests subcontractors could be directly liable for warranty claims in stating:

> In an appropriate future case, we may be called upon to determine whether lack of privity of contract between property owners and remote subcontractors bars recovery under various implied warranties when a defect in construction causes a problem that is restricted to economic loss (i.e., where the claimant is restricted to his, her or its recovery in contract). To the extent that building construction is treated by the majority as analogous to an integrated product for economic loss considerations, we may wish to examine whether this court's ruling in *Hiles v. Johnson Pump Co.*, 93 Nev. 73, 560 P.2d 154 (1977) [holding that privity was not necessary], should apply by analogy to implied warranty claims made in this context. This issue is not before us because appellants' warranty claims were voluntarily dismissed below.[10]

In Clark County, the issue of contractual privity was addressed by District Court Judge Allan R. Earl, who held that subcontractors can be sued directly and that privity is not required for a claim of breach of the warranty of habitability. In a written order, Judge Earl stated:

> After taking this matter under advisement, it is the Court's view, as well as that of Department 17 [Judge Michael A. Cherry] and 18 [Judge Nancy M. Saitta], that under Chapter 40, a subcontractor may be sued directly and that pursuant to *Vacation Village, Inc. v. Hitachi America Ltd.*, 110 Nev. 481 (1994), contractual or vertical privity is not required for a claim for breach of implied warranty of merchantability. See also *Hiles Co. v. Johnson Pump Co.*, 93 Nev. 73 (1977). In addition, it is this Court's view that until further clarification by the Nevada Supreme Court, a cause of action or claim for breach of warranty for habitability exists in the State of Nevada and can be brought under Chapter 40 without the requirement of vertical privity. (*Elan Homeowners Association v. Picerne Const. Co.*, Clark Co. Dist. Ct. No. A401128, October 2, 2002.)[11]

D. The Warranty of Habitability Is Limited To Latent Defects

In *Radaker*, the Nevada Supreme Court expressed that the purpose of the warranty is to protect homeowners from latent defects. The *Radaker* court stated:

> The Supreme Court of Illinois indicated that the warranty of habitability is a creature of public policy designed to protect purchasers of new houses who are victims of latent defects in construction.[12]

In N.R.S. 11.204(4), Nevada has defined a latent deficiency as "a deficiency which is not apparent by reasonable inspection." This definition may be instructive in determining what is meant by a latent defect in terms of the implied warranty and seems appropriate given the history of the warranty as set forth in *Radaker*. In each case cited by the *Radaker* court, the defects complained of were not apparent by the homeowner's reasonable inspection.

In *Miller* and *Vanderschrier*, the homes at issue were not complete at the time the parties entered into the contract. Because an inspection of the completed homes would have been impossible at the time of the sale, any defects could therefore be considered latent.[13]

In *Carpenter*, the homeowner's walls began to crack within four months of occupancy. Upon investigation, the owners discovered the home was constructed in such a manner that a number of county building codes were violated. The *Carpenter* court considered the building code violations to be "latent conditions."[14]

In *Redarowicz*, although the plaintiff was not the original owner at the time of purchase, none of the defects complained of were apparent upon inspection. It was not until after moving in that the plaintiffs discovered the chimney and adjoining brick wall were pulling away from the house. The *Redarowicz* court reasoned that a purchaser relies, to a substantial degree, upon the expertise of the builder.[15]

When a homebuyer is unable to discover defects upon a reasonable inspection, the warranty of habitability applies. However, the builder is protected from limitless liability as any claims must fall within the applicable statute of repose and limitations periods.

E. The Warranty Of Habitability May Apply To Common Areas

For many construction defect cases in Nevada, the defects complained of are within a homeowner association's common areas. The few states which have addressed the issue have almost uniformly held that the warranty of habitability extends to common areas.[16] Other states not specifically addressing common areas have held that the warranty covers separate structures sold along with the home.[17]

In the small minority of states that make a distinction between the implied warranty of quality and the implied warranty of workmanship, a different rule applies. In these states, the warranty of habitability ensures that the home shall be habitable, and a separate implied warranty of good workmanship ensures that the home shall be built in a workmanlike manner. (This is in contrast to other states, including Nevada, which consider the warranty of good workmanship to exist within the warranty of habitability.)[18] In the few states that distinguish between the two warranties, courts have generally held that the warranty of habitability does not apply to the common areas,

but the warranty of good workmanship does.[19] This is presumably because homeowners do not live in the common areas.[20] Because the warranty of good workmanship applies to the common areas even in these states, the practical distinction between these two approaches is minimal.

