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Another Look at the Implied Warranty of Habitability in North Carolina

In 1974 the North Carolina Supreme Court established the right of homeowners to bring suit for recovery of damages based on breach of an implied warranty of habitability. The court held in *Hartley v. Ballou*[1] that the initial vendee of a recently completed dwelling could bring an action for breach of the implied warranty of habitability against the individual who had both built and sold the home (builder-vendor).[2] The court held that the builder-vendor had impliedly warranted that the home and fixtures would be "sufficiently free from major structural defects, and . . . constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction