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Torts - Extension of Implied Warranty and Negligence Actions to Remote Purchasers of Realty - Keyes v. Guy Bailey Homes, Inc.

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TORTS – Extension of Implied Warranty and Negligence Actions to Remote Purchasers of Realty - *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670 (Miss. 1983).

On August 7, 1975, Troy Gerald Fulgram purchased a house in Jackson, Mississippi, which was constructed by Guy Bailey Homes, Inc. Fulgram later sold the home to Kathleen Keyes on June 1, 1979. After moving into the house, Keyes discovered that it had a cracked foundation.

Keyes filed suit in circuit court alleging breach of an implied warranty in the construction of the house and negligent construction. Guy Bailey Homes moved to dismiss the complaint on the basis of lack of privity between the parties. The circuit court granted this motion and Keyes appealed. The Supreme Court of Mississippi reversed and held that the builder-vendor of a home may be liable to second or subsequent purchasers on the basis of breach of implied warranty and negligence.[1] The court thus abolished the rule in Mississippi requiring privity of contract between the builder-vendor and the purchaser of a permanent structure on real estate in order to impose liability on the builder.[2] In addition to an analysis of the holding in *Keyes*, this note will discuss the development of implied warranties in realty transactions, their development in Mississippi, and the builder-vendor's liability to subsequent purchasers on this theory.

BACKGROUND AND DEVELOPMENT

Caveat Emptor

The common law doctrine of *caveat emptor*[3] has played an important role in the development of the law governing transactions in realty. It has served to "trap the unsuspecting vendee who has failed, or was unable, to secure an express warranty."[4] In Mississippi, the doctrine was applied to cases involving patent defects[5] as early as 1840.[6] It was later stated that this rule did not apply

1. Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 671 (Miss. 1983).

2. *Id.*

3. "Let the buyer beware," or the general rule that a buyer must "examine, judge, and test for himself." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

4. Bearman, *Caveat Emptor in Sales of Realty - Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 542 (1961).

5. Patent defects are obvious ones discoverable by a reasonable inspection. Latent defects, however, are hidden defects *not* discoverable by the exercise of ordinary diligence in inspection.

6. Anderson v. Burnett, 6 Miss. (5 How.) 165 (1840). Patent defects are those discoverable by a reasonable inspection. *Id.* at 167.

in situations where the vendor had used fraudulent means to conceal the defect.[7] The issue of whether the doctrine should be extended to include latent defects was not addressed until 1923 in the case of *Mincy v. Crisler.*[8] In that case, brick foundation piers were constructed over a ditch filled with timbers and dirt. Over a period of time, the timbers rotted, causing the foundation of the home to sink. The court held that the purchaser had a right to presume that a reasonably prudent builder would not construct a house in this manner.[9]

The doctrine of *caveat emptor* has recently been attacked by various writers and commentators calling for its demise in cases involving realty transactions.[10] The rationale proffered for the elimination of this common law maxim is based on today's trend toward mass production of housing and a greater awareness of the need for consumer protection.[11] As Justice Inzer noted in *Oliver v. City Builders, Inc.:*

> The common law maxim of caveat emptor was fundamentally based on the premise that the buyer and seller dealt at arm's length and that the purchaser had means to gain information concerning the subject matter of the sale equal to the seller. However, under modern conditions this rule has no application to latent defects in products built or manufactured by the vendor. Furthermore, the maxim of caveat emptor has been gradually restricted and circumvented until it is now a mere shadow of itself. To apply the maxim to an inexperienced buyer of a new home in favor of an experienced builder would result in a manifest denial of justice in many cases.[12]

As a result of the disfavor of the doctrine there has been a relatively recent trend toward the creation of various implied warranties[13] in the sale of realty.[14] Today, an overwhelming majority of jurisdictions recognize implied warranties in the sale of real property.[15]

Emergence of Implied Warranties

The implied warranty as applied to real estate transactions was

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7. Halls v. Thompson, 9 Miss. (1 S. & M.) 443, 482 (1843).

8. 132 Miss. 223, 96 So. 162 (1923).

9. *Id.* at 237-38, 96 So. at 163.

10. *See, e.g.*, Bearman, *supra* note 4; Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property,* 53 GEO. L. J. 633 (1965); Schwartz, *Defective Housing: The Fall of Caveat Emptor,* 33 ATL. 122 (1970).

11. Demko, *Caveat Aedificator - Home Builders Beware!,* 71 ILL. B.J. 724 (1983).

12. 303 So. 2d 466, 469 (Miss. 1974) (Inzer, J., specially concurring).

13. An implied warranty is a "promise arising by operation of law, that something which is sold shall be merchantable and fit for the purpose for which the seller has reason to know that it is required." BLACK'S LAW DICTIONARY 1423 (5th ed. 1979).

14. Comment, *Implied Warranties in the Sale of Real Estate in Colorado: Rational Boundaries of the Doctrine,* 53 U. COLO. L. REV. 137 (1981).

15. *See, e.g.*, Cochran v. Keeton, 252 So. 2d 313 (Ala. 1971); Wawak v. Stewart, 449 S.W.2d 922 (Ark. 1970); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Tavares v. Horstmann, 542 P.2d 1275 (Wyo. 1975).

developed in 1931 in the English case of *Miller v. Cannon Hills Estates, Limited.*[16] There the King's Bench distinguished between finished and unfinished homes, holding that when a purchaser contracts to buy a house "in course of erection,"[17] he is protected not only by any express warranty that may be found but also by an implied warranty that the house is to be completed in a workmanlike manner.[18] Although this type of implied warranty was first applied in an American jurisdiction in 1957,[19] Colorado became the first state to recognize the existence of an implied warranty in the sale of a completed house.[20]

Three basic types of implied warranty have been recognized in cases involving real estate transactions: habitability, workmanlike construction, and that the house is built in compliance with local building codes.[21] Perhaps the most common of these is the implied warranty of habitability.[22] The underlying rationale of the implied warranty is to allow a purchaser to rely on a seller's skill and judgment in purchasing an item,[23] when the seller has reason to know the particular purpose for which the item is to be used.[24] The function of the implied warranty in general is to "promote high standards in business and to discourage sharp dealings."[25]

Following the *Carpenter v. Donohoe*[26] case, many states abandoned the common law relic of *caveat emptor* and opted for the implied warranty theory in imposing liability on builder-vendors.[27] Application of the implied warranty theory continued to gain wide acceptance throughout the 1970's.[28] To date, of those states that have addressed the issue, only two states have refused to apply some form of implied warranty to realty transactions.[29]

Mississippi's first recognition of implied warranties in the sale of realty came about in the case of *Oliver v. City Builders, Inc.*[30]

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16. [1931] 2 K.B. 113.

17. *Id.* at 121.

18. *Id.* at 122.

19. Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957) (sale of an unfinished home).

20. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).

21. *Id.* at 83-84, 388 P.2d at 402.

22. *See* Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 REAL EST. L.J. 291 (1980). This warranty is somewhat similar to the implied warranty of fitness for a particular purpose in the context of goods found in U.C.C. § 2-315 (1978).

23. 67 AM. JUR. 2D *Sales* § 472 (1973) (citing Price Brothers Lithographic Co. v. American Pack. Co., 381 S.W.2d 830 (Mo. 1964)).

24. Garner v. S & S Livestock Dealers, Inc., 248 So. 2d 783, 785 (Miss. 1971).

25. 67 AM. JUR. 2D *Sales* § 460 (1973).

26. *See supra* note 20.

27. Shedd, *supra* note 22, at 295-96.

28. *Id.* at 298-99.

29. Amos v. McDonald, 123 Ga. App. 509, 181 S.E.2d 515 (1971); Bruce Farms, Inc. v. Coupe, 219 Va. 287, 247 S.E.2d 400 (1978).

City Builders constructed a house for Jansing, who conveyed it to Oliver more than two years later. Six months after he moved in, Oliver began to discover cracks in the walls and floor. He brought suit against the builder on the theory of "strict liability in tort," asking the court to abolish the doctrine of *caveat emptor*. The court rejected this argument, holding that the other jurisdictions willing to abolish the doctrine of *caveat emptor* have necessarily found an implied warranty running from the builder-vendor to his original vendee.[31] Writing for the court, Justice Smith held that since Mississippi had previously followed the doctrine of merger, there was no room for an implied warranty.[32] However, he was the only member of the court to subscribe to this view. Five justices departed from his reasoning and agreed that as between the builder-vendor and his *original* vendee there existed an implied warranty of habitability and workmanlike construction.[33]

This reasoning was later followed in the case of *Brown v. Elton Chalk, Inc.*,[34] where the court, relying on the "*Oliver* implied warranty," clearly articulated the grounds upon which a purchaser may recover from a builder-vendor. According to *Brown*, a party bringing an action under an implied warranty "must allege in his declaration, *inter alia*, that (1) the house is new; and (2) that the plaintiff was the first purchaser."[35] Although the Mississippi Supreme Court was clearly recognizing the implied warranty, the resulting scope of the *Oliver-Brown* rule was very narrow.[36]

Extension of Implied Warranties to Subsequent Purchasers

The 1960's and 1970's saw wide acceptance of the implied war-

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30. 303 So. 2d 466 (Miss. 1974).

31. *Id.* at 467.

32. *Id.* at 469. The court cited Mississippi State Highway Commission v. Cohn, 217 So. 2d 528 (Miss. 1969), Blaylock v. McMillan Farms, Inc., 214 So. 2d 456 (Miss. 1968), and West v. Arrington, 183 So. 2d 824 (Miss. 1966) for the proposition that "where parties to a transaction finally reduce its terms to an executed writing, all negotiations and previous understandings are merged into the writing and the terms of the writing will control." *Oliver*, 303 So. 2d at 469.

33. *Id.* at 469-70 (Inzer, J., specially concurring). Justice Inzer, joined by Justices Rodgers, Patterson, Walker and Broom, stated that the common law doctrines of merger and caveat emptor did not "preclude an implied warranty as between a builder-vendor and the first purchaser. An implied warranty arises by operation of law and when it arises it cannot be destroyed or defeated by the mere passage of title . . . ." *Id.* at 470. Justices Robertson, Sugg and Gillespie dissented, holding that privity of contract is not a requirement to an action for damages by the homeowner against the builder-seller. The dissenters based their reasoning upon the holding in State Stove Manufacturing Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), which eliminated privity of contract as a requirement in suits by the consumer against the manufacturer of a product.
Id. at 470-73 (Robertson, J., dissenting).

34. 358 So. 2d 721 (Miss. 1978).

35. *Id.* at 722.

36. Only the *first* purchasers of *new* homes were protected, and not second or subsequent purchasers not in privity with the builder.

ranty theory in realty transactions.[37] However, most of those states that have recognized the implied warranty have, as in *Oliver* and *Brown,* only allowed the first purchaser to recover.[38] Thus, second or subsequent purchasers are often deprived of essential protection.

In what has been described as a new trend of authority,[39] a few states have extended implied warranties to subsequent purchasers not in privity with the builder.[40] Among the first of these jurisdictions was Indiana in the case of *Barnes v. Mac Brown and Company, Inc.*[41] The plaintiff, upon moving into a house that he had bought from the original purchaser, discovered cracks in the basement walls and subsequent leaking. Upon appeal of a motion to dismiss in favor of the defendant, the Supreme Court of Indiana held the implied warranty of fitness for habitation should extend to subsequent purchasers notwithstanding lack of privity of contract. The court noted that the logic compelling a similar change in the law of personal property "is equally persuasive in the area of real property."[42]

In a more recent decision,[43] the Supreme Court of Arizona extended its holding in *Columbia Western Corporation v. Vela,*[44] creating an implied warranty of workmanlike construction in favor of first purchasers, to include subsequent purchasers as well. The court explained that:

> [T]he same policy considerations that led to [the *Columbia Western*] decision – that house-building is frequently undertaken on a large scale, that builders hold themselves out as skilled in the profession, that modern construction is complex and regulated by many governmental codes, and that homebuyers are generally not skilled or knowledgeable in construction, plumbing, or electrical requirements and practices – are equally applicable to subsequent homebuyers. Also, we note that the character of our society is such that people and families are increasingly mobile. Home builders should anticipate that the houses they construct will eventually, and perhaps frequently, change ownership. The effect of latent defects will be just as catastrophic on a subsequent owner as on an original buyer and

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37. *See supra* notes 28 and 29 and accompanying text.

38. *See, e.g.*, Cochran v. Keeton, 287 Ala. 439, 252 So. 2d 313 (1971); Conklin v. Hurley, 428 So. 2d 654 (Fla. App. 1983); Sousa v. Albino, 120 R.I. 461, 388 A.2d 804 (1978); Brown v. Fowler, 279 N.W.2d 907 (S.D. 1979).

39. Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 671 (Miss. 1983); Note, *Gupta v. Ritter Homes, Inc.: Extending the Implied Warranty of Habitability to Subsequent Purchasers - An Honorable Result Based on Unsound Theory,* 35 BAYLOR L. REV. 670, 672 (1983).

40. Richards v. Powercraft Homes, Inc., 139 Ariz. 342, 678 P.2d 427 (Ariz. 1984); Blagg v. Fred Hunt Co., 272 Ark. 185, 612 S.W.2d 321 (1981); Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 441 N.E.2d 324 (1982); Barnes v. Mac Brown and Company, Inc., 264 Ind. 227, 342 N.E.2d 619 (1976); Elden v. Simmons, 631 P.2d 739 (Okla. 1981); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980); Gupta v. Ritter Homes, Inc., 646 S.W.2d 168 (Tex. 1983); Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo. 1979).

