Contractor Liability Under the Implied Warranty Doctrine

By Andrew J. King and Chad W. Johnson

Introduction

In Colorado, new residential homes are protected by implied warranties. Due to Colorado's recent period of sustained population growth and the associated rise in residential construction, practitioners representing homeowners increasingly plead breach of implied warranty alongside the negligence and contractual claims common to residential defect actions.

Unlike other claims asserted against construction professionals, the burden to prevail on a claim for breach of implied warranty is analogous to strict liability.[1] A viable implied warranty claim is an effective means to drive settlement or obtain a verdict to secure needed funds for home repairs.

With the growth of implied warranty pleading, trial courts are increasingly asked to resolve two unsettled questions concerning the scope of implied warranties: 1) what specific categories of construction professionals are liable under the implied warranty doctrine; and 2) are implied warranties applicable to construction projects other than a brand new home construction?

Defendants consistently argue that implied warranties are imposed only upon a narrow category of builder-vendors. Under this interpretation, the liable builder must both construct[2] the dwelling and sell the new home and land to the homeowner plaintiff. A suburban residential developer falls within this interpretation, as does a contractor who purchases an urban lot to demolish the existing structure or structures to build new condos or townhomes. In contrast, under the defense view, a general contractor constructing a custom home on land already owned by the plaintiff would not owe implied warranties.

The second unresolved area of implied warranty law in Colorado is whether any implied warranties are owed when a contractor or developer builds an addition or otherwise substantially remodels an existing home. Construction professionals and their counsel argue that no implied warranties are owed because the home is not technically new. Conversely, homeowners' counsel argues that, at a minimum, implied warranties are owed on the newly constructed portions of the home.

This article is intended to push back against the limited scope advanced by construction professionals and their counsel. Whether a builder sells a new home, constructs a home on land previously purchased by the homeowner, or builds a completely new addition attached it to an existing structure, the policy considerations giving rise to implied warranties apply with equal force.

No Colorado appellate court has considered whether general contractors or design-build firms constructing a residence on land owned by the plaintiff owe implied warranties. Similarly, no Colorado appellate court has decided whether or not implied warranties exist in new additions to existing homes. As an evolving area of consumer law, practitioners should consider asserting a claim for breach of implied warranties in any case involving defects in residential construction.

Implied Warranties Available to Colorado Homeowners

Colorado was one of the first states to recognize implied warranties in residential construction. The Colorado Supreme Court introduced the State's implied warranty doctrine with the *Carpenter v. Donohoe* decision in 1964.[3] In subsequent decisions, the Court acknowledged its role as a progenitor of the nationwide departure from caveat emptor towards a more equitable framework of broad seller disclosures and implied warranties for new construction.[4]

Today, Colorado recognizes three categories of implied warranties in the residential construction context.[5] First, the home must be fit for habitation. This is often referred to as the implied warranty of habitability.[6] A plaintiff need not prove that the entire dwelling be unusable. Instead, where a portion of the home "[can]not be used for the purposes for which it was designed" the implied warranty of habitability is breached.[7] Second, the home must be built in a workmanlike manner, often referred to as the implied warranty of workmanlike construction.[8] Third, the home must be built in compliance with all applicable building codes.[9]

Public Policy Source of Implied Warranties

Implied warranties are judicial creations responsive to public policy concerns inherent to residential construction. Home construction implicates two issues that traditionally invite consumer protection – significant consumer investment and disparate sophistication of the contracting parties.

Colorado courts are mindful of the "magnitude of the investment made when purchasing a home," and the adverse economic impact when a home becomes a liability rather than an asset.[10] "[T]he purchaser makes the biggest and most important investment of his or her life and, more times than not, on a limited budget."[11] Beyond its function as a residence, a home provides equity to fund retirement or serves as a vehicle to pass wealth to children. Defective construction erases that equity and homeowners soon realize that without our judicial system they are burdened with costly repairs for their damaged home.

As well, new home transactions – whether a prospective buyer purchases from a developer, or a property owner contracts for construction of a new home or home addition – typically feature an experienced builder bargaining with an inexperienced consumer.

Colorado courts cite this disparity as justification for imposition of implied warranties. Builders possess superior knowledge, experience, and skill in constructing homes relative to the consumer.[12] "An experienced builder who has erected and sold many houses is in a far better position to determine the structural condition of a house than most buyers."[13] "[E]very builder holds itself out, expressly or impliedly, as having the expertise necessary to construct a livable dwelling."[14] Consumers rely upon these representations and expect their new house to be suitable for use as a home.[15] Implied warranties counterbalance the inequities inherent to dealings between experienced construction professionals and lay consumers.[16]

Misplaced Emphasis on the Land Sale Transaction

These public policy considerations should define the classes of builders owing implied warranties to Colorado homeowners. However, general contractor and design-build defendants often cite a purported "builder-vendor" requirement as excluding such businesses from the scope of implied warranty claims.

This reasoning likely originates from Colorado appellate courts' tendency to identify the liable party as a builder-vender.[17] A "builder-vendor" is a "seller who either built, or participated in the building of, or supervised the building of, the property."[18] General contractors and design-build firms emphasize the "sales" requirement as evidence that they owe no implied warranty to plaintiffs who contract for the construction of a new home on land owned by the plaintiffs. Those entities built, but did not sell, the home, and defense counsel argue that claims are therefore limited to negligence and breach of contract.

This strict interpretation is at odds with the policy considerations articulated by Colorado courts in support of the implied warranty doctrine. These considerations do not turn on conveyance of real property title from the builder to the homeowner.[19] Instead, Courts' analyses focus on the builder-vendor's influence over the construction project and the deficient character of the home constructed.[20] Whether the builder sold the real property or home to the plaintiff is immaterial to either area of analysis.

The defining characteristic of a builder-vendor is not that it owns the property on which a home is constructed, but that the builder exercises control over the construction process and possesses greater experience than the homeowner.[21] Accordingly, Courts have consistently deemphasized the transactional element of the builder-homeowner relationship in implied warranty decisions. The timing of the sales transaction is not relevant and may occur before or after construction is substantially completed.[22] Whether the builder initially intended to sell the house or use it as a personal residence is not relevant.[23]

This inattention to the sales transaction is expected, as the purpose of the implied warranties is to "hold the builder-vendor responsible for complying with the building codes, accomplishing the construction in a workmanlike manner, and delivering the house in a condition suitable for habitation."[24] Transfer of ownership has no bearing on those duties.

Plainly, public policy does not support disparate treatment of home buyers and the homeowner clients of general contractors and design-build firms. The "seller" requirement of the "builder-vendor" designation is better understood as an assurance that the construction professional performs substantive new construction at the property and is in privity of contract with the homeowner plaintiff.

Misplaced Emphasis on the "New Home" Requirement

The requirement that a home be "new" appears to be a threshold element in implied warranty cases.[25] For example, in *Mazurek v. Nielsen*, the Colorado Court of Appeals explained that the "seller" requirement is a secondary consideration intended to achieve the broader goal of limiting implied warranties to new residential construction:

However, this warranty of habitability generally extends only to the immediate purchaser. As some of the cases have expressed it, the warranty applies only to "new" as opposed to "used" homes. Thus, the warranty runs only against "builder-sellers."[26]

This "new" construction requirement is actually better explained as a privity of contract requirement, as the Colorado Supreme Court recently affirmed in 2017.[27] Because implied warranties are contractual claims, privity of contract is required unless a party pleads third-party beneficiary status.[28]

General contractors construct homes, as do design-build firms and those fix and flippers that build an addition from foundation to roof. There is no principled distinction between a general contractor, design-build firm, or fix and flipper and the "builder-vendor" discussed in relevant precedent. Each entity controls the construction of a residential structure. Each entity is legally responsible for the quality of the structure and the conduct of its subcontractors and employees. Each entity engages in a commercial transaction with the plaintiff homeowner, and the homeowner relies upon the entity's expertise. Each entity is in privity with the plaintiff homeowner. The policy considerations imposing implied warranties on mass developers that own the land apply with equal force to any builder of new residential construction.