In Nevada, an association's standing to bring claims for a breach of the warranty of habitability is codified. N.R.S. 116.3102(d) provides that a homeowners association may "institute, defend or intervene in litigation on behalf of the association or two or more units' owners on matters affecting the common-interest community." The "common-interest community" includes the common elements as well as the units themselves.[21] Given that the state legislature has provided such a broad right of action to an association, limitations on an association's ability to pursue implied warranty claims would likely not apply.

CONCLUSION

While Nevada case law defining the scope of the common law implied warranty of habitability is scarce, it is not without definition. *Radaker*, and the cases it cites with approval, provide insight into the warranty's applicability to subsequent purchasers, subcontractors, and common areas. By citing *Miller, Vanderschrier, Carpenter*, and *Redarowicz*, the Nevada Supreme Court has indicated its willingness to adopt the modern trend of providing significant protections to homeowners who by necessity rely upon the builder's expertise to produce a habitable, workmanlike product, constructed in compliance with applicable building codes. In a state that is experiencing the largest population growth in the country and a corresponding construction boom, the warranty of habitability provides an important protection to homebuyers. NL

Endnotes

1. September 8, 2003, Charles Harvey, Clark County District Court, Case Management Coordinator.

2. *See, e.g., Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 678 P.2d 427 (1984); *Blagg v. Fred Hunt Co.*, 272 Ark. 185, 612, S.W.2d 321 (1981); *Tusch Enterprises v. Coffin*, 113 Ida. 37, 740 P.2d 1022 (1987); *Redarowicz*, 441 N.E.2d at 330; *Briarcliffe West v. Wiseman Const. Co.*, 118 Ill.App.3d 163, 454 N.E.2d 363 (1983); *Wagner Construction Co., Inc. v. Noonan*, 403 N.E.2d 1144 (Ind. Ct. App. 1980); *Ramos v. Holmberg*, 241 N.W.2d 253 (Mich. Ct. App. 1976); *Keyes v. Guy Baily Homes, Inc.*, 439 So.2d 670 (Miss. 1983); *Degnan v. Executive Homes, Inc.*, 215 Mont. 162, 696 P.2d 431 (1985); *Bridges v. Ferrell*, 685 P.2d 409 (Okl.Ct.App. 1984); *Lempke v. Dagenais*, 547 A.2d 290 (N.H. 1988); *Aronsohn v. Mandara*, 98 N.J. 92, 484 A.2d 675 (1984); *Reichelt v. Urban Investment & Development Co.*, 577 F. Supp. 971 (N.D.Ill.1984); *Spivack v. Berks Ridge Corp. Inc.*, 586 A.2d 402 (Pa. Super. Ct. 1990); *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980); *Parkway Co. v. Woodruff*, 857 S.W.2d 903 (Tex. Ct. App., 1993); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168 (Tex. 1983); *Eastern Steel Constructors, Inc. v. City of Salem*, 549 S.E.2d 266 (W.Va. 2001); *Moxley v. Laramine Builders*, 600 P.2d 733 (Wyo. 1979).

3. *Calloway v. City of Reno*, 116 Nev. 250, 261, 993 P.2d 1259, 1266 (2000), citing, *Casa Clara v. Charley Toppino and Sons*, 620 So.2d 1244, 1247 (Fla. 1993).

4. *Peterson v. Hubschman Constr. Co.*, 76 Ill.2d 31, 41, 389 N.E.2d 1154, 1158, 27 Ill.Dec. 746, 750 (1979).

5. *Miller*, 2 K.B. at 121-122; *Vanderschrier*, 103 Ohio App. at 341-342, 140 N.E.2d at 821, *Carpenter*, 154 Colo. at 83, 388 P.2d at 402. Colorado's warranty of habitability jury instruction should be instructive, because it is based upon the *Carpenter* case, which in part formed the basis of the *Radaker* decision. The Colorado jury instruction reads as follows:

> 30:28A BUILDING CONTRACTOR'S IMPLIED WARRANTIES-DEFINED
> A person who enters into a contract to build a building or structure for another or who, as a business venture, builds or has built a structure or building and sells that structure or building to another impliedly warrants, that is, impliedly promises, that:
> 1. All relevant provisions of the (describe any relevant codes) applicable to the construction of the structure or building have been complied with;
> 2. All work on the structure or the building has been done in a workmanlike manner; and
> 3. The building or structure is suitable for the ordinary purposes for which it might reasonably be used.