41. 264 Ind. 227, 342 N.E.2d 619 (1976).

42. *Barnes*, 264 Ind. at 229, 342 N.E.2d at 620.

43. Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 678 P.2d 427 (Ariz. App. 1984).

44. 122 Ariz. 28, 592 P.2d 1294 (Ariz. App. 1979).

> the builder will be just as unable to justify improper or substandard work. Because the builder-vendor is in a better position than a subsequent owner to prevent occurrence of major problems, the costs of poor workmanship should be his to bear.[45]

Despite this trend, most states have adhered to the privity of contract requirement either judicially[46] or by statute[47] in refusing to extend the implied warranty to subsequent purchasers. In Mississippi, however, the question of extension of implied warranties continued to surface in the courts. For example, subsequent to the *Oliver* and *Brown* decisions, Mississippi was once again faced with this issue in the case of *Hicks v. Greenville Lumber Company, Inc.*[48] The plaintiff, a subsequent purchaser of the house in question, sought recovery *inter alia* on the theories of negligence and breach of implied warranties. The court, relying solely on *Oliver* and *Brown,* refused to extend protection to the plaintiff on either theory.[49] Thus, the privity of contract barrier remained a deterrent to implied warranty actions by subsequent purchasers.

Negligence

The privity barrier relating to implied warranty actions has also had a significant impact upon actions based on the theory of negligence.[50] Prior to 1916, the general rule was that the original seller was only liable to one in privity of contract with him, *i.e.*, his immediate buyer.[51] However, in 1916, Judge Cardozo's opinion in *MacPherson v. Buick Motor Company* had the effect of wiping out privity as a requirement to maintain an action against the seller-manfacturer of goods.[52]

Although most states readily accepted the *MacPherson* rule,

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45. *Richards,* 139 Ariz. at 245, 678 P.2d at 430.

46. Drexel Properties, Inc. v. Bay Colony, Etc., 406 So. 2d 515 (Fla. App. 1981); Brown v. Fowler, 279 N.W.2d 907 (S.D. 1979).

47. Coburn v. Lenox Homes, Inc., 173 Conn. 567, 378 A.2d 599 (1977) (construing CONN. GEN. STAT. § 52-563a (1979) (what is now CONN. GEN. STAT. § 47-121 (1981)). Other states with statutory warranties include: Louisiana, LA. CIV. CODE ANN. art. 2520 (West 1952); Minnesota, MINN. STAT. ANN. § 327A.01-.07 (West Supp. 1979); New Jersey, N. J. REV. STAT. §§ 46:3B-1 to -12 (West Supp. 1979). The National Conference of Commissioners on Uniform State Laws included a section in the Uniform Land Transactions Act which contains a warranty to subsequent purchasers similar to that fashioned by the courts (U.L.T.A. § 2-309(b) (1975)). However, at this time no state has adopted this Act. Note, *Builder's Liability for Latent Defects in Used Homes,* 32 STAN. L. REV. 607, 619 (1980).

48. 387 So. 2d 94 (Miss. 1980).

49. *Id.* at 95-96.

50. Negligence as a theory of products liability is the context in which negligence is discussed here. Generally, products liability refers to "the liability of sellers of chattels to third persons with whom they are not in privity of contract." W. PROSSER, HORNBOOK OF THE LAW OF TORTS § 96 (4th ed. 1971).

51. *Id.*

52. 217 N.Y. 382, 111 N.E. 1050 (1916). That decision held the manufacturer liable to the ultimate purchaser of an automobile with a defective wheel. The exception to the general rule requiring privity "[extended] the class of inherently dangerous articles to include anything which would be dangerous if negligently made." W. PROSSER, *supra* note 50, § 96.

Mississippi was hesitant to do so.[53] In the case of *Ford Motor Company v. Myers*,[54] the Supreme Court of Mississippi denied recovery to the remote vendee of an automobile which was alleged to have been defective. Basing its decision primarily on early Mississippi precedent,[55] the court held that the manufacturer could only be liable to his *immediate* vendee.[56] Thus, privity of contract remained a requirement in suits by a purchaser against the manufacturer of a product.[57]

It was not until 1966 that the privity requirement was relinquished in negligence actions. The landmark decision of *State Stove Manufacturing Company v. Hodges*[58] expressly overruled *Ford Motor Company v. Myers* by stating that privity of contract was not an essential element in a cause of action against the manufacturer of a defective product.[59] In that case, State Stove sold a hot water heater to Orgill Brothers, a wholesaler. Yates and Gary purchased the heater from Orgill and used it in the construction of a home for Hodges. The hot water heater later exploded and destroyed Hodges' home. Although the court exonerated State Stove on the negligence claim under Section 402A of the *Second Restatement of Torts*,[60] it accepted the reasoning of the *MacPherson* doctrine in rejecting State Stove's privity of contract argument.[61] Subsequent Mississippi cases have followed this reasoning in similar situations.[62]

The State Legislature of Mississippi has also addressed the is-

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53. *Id.*

54. 151 Miss. 73, 117 So. 363 (1928).

