COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

Nos. 97-2310
97-2311
97-2312

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

97-2310
KELLY SHISLER,

PLAINTIFF-RESPONDENT,

V.

CRAIG FRANK D/B/A CF BUILDERS,

DEFENDANT-APPELLANT.

97-2311
MARY V. SKOLASKI,

PLAINTIFF-RESPONDENT,

V.

CRAIG FRANK D/B/A CF BUILDERS,

DEFENDANT-APPELLANT.

97-2312

BRENDA STUBER,

PLAINTIFF-RESPONDENT,

v.

CRAIG FRANK D/B/A CF BUILDERS,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

VERGERONT, J.[1] Craig Frank appeals from three separate judgments in favor of Kelly Shisler, Mary Skolaski and Brenda Stuber (owners). The owners brought this action alleging defects including leaking basements in new condominiums that each bought from Frank.[2] The trial court found that the basements as constructed were not suitable for the intended purpose and awarded $4,500 in damages. We conclude that the trial court's decision is correct and therefore affirm.

BACKGROUND

Most of the facts are undisputed. In 1994, Kelly Shisler, Mary Skolaski and Brenda Stuber each bought a new condominium from Craig Frank. Frank, a general contractor, built the condominiums and sold them as entry level

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[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

[2] Kelly Shisler, Mary Skolaski and Brenda Stuber also claimed that they had problems with windows in their condominiums. That issue, however, is not a subject of this appeal.

condominiums of simple construction, which means that he sold them without any warranties. The basements in all three condominiums were unfinished space.

After the purchase, the basement in each condominium began to flood after each rain and the owners, individually, contacted Frank about the problem. Frank sent someone to look at the basements and made several attempts to stop the basements from flooding. Water, however, continued to get into the basements and with the water came mud and sand. Eventually, the owners contacted several waterproofing companies, including All Dry and Weatherproofing, to get an estimate for waterproofing their basements.

The owners notified Frank about their decision to seek estimates for waterproofing the basements and provided him with copies of the estimates. The owners testified that Frank told them that he would get back to them at a certain time; he disputes that he said that. According to the owners, when Frank did not get back to them, they contracted with All Dry to correct the flooding in their basements. All Dry waterproofed the basements and the owners wrote Frank a letter demanding reimbursement for their costs. Mary Skolaski paid All Dry $1,500 to waterproof her basement; Brenda Stuber paid $1,300; and Kelly Shisler paid $1,300 for the waterproofing service. Frank refused to reimburse the owners for the expenses they incurred. Consequently, the owners filed a small claims action.

In the small claims action, the owners alleged that they had frequent problems with water flooding their basements. The small claims court commissioner found that they had met the burden of proof to recover and awarded $1,575 to Mary Skolaski, $1,300 to Brenda Stuber and $1,300 to Mary Shisler for

the cost of remedying the flooding in their respective basements. Frank requested a trial de novo pursuant to § 799.207(3), STATS.

The trial court found that "there was water in the basements during construction after the roof was on; that water problems appeared in one of the units after purchase very shortly after construction; and that water problems appeared over time throughout all of the basements of all of the units…." The court determined that there were "implied warranties of suitability to purpose in the common law which were violated immediately and which continued to develop over time." In reaching this conclusion, the court stated:

> [I]t is a reasonable understanding of people who own homes with basements that they can be used, for instance, in unfinished areas for reasonable storage. They also have a reasonable expectation that there will not be sand and mud coming through with every rainstorm and the water receding.
>
> Those constitute health hazards and moisture problems which undermine the integrity of a building if left uncorrected, and this was a serious problem. This was not an incidental problem, and it affected the entire building.
>
> ….
>
> Additional proof of [violation of the implied warranty] is that it could not be corrected by the individual homeowners because if one of the units did not waterproof, the water problems continued, so it was not within their ability to solve the problem.
>
> For all those reasons, I find there was a violation of that implied warranty. I am not entering a finding there was negligence. I am not entering a finding that there was a violation of industry standards. But that the basements as constructed were not suitable for the purpose.

Appealing from the judgments against him, Frank contends that Wisconsin does not recognize an implied warranty of fitness for intended use in the sale of real estate where there was no express warranty and there is no

negligence or failure to comply with code or industry standards upon the part of the contractor. Whether Wisconsin recognizes an implied warranty of fitness for intended use where the seller of the house is also the builder is a question of law, which we review de novo. *See* ***Midwest Developers v. Goma Corp.***, 121 Wis.2d 632, 651, 360 N.W.2d 554, 564 (Ct. App. 1984).

Frank correctly points out that no Wisconsin published decision has implied a warranty in a home purchased from the builder-vendor. However, we also observe that no Wisconsin published decision has declined to do so. In ***Dittman v. Nagel***, 43 Wis.2d 155, 168 N.W.2d 190 (1969), the court addressed an express warranty in a real estate sales contract and in a footnote stated: "It is generally the law that there are no implied warranties of quality in the sale of real estate. *See* 7 Williston, CONTRACTS (3d ed.) p. 804 sec. 926A, and cases cited therein." ***Id.*** at 160 n.1, 168 N.W.2d at 193. However, the question whether the court should recognize an implied warranty was neither presented to nor addressed by the court.