6. *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 201, 225 S.E.2d 557, 567 (1976); *Hartley v. Ballou*, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974); *Tassan v. United Development Company*, 88 Ill.App. 3d 581, 584-585, 410 N.E.2d 902, 906-907 (1980); *Lyon v. Ward*, 28 N.C.App. 446, 447, 221 S.E.2d 727, 728 (1976); *Redarowicz*, 92 Ill.2d at 175, 441 N.E.2d at 326; *Terlinde*, 275 S.C. at 396, 271 S.E.2d at 768; *Petersen*, 76 Ill.2d at 36, 389 N.E.d at 1156, 27 Ill.Dec. at 748.

7. In 1991, Nevada adopted a statutory warranty of quality, which applies to common-interest communities only. N.R.S. 116.4113 and 116.4114. This warranty, which can be express or implied, overlaps in scope with the common law warranty of habitability. The legislative-drawn broad scope of the warranty of quality demonstrates the legislature's concurrence with the Nevada Supreme Court that the principle of *caveat emptor* is no longer the prevailing law in Nevada.

8. Specifically, of the 15 courts that have visited the issue, 11 held that privity is not required, largely citing the same public policy considerations set forth in *Redarowicz*.

9. *Redarowicz*, 92 Ill.2d at 183, 441 N.E.2d at 330.

10. *Calloway*, 993 P.2d at 1277, fn. 13 (Maupin, J., concurring in part and dissenting in part).

The Warranty of Habitability in Nevada

continued from page 15

11. This common law exception to the privity requirement does not take into account recent statutory enactments. Specifically, Senate Bill 241, which was signed into law by Governor Kenny Guinn on June 9, 2003, defines a "subcontractor" as "a contractor who performs work on behalf of another contractor in the construction of a residence or appurtenance." (SB 241, Section 4). This provision indicates that a homeowner has the same right of action against a subcontractor as against the general contractor and developer.

12. *Radaker*, 109 Nev. at 660 (emphasis added).

13. *See, Miller*, 2 K.B. at 115; *see also Vanderschrier*, 103 Ohio App. at 340, 140 N.E.2d at 820.

14. *Carpenter*, 154 Colo. at 79-80.

15. *Redarowicz*, 92 Ill.2d at 175, 181-182, 441 N.E.2d at 326, 329.

16. *Council of Unit Owners of Sea Colony East, Phases III, IV, VI, VII, v. Carl M. Freeman Associates, Inc.*, 1989 W.L. 48568 (Del. Supp. 1989) (Unpublished Opinion); *Board of Dir. Of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 692 N.E.2d 825 (Ill. Ct. App. 1998); *Berish v. Bornstein*, 770 N.E.2d 961 (Mass. 2002) (warranty of habitability covers common areas if defect implicates the habitability of individual condominium units); *Redbud Coop. Corp. v. Clayton*, 700 S.W.2d 551 (Tenn. Ct. App. 1985); *Meadowbrook Condominium Ass'n v. South Burlington Realty Corp.*, 152 Vt. 16, 565 A.2d 238 (1989); *c.f. Stuart v. Coldwell Banker Commercial Group, Inc.*, 745 P.2d 1284 (Wash. 1987) ("The warranty does not provide recovery for defects in exterior, nonstructural elements adjacent to the dwelling unit.").

17. *See, e.g., Lyon v. Ward*, 28 N.C. App. 446, 450, 221 S.E.2d 727, 729 (1976).

18. *See, e.g., Bloomfield*, 186 Ill.2d at 430, 712 N.E.2d at 336; *Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002).

19. *See, e.g., Bloomfield*, 186 Ill.2d at 429, 712 N.E.2d at 336.

20. In associations where homeowners own the airspace only, and ownership of the structure belongs to the association, perhaps both warranties would apply to the common areas, even in these few states.

21. See, N.R.S. 116.110318 ("Common elements mean: …all portions of the common-interest community other than the units…"), 116.110323 and 116.11039 ("Unit means a physical portion of the common- interest community…").