55. *Id.* at 74, 117 So. at 363. The early Mississippi cases included Kilcrease v. Galtney Motor Co., 149 Miss. 135, 115 So. 193 (1928); W. T. Pate v. Westbrook Elevator Co., 142 Miss. 419, 107 So. 552 (1926); and Vicksburg v. Holmes, 106 Miss. 234, 63 So. 454 (1913).

56. *Ford*, 151 Miss. at 73, 117 So. at 363. The court noted in dictum that privity of contract might not be required if the product was a dangerous instrumentality *per se*. *Id.*

57. The only settled exception to this general rule was in food and beverage cases. For example, in Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939), the plaintiff discovered part of a dead mouse in a bottle of beverage. The court held that a bottler of beverage impliedly warrants that the beverage "is wholesome and fit for human consumption" and that this warranty inures to the ultimate consumer. *Id.* at 726-27, 186 So. at 629. Also, in Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927), the court found the manufacturer liable for injuries resulting from broken glass in a bottle of Coca-Cola. The court held that a manufacturer impliedly warrants that bottled beverages are pure and wholesome and that a contractual relationship with the manufacturer is not a requirement. *Id.* at 883, 111 So. at 306.

58. 189 So. 2d 113 (Miss. 1966).

59. *Id.* at 116-18. Mississippi became the last state to adopt some form of the *McPherson* doctrine.

60. *Id.* at 121-23. The court found no liability because the water heater was not in "a defective condition unreasonably dangerous to the user or consumer or his property," it reached Hodges "without substantial change" in its condition when sold, and the proximate cause of the explosion was attributed to Yates' and Gary's negligent installation. *Id.* at 121.

61. *Id.* at 115-18.

62. *See, e.g.*, Hamilton Fixture Co., Inc. v. Anderson, 285 So. 2d 744 (Miss. 1973) (manufacturer found strictly liable for defective humidifier); Ford Motor Co., Inc. v. Cockrell, 211 So. 2d 833 (Miss. 1968) (manufacturer found strictly liable for latent defect in truck wiring system).

sue of privity by enacting Section 11-7-20 of the *Mississippi Code*. Approved in April, 1976, this section effectively abrogates the requirement of privity of contract in actions brought under the theories of negligence, strict liability and breach of warranty.[63]

Perhaps the only area in which privity continued to retain vitality was in real estate transactions. In addition to asserting breach of implied warranty as a basis of liability in the *Hicks* case, the plaintiff also asserted negligent construction of the house.[64] However, as with the implied warranty argument, the court held, in effect, that privity was a necessary requirement to this type of action as well.[65]

ANALYSIS

In *Keyes v. Guy Bailey Homes, Inc.*,[66] the Mississippi Supreme Court was once again faced with the issue of whether to extend actions based upon implied warranty and negligence to subsequent purchasers of real estate. A split court decided to abrogate the requirement of privity of contract theretofore followed and to embark upon a new frontier, inhabited by only a few jurisdictions.[67] The court did not, however, follow the reasoning of the dissent in *Oliver*;[68] instead, it based its decision upon certain policy considerations[69] because of what it viewed as a growing trend of authority.[70]

The court noted that for the nine years prior to the *Keyes* case, the *Oliver, Brown* and *Hicks* line of cases was the controlling precedent. Although *Oliver* recognized an implied warranty to the first purchaser, it did not extend protection to subsequent pur-

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63. MISS. CODE ANN. § 11-7-20 (Supp. 1984).

64. Hicks v. Greenville Lumber Co., Inc., 387 So. 2d 94 (Miss. 1980).

65. *Id.* at 95-96. Some jurisdictions have extended negligence actions without privity of contract. *See, e.g.*, Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983); McMillan v. Brune-Harpenau-Torbeck Builders, Inc., 8 Ohio St. 3d 3, 455 N.E.2d 1276 (1983); Newman v. Tualatin Dev. Co., Inc., 287 Or. 47, 597 P.2d 800 (1979); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980).

66. 439 So. 2d 670 (Miss. 1983).

67. *See supra* notes 39 - 42 and accompanying text.