In ***Fisher v. Simon,*** 15 Wis.2d 207, 112 N.W.2d 705 (1961), the supreme court noted that the trial court's dismissal of the claim for breach by the builder-vendor of an implied warranty for latent defects in the building due to faulty construction was not appealed and therefore not before it. ***Id.*** at 210, 112 N.W.2d at 707. In a footnote, the court referred to "an annotation on the question of a vendor's liability grounded on implied warranty," and observed that in England there is no implied warranty of safety in a house sold by the builder, but did not otherwise comment on or discuss this issue. ***Id.*** at 207 n.1, 112 N.W.2d at 707.

In the absence of Wisconsin cases on point, we turn first to Wisconsin supreme court decisions that are sufficiently related to provide guidance, and next to decisions in other jurisdictions.

In ***Pines v. Perssion***, 14 Wis.2d 590, 595, 111 N.W.2d 409, 412 (1961), the supreme court concluded that the traditional common law rule that a landlord had no duty to make the dwelling habitable was incompatible with contemporary social conditions and public policy, and therefore recognized that a residential lease contains an implied warranty of habitability. In ***Pines,*** the plaintiffs entered into a leasing agreement for a furnished house. ***Id***. at 591, 111 N.W.2d at 410. Although three of the plaintiffs visited the house and found it in a filthy condition, they eventually signed the lease. ***Id***. The plaintiffs alleged that the defendant promised to clean and fix up the house, paint it, provide the necessary furnishings, and have the house in suitable condition by the fall semester. ***Id***. at 591-92, 111 N.W.2d at 410. When the plaintiffs arrived to take up residence, however, the house was still in a filthy condition and without furnishings. ***Id***. at 592, 111 N.W.2d at 411. After the City of Madison Building Inspection Department inspected the premises and found several building code violations, the plaintiffs vacated the premises. ***Id.*** at 593, 111 N.W.2d at 411.

The ***Pines*** court concluded that there was an implied warranty of habitability in the lease and that the defendant breached the warranty. ***Id.*** at 596, 111 N.W.2d at 413. The court recognized that the general rule was no implied warranty because a tenant is a purchaser of an estate in land and is subject to the doctrine of *caveat emptor.* ***Id.*** at 594-95, 111 N.W.2d at 412. However, the court noted that the "frame of reference in which the old common-law rule operated has changed." ***Id.*** at 595, 111 N.W.2d at 412. Legislation and administrative rules,

the court said, now imposed certain duties on a property owner, demonstrating a policy judgment that was inconsistent with the old common law rule and made it obsolete. ***Id.*** at 595-96, 111 N.W.2d at 412-13.

Our supreme court has demonstrated a willingness to move away from the *caveat emptor* rule in other related contexts. In ***Fisher***, the supreme court, unwilling to follow prior cases that held that the contractor-vendor was not liable for injury arising from negligent construction after it completed the work and the owner accepted it, concluded that the policy of the law does not preclude recovery for damages resulting from the builder's negligence. ***Fisher***, 15 Wis.2d at 216, 112 N.W.2d at 710. As part of its reasoning, the court analogized a contractor-vendor to a manufacturer constructing a product for sale to others, noted that the "modern and enlightened view" was to apply the principles of products liability cases to real structures, and the court did so. ***Id.*** We recognize that in ***Fisher*** there was negligence and the issue was the extent of liability. Nevertheless, the court's analogy of a contractor-vendor to the producer of goods and the application of principles of law from that source is instructive here.

In ***Ollerman v. O'Rourke Co.***, 94 Wis.2d 17, 288 N.W.2d 95 (1980), the supreme court declined to follow the old common law rule of *caveat emptor* in real estate transactions and decided to impose a duty to disclose on the vendor in a real estate transaction under certain situations. ***Id.*** at 29-41, 288 N.W.2d at 101-06. The court stated: "This court has moved away from the rule of *caveat emptor* in real estate transactions, as have courts in other states." ***Id.*** at 38, 288 N.W.2d at 105. The court cited ***Pines*** and ***Fisher*** as examples of Wisconsin cases that moved away from the *caveat emptor* rule, and then analyzed cases in other jurisdictions. ***Id.*** at 38-39, 288 N.W.2d at 105-06.

We now consider how other jurisdictions have decided the question whether there is an implied warranty in new houses or condominiums sold by the builder-vendor. Courts in a majority of states have held that an implied warranty arises from the sale of new homes by the builder-vendor. *See* ***Redarowicz v. Ohlendorf***, 441 N.E.2d 324, 329 (Ill. 1982), and the cases from twenty-four states cited therein. At least four additional states have reached the same conclusion: *See* ***Richards v. Powercraft Homes, Inc.***, 678 P.2d 427 (Ariz. 1984); ***Loch Hill Construction Co. v. Fricke***, 399 A.2d 883 (Md. 1979); ***Banville v. Huckins***, 407 A.2d 294 (Me. 1979); ***Oliver v. City Builders, Inc.***, 303 So.2d 466 (Miss. 1974).

In many states, courts first adopted the implied warranty of habitability in residential leases, following ***Pines***, which was the first case to do so. *See* ***Schipper v. Levitt & Sons, Inc.***, 207 A.2d 314, 317 (1965). They then extended the application to the context of the sale of new homes by the builder-vendor. *See, e.g.,* ***Weeks v. Slavick Builders, Inc***., 180 N.W.2d 503 (Mich. Ct. App. 1970); ***Hanavan v. Dye***, 281 N.E.2d 398 (Ill. App. Ct. 1972); ***Theis v. Heuer***, 280 N.E.2d 300 (Ind. 1972), and cases cited therein. This implied warranty has been applied to condominiums, as well as houses, purchased from the builder-vendor. *See* ***Gable v. Silver***, 258 So.2d 11 (Fla. Dist. Ct. App. 1972). These cases recognize that although the general rule has been that implied warranties did not apply to sale of realty, that general rule is eroding and the trend is to find implied warranties in the sale of new homes. ***Gable***, 258 So.2d at 13.

Some of these cases call the implied warranty one of "habitability." *See, e.g.,* ***Tusch Enterprises v. Coffin***, 740 P.2d 1022 (Idaho 1987); ***Park v. Sohn***, 433 N.E.2d 651 (1982). Others call it an implied warranty for fitness of purpose or intended use. *See* ***Petersen v. Hubschman Constr. Co., Inc.***, 389 N.E.2d 1154,

1158 (Ill. 1979). Others use both. *See* ***Hesson v. Walmsley Construction Co.***, 422 So.2d 943, 944 (Fla. Dist. Ct. App. 1982) ("implied warranties of fitness and habitability"). However, the substance of the warranty is defined in a similar manner:

> [I]mplied in the contract for sale from the builder-vendor to the vendees is a warranty that the house, when completed and conveyed to the vendees, would be reasonably suited for its intended use. This implied warranty, of course, extends only to latent defects which interfere with this legitimate expectation.

Petersen, 389 N.E.2d at 1158.

The rationale for abandoning *caveat emptor* in favor of an implied warranty in the sale of a new house by a builder-vendor is based on the changes in the method of constructing and marketing new houses. ***Petersen***, 389 N.E.2d at 1157.

> Many new houses are, in a sense, now mass produced. The vendee buys in many instances from a model home or from predrawn plans. The nature of the construction methods is such that a vendee has little or no opportunity to inspect. The vendee is making a major investment, in many instances the largest single investment of his life. He is usually not knowledgeable in construction practices and, to a substantial degree, must rely upon the integrity and the skill of the builder-vendor, who is in the business of building and selling houses. The vendee has a right to expect to receive that for which he has bargained and that which the builder-vendor has agreed to construct and convey to him, that is, a house that is reasonably fit for use as a residence.

Id.

We find this reasoning persuasive, and supported by ***Pines***, ***Fisher*** and ***Ollerman***. We also observe that the courts finding an implied warranty have

frequently looked to the protections afforded consumers in the sale of goods under the UCC as a sound analogy. *See* ***Putnam v. Roudebush***, 352 So.2d 908 (Fla. Dist. Ct. App. 1977); ***Lane v. Trenholm Building Co.***, 229 S.E.2d 728 (S.C. 1976). In this respect, the reasoning of many of these cases is similar to that in ***Fisher***. We therefore hold that there is an implied warranty of fitness for the intended use in the contract for sale of a home or condominium from the builder-vendor to the builder-vendee.[3]

Frank argues that even if we conclude that there is an implied warranty, there is no breach of that warranty here because the unfinished basements had no defects in the foundation walls and were suitable for the purpose of providing a foundation for the building. We do not agree. The trial court found that "the purpose of the basement and the foundation goes beyond merely supporting the walls." Homeowners use basements for a variety of things, one of which is for storage. While the owners understood that they were buying an unfinished basement, the trial court found that they did not expect to have water, mud and sand in their basements every time it rained. In addition, the trial court found that basements, whether unfinished or finished, are an integral part of the structure as they provide structural support. Therefore constant flooding, as the

[3] We do not adopt the term "implied warranty of habitability" because that may connote a narrowness that is inconsistent with the actual definition of the warranty:

> 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. Because of its imprecise meaning it is susceptible of misconstruction. It would more accurately convey the meaning of the warranty as used in this context if it were to be phrased in language similar to that used in the Uniform Commercial Code, warranty of merchantability, or warranty of fitness for a particular purpose.

Petersen v. Hubschman Constr. Co., Inc., 389 N.W.3d 1154, 1158 (Ill. 1979).

trial court noted, "may create moisture problems which, left uncorrected, can undermine the integrity of the structure."

In summary, we conclude that the trial court correctly decided that there was an implied warranty of fitness for the intended purpose in the sale of the condominiums to the owners and that Frank breached that warranty.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.