No appellate court has directly addressed the liability of non-seller homebuilders under the current implied warranty doctrine.[29] Finding that general contractors, design-build firms, and fix and flippers impliedly warrant the condition of new residential construction (or at least the new portions) fulfills the purpose of implied warranties and advances the policy considerations giving rise to the doctrine. Jurisdictions applying analogous doctrines have recognized that implied warranties apply to new residential construction performed by a general contractor.[30]

Recognition of the liability of a general contractor, design-build contractor, and even a fix and flip contractor that builds an addition on an existing structure is consistent with the approved implied warranty jury instructions. CJI 30:54 states:

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) claim of breach of implied warranty, you must find both of the following have been proved by a preponderance of the evidence:

1. (As a business venture, the) (The) defendant (entered into a contract with the plaintiff to build *[insert an appropriate description, e.g., "a house for the plaintiff"]*) ([built] [or] [had built] *[insert an appropriate description, e.g., "a house"]* which [he] [she] [sold to the plaintiff]); and

2. When the defendant (gave possession of) (sold) the *(insert appropriate description, e.g., "house")* to the plaintiff, the *(insert appropriate description, e.g., "house")* did not comply with one or more of the warranties the law implies as part of such a (construction contract) (contract of sale).[31]

Under the first element, an eligible defendant either "entered into a contract with the plaintiff to build [a house or addition on a house]" or "built [a house or addition on a house] which he or she sold to the plaintiff." The second element is similarly supportive, providing that ceding possession **or** selling the home satisfies the transactional component. A general contractor building on land owned by the plaintiff homeowner satisfies both criteria. So does a fix and flipper that adds an addition on the back of smaller existing home.

The adopted jury instruction defining a builder's warranty appears to endorse general contractor and design-build firm liability as well. CJI 30:55 states that "[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" may be liable under the implied warranty doctrine.[32] At least one Colorado trial court has agreed.[33]

Conclusion

Colorado's implied warranty doctrine provides consumer homeowners a powerful tool. While the Courts have yet to expressly define the categories of builder subject to implied warranty claims, a reasonable analysis of prior cases and the underlying public policy supports recognition of a builder's liability where, at a minimum, the builder constructs a new residence on land owned by the plaintiff homeowner. An even more appropriate rationalization of the public policy behind implied warranties is that any construction professional owes an implied warranty for the work it contracts for, especially when it includes a substantial remodel or addition. Until and unless the Court of Appeals directs otherwise, homeowner's attorneys would be wise to consider pleading breach of implied warranty in any litigation involving a construction professional in privity with the plaintiff homeowner. ▲▲▲

Andrew J. King is an associate with Johnson Law. Mr. King's practice focuses on construction defect, real estate

nondisclosure, commercial contracts, and real estate agent negligence litigation.

Chad W. Johnson is the founder of Johnson Law. Mr. Johnson's practice focuses on construction defect, construction contract, real estate nondisclosure, and real estate agent negligence litigation.

Endnotes:

[1] *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1045 n.6 (Colo. 1983).

[2] The defendant need not self-perform the construction. Retention of contractors and subcontractors for the purpose of causing a house to be built is sufficient. *E.g.*, *Mazurek v. Nielsen*, 599 P.2d 269, 271 (Colo. App. 1979) ("a seller need not be involved in the physical acts of construction before the implied warranty of habitability attaches.").

[3] *Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964).

[4] *Sloat v. Matheny*, 625 P.2d 1031, 1033 (Colo. 1981).

[5] For a more thorough description of the protections afforded under each implied warranty, *see* RESIDENTIAL CONSTRUCTION LAW IN COLORADO, §4.3 Breach of Implied Warranties (6th Ed.).

[6] *Carpenter*, 388 P.2d 399; *Sloat,* 625 P.2d at 1033.

[7] *Mulhern v. Hederich*, 430 P.2d 469, 470 (Colo. 1967) (finding that defects affecting approximately 15% of a home's value constituted a breach of the implied warranty of habitability).

[8] *Carpenter*, 388 P.2d at 402.

[9] *Id.*

[10] *In re Estate of Gattis*, 318 P.3d 549, 553 (Colo. 2013).

[11] *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1045 (Colo. 1983).

[12] *Id.*

[13] *Duncan v. Schuster-Graham Homes, Inc.*, 578 P.2d 637, 638–39 (Colo. 1978) (superseded by statute on other grounds).