68. Oliver v. City Builders, Inc., 303 So. 2d 466, 470 (Miss. 1974) (Robertson, J., dissenting). Justice Robertson insisted that the court had previously answered the question of privity of contract in the case of *State Stove* by purportedly following the *McPherson* doctrine. *Id.* In order for this argument to be persuasive, one must analogize building a house to manufacturing a product. However, this argument is not without merit. In Schipper v. Levitt & Sons, the New Jersey Supreme Court stated:

> We consider that there are no meaningful distinctions between [the] mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. That being so, the warranty or strict liability principles . . . should be carried over into the realty field . . . .

Schipper v. Levitt & Sons, 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).

69. *See, e.g.*, note 76, *infra*.

70. *Keyes*, 439 So. 2d at 671-72.

chasers. One of the reasons offered by the court for the outcome in *Oliver* dealt with the unique transaction that takes place between a builder and his purchaser. The court reasoned that since the purchaser may, for economic or other reasons, be willing to accept sub-par construction or waive defects, "[i]t would be strange indeed if, when the original purchaser conveyed the property to another, that his vendee could resort to the builder for damages for deficiencies in workmanship or materials which the original purchaser from the builder had accepted."[71] Basically, the court was stating that the builder and his vendee should have the right to bargain for a lower standard of quality of construction.

This reasoning is unsound. To allow the builder and his purchaser to bargain for a lower standard of quality would be to allow shoddy construction of homes, which is what implied warranties are designed to protect against by holding the builder accountable for his work.[72] Since it is very likely that the home will be sold to another within the first few years after construction,[73] it would be poor policy to allow the builder to escape liability merely because his purchaser sold the house to another. The purchaser of a used home relies upon the workmanship of the builder as does the first purchaser, although his "reliance diminishes as the house ages and [his] expectations decline."[74]

The main thrust behind an implied warranty is to afford protection to a purchaser for latent defects.[75] Under the *Oliver* reasoning, the first purchaser could readily accept some patent defect in the construction of a house, but a latent defect might indeed be unacceptable to him.[76] In such cases, the first purchaser can rely on the implied warranty to avoid financial catastrophe. Since the defect might not arise until after the first purchaser has sold to another, the subsequent purchaser should have the same protection as the first purchaser, provided he buys the home within the period of time when the first purchaser could still benefit from the implied warranty.[77]

The departure from the *Oliver* line of cases is an equitable so-

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71. *Oliver*, 303 So. 2d at 468.

72. Moxley v. Laramie Builders, Inc., 600 P.2d 733, 736 (Wyo. 1979).

73. *Redarowicz*, 92 Ill. 2d at 185, 441 N.E.2d at 331; Comment, *Extension of Implied Warranties to Subsequent Purchasers of Real Property: Insurance Company of North America v. Bonnie Built Homes*, 43 OHIO ST. L.J. 951, 967 (1982).

74. Note, *Builders' Liability for Latent Defects in Used Homes*, 32 STAN. L. REV. 607, 622 (1980).

75. Barnes v. Mac Brown and Co., Inc., 264 Ind. 227, 342 N.E.2d 619 (1976).

76. "Often a buyer is willing to accept certain deficiencies in a house in exchange for a lower purchase price. However, a buyer cannot be expected to discover structural defects which remain latent at the time of purchase." Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041, 1045-46 (Colo. 1983).

77. *See* Note, *supra* note 74, at 623.

tion to the problem previously faced by subsequent purchasers of realty. As the court in *Keyes* noted, there is "no reasonable justification" for distinguishing between first and subsequent purchasers of realty.[78] Instead, there are valid policy reasons for extending implied warranty and negligence actions to remote purchasers.

The most compelling policy reason offered by the court is preventing the financial catastrophe of an innocent purchaser.[79] Although a new home in many instances will be more expensive than one previously occupied, the potential catastrophic outcome is equally severe in cases involving used homes.[80] Allowing recovery to the first and not the subsequent purchaser results in a manifest injustice, "a wrong without a remedy."[81] Neither the first nor a subsequent purchaser is in a position to monitor the construction of a house or to detect latent defects. The subsequent purchaser cannot rely upon his seller, "who lacks the knowledge and skill of the builder, to sell a well-constructed dwelling."[82] Consequently, "[he] must . . . rely upon the honesty and expertise of the builder"[83] to construct a home in a workmanlike manner and fit for habitation. It is this reliance by one party on the other that necessitates an implied warranty.

Arguments Against Extension of Implied Warranties: Legislative Deference

Many state courts have based their refusal to extend implied warranty and negligence actions upon deference to that branch of government they feel best able to cope with it – the legislative.[84]

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78. 439 So. 2d at 672.

79. *Id.* at 671-72.