[14] *Sloat v. Matheny*, 625 P.2d 1031, 1033 (Colo. 1981).

[15] *Duncan*, 578 P.2d at 638-39.

[16] *See Carpenter v. Donohoe*, 388 P.2d 399 (Colo. 1964) (the purpose of implied warranties is to "afford home buyers protection from overreaching by comparatively more knowledgeable builder-vendors [because the builder] is in a far better position to determine the structural condition of a house than most buyers.")

[17] *E.g.*, *Gallegos v. Graff*, 508 P.2d 798, 799 (Colo. App. 1973) ("implied warranty . . . is available to the buyer of a newly constructed house against a builder-vendor.").

[18] *Erickson v. Oberlohr*, 749 P.2d 996, 998 (Colo. App. 1997).

[19] *Cf. Hefler v. Wright*, 121 Ill. App. 3d 739, 741 460 N.E.2d 118, 120 (5th Dist. 1984) ("The supreme court has stated that the implied warranty **does not arise as a result of the execution of the deed, but** arises by virtue of the execution of the agreement between the vendor and the vendee. The warranty is an implied covenant that the house built and conveyed by the builder-vendor is reasonably suited for its intended use.") (emphasis added) (citing *Petersen v. Hubschman Const. Co.,* 389 N.E.2d 1154, 1158 (Ill. 1979)).

[20] *Mazurek v. Nielsen*, 599 P.2d 269, 270-71 (Colo. App. 1979)

[21] *Cf. A.C. Excavating v. Yacht Club II Homeowners Ass'n.*, 114 P.3d 862, 873-74 (Colo. 2005) ("General contractors understand and appreciate the entire project for which they have hired subcontractors. . .. The general contractor has a duty of oversight for the whole project and a working familiarity with the plans for the whole project; a subcontractor has no such duty and no such knowledge. The general contractor deals with the prospective purchaser; the subcontractor may not.").

[22] *Carpenter v. Donohoe*, 388 P.2d 399, 402 (Colo. 1964) (recognizing attachment of implied warranties whether the home was sold while under construction or sold post-construction).

[23] *Sloat v. Matheny*, 625 P.2d 1031, 1034 (Colo. 1981).

[24] *Gallegos v. Graff*, 508 P.2d 798, 799 (Colo. App. 1973).

[25] *See H.P. Bolas Enters., Inc. v. Zarlengo*, 400 P.2d 447, (Colo. 1965) (holding that, because a home was "occupied by [a prior owner] for some time, it was **not a new house** permitting reliance upon any implied warranty of fitness for habitation"); *Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159, 1169 (Colo. App. 2012) ("The contractual responsibilities of a **new home** builder 'are implicit in the concept [of] implied warranty of habitability'"); *Gallegos*, 508 P.2d at 799 ("[T]he implied warranty doctrine is available only to the buyer of a **newly constructed house**"); *Wright v. Creative Corp.*, 498 P.2d 1179, 1182 (Colo. App. 1982) (limiting the implied warranty of merchantability to "**newly-constructed building**") (emphasis added to all).

[26] *Mazurek v. Nielsen*, 599 P.2d 269, 270-71 (Colo. App. 1979).

[27] *Forest City Stapleton Inc. v. Rogers*, 393 P.3d 487, 490 (Colo. 2017)

[28] *Id.*

[29] In a 1955 opinion addressing an analogous predecessor implied warranty theory, the Colorado Supreme Court held that the implied warranty of workmanlike construction applies to a builder who constructed a home on land owned by the plaintiff. *Newcomb v. Schaeffler*, 279 P.2d 409 (Colo. 1955).

[30] *See Moglia v. McNeil Co., Inc.*, 700 N.W.2d 608, 612-13 (Iowa 2005) ("as a general rule a contractor constructing a building impliedly warrants that the building is erected in a workmanlike manner.").

[31] CJI 30:54 Claim – Building Contractor's Breach of Implied Warranty – Elements of Liability (June 2019).

[32] CJI 30:55 Definition – Building Contractor's Implied Warranties.

[33] *McKenna v. Judd Fine Homes, Inc., et al.*, No. 2017CV30068, ORDER ON PLAINTIFF'S MOTION TO AMEND (Chafee County Dist. Ct. Aug. 9, 2019).