80. *See* Note, *supra* note 74, at 622. The court quoted the Wyoming Supreme Court to illustrate the potential injustice of such a rule:

> Let us assume for example a person contracts construction of a home and, a month after occupying, is transferred to another locality and must sell. Or let us look at the family which contracts construction, occupies the home and the head of the household dies a year later and the residence must, for economic reasons, be sold. Further, how about the one who contracts for the construction of a home, occupies it and, after a couple of years, attracted by a profit incentive caused by inflation or otherwise, sells to another. No reason has been presented to us whereby the original owner should have the benefits of an implied warranty or a recovery on a negligence theory and the next owner should not simply because there has been a transfer. Such intervening sales, standing by themselves, should not, by any standard of reasonableness, effect an end to an implied warranty or, in that matter, a right of recovery on any other ground, upon manifestation of a defect. The builder always has available the defense that the defects are not attributable to him.

Keyes, 439 So. 2d at 672 (quoting *Moxley*, 600 P.2d at 736).

81. *Id.* at 672.

82. *See* Note, *supra* note 74, at 622. The implied warranty theory is inapposite because the nonbuilder-seller is on equal footing with the purchaser.

83. *Keyes*, 439 So. 2d at 672.

84. *See, e.g.*, Strathmore Riverside v. Paver Development Corp., 369 So. 2d 971, 973 (Fla. App. 1979); Insurance Company of North America v. Bonnie Built Homes, 64 Ohio St. 2d 269, 271, 416 N.E.2d 623, 625 (1980).

Louisiana, Minnesota, New Jersey and Connecticut are examples of those states that incorporate warranties by statute.[85] However, it has been stated that "the courts should not be reluctant to impose liability through an extension of either the implied warranty or strict liability in tort" in states where the legislature has failed to respond.[86]

In *Keyes,* however, the court felt that the Mississippi Legislature had already addressed the privity issue by enacting Section 11-7-20 of the *Mississippi Code.*[87] According to the court, it was the intent of the legislature to "remove the privity requirement in all cases."[88] The court took what it read as the legislative intent of Section 11-7-20 and judicially abolished the privity requirement in realty transactions. Therefore, the *Keyes* decision was not inconsistent with the general intent of the legislature expressed in Section 11-7-20.

Unfair Surprise to the Building Industry

In his dissent in *Keyes,* Justice Walker expressed concern over the fact that the court was acting without adversary or amicus curiae briefs. It was his belief that the case would "[change] the rule in the middle of the game as to those home builders who built homes prior to the enactment of Section 11-7-20 on April 27, 1976."[89] This appears to be a meritorious argument, since the builder-vendor's potential liability is increased while he has not had an opportunity to insure against it. However, not all rule changes require a "grace period" to allow those affected to take appropriate measures to guard against potential liability.

In examining the effect of the rule change, the first determination is whether the rule is primary or remedial.[90] When changing a primary rule, it may be necessary to allow a period of time before enforcement commences so that those affected can make any needed arrangements to prepare for "new exposure to suit."[91] The court in *Keyes* illustrated this point by referring to the case of

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85. *See supra* note 47.

86. *See* Note, *supra* note 74, at 609. It has been stated that the building industry's strong lobby would probably prevent passage of a statute that extends liability of builders. *See* Comment, *supra* note 73, at 965.

87. 439 So. 2d at 673. The statute reads as follows: "In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the Uniform Commercial Code, privity shall not be a requirement to maintain said action." MISS. CODE ANN. § 11-7-20 (Supp. 1982).

88. *Keyes,* 439 So. 2d at 673.

89. *Id.* at 674.

90. Remedial rules are those "which pertain to or affect a remedy," whereas primary rules are "those which affect or modify a substantive right or duty." BLACK'S LAW DICTIONARY 1162-63 (5th ed. 1979) (quoting Perkins v. Williamette Industries, Inc., 273 Or. 566, 571 n.1, 542 P.2d 473, 475 n.1 (1975)).

91. *Keyes,* 439 So. 2d at 672.

Pruett v. City of Rosedale,[92] where the Mississippi Supreme Court abolished immunity from tort suits that had previously been granted to state and administrative agencies. Since these agencies would be liable for the first time for failure to exercise reasonable care when performing their duties, "unfair surprise" considerations forced the court to apply the rule change prospectively to allow those agencies to secure liability insurance and take other appropriate measures to guard against potential liability.[93]

On the other hand, there is no need for only prospective application of a remedial rule change because the rules that govern the activity of those affected are not changed (*i.e.*, the underlying duty remains the same). The court noted that in the case of *Tideway Oil Programs, Inc. v. Serio*,[94] the remedial change was to allow punitive damages for the first time in chancery court.[95] Since punitive damages had always been allowed in cases of gross negligence, there was no need for prospective application of the rule change.[96]

The court in *Keyes* decided that the rule being changed was remedial and the building industry would not suffer from unfair surprise.[97] In reaching this decision, the court offered this reasoning:

> The builder already owes a duty to construct the home in a workmanlike manner and to construct a home which is suitable for habitation. If we extend potential liability of the builder to subsequent purchasers, the builder still is burdened only with the duty to construct the home in a workmanlike manner, etc. In other words, no greater effort will be imposed on the builder to protect himself. This change will not affect the primary rules by which his activity is governed. Instead, the remedial rule will be enlarged to strengthen enforcement of the so-called primary rule - the duty to construct the home in a workmanlike manner.[98]

Justice Prather, writing for the court, used the same reasoning with respect to negligence actions. Since a builder is required to exercise reasonable care in the construction of buildings, extension of liability to remote purchasers will impose no greater duty upon builders: they must still exercise reasonable care.[99]

In summary, extending implied warranty and negligence ac-

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92. 421 So. 2d 1046 (Miss. 1982).

93. *Keyes*, 439 So. 2d at 672.

94. 431 So. 2d 454 (Miss. 1983).

95. *Keyes*, 439 So. 2d at 672.

96. The only change was an enlargement of the types of courts in which one may be reprimanded. *Keyes*, 439 So. 2d at 672-73. "In short, no citizen . . . is going to engage in conduct which would subject him to an assessment of punitive damages in reliance upon the rule we abandon here." *Tideway Oil*, 431 So. 2d at 466.

97. 439 So. 2d at 673.

98. *Id.*

99. *Id.*

tions to subsequent purchasers does not require a change in the builder's basic rights or duties. As the Supreme Court of Texas recently stated: "In our very mobile society a builder/seller should know a house he builds might be resold within a very short period of time; therefore, our extension of the implied warranty should not place any extra burdens on builders."[100]

Limitations

Of those states which have extended implied warranties to subsequent purchasers, most of them have imposed limitations upon the type of defect covered and the period of time within which to bring an action. Most courts have stipulated that the defect must be latent,[101] which requires that the purchaser make a reasonable inspection. Although the court in *Keyes* did not specifically state that the warranty was limited to latent defects, it was implicit by virtue of its prior holdings.[102]

The standard of reasonableness is generally used in determining the period of time within which an action must be brought for breach of an implied warranty.[103] In Mississippi, however, this period of time is statutorily fixed at ten years.[104] Although this period of time had previously been shortened if the original purchaser sold to another, the court in *Keyes* held that Section 15-1-41 applies in all cases, regardless of how many subsequent purchasers may intervene.[105]

CONCLUSION

Prior to *Keyes,* Mississippi adhered to the concept of privity of contract in order for one to assert an implied warranty or negligence claim arising from a transaction in realty. As a result, subsequent purchasers did not have a cause of action for faulty construction. By abolishing the privity of contract requirement, the court in *Keyes* extended protection to those no less deserving than the first purchaser of the house. This case simply reflects the reality of today's housing industry in general. The mobility of society and large scale construction of houses makes the builder-

100. Gupta v. Ritter Homes, Inc., 646 S.W.2d 168, 170 (Tex. 1983) (Spears, J., concurring).

101. *See, e.g., Id.* at 169; *Redarowicz,* 92 Ill. 2d at 183-85, 441 N.E.2d at 330-31.

102. Oliver v. City Builders, Inc., 303 So. 2d 466, 469 (Miss. 1974) (Inzer, J., specially concurring); Mincy v. Crisler, 132 Miss. 223, 96 So. 162 (1923).

103. *Moxley,* 600 P.2d at 736.

104. MISS. CODE ANN. § 15-1-41 (Supp. 1982).

105. 439 So. 2d at 673.

purchaser relationship closely resemble that of manufacturer-consumer.[106] Thus, it is incumbent upon courts to "fashion some legal framework in which to protect innocent purchasers."[107] The *Keyes* case accomplishes this end.

The result in *Keyes* was reached by expressly overruling three prior cases on the issue of privity of contract. Although it may be desirable to adhere to precedent, "a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy."[108]

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106. Perhaps Justice Robertson's dissent in *Oliver* was well founded after all in regard to his analogy of houses to manufactured products in the context of products liability. *See supra* note 33, which clarifies the *Oliver* holding, and note 68, pertaining particularly to Justice Robertson's dissent in *Oliver*.

107. *Keyes*, 439 So. 2d at 672.

108. *Tideway Oil*, 431 So. 2d at 467 (quoting Moragne v. State Marine Lines, Inc., 398 U.S. 375, 405 (1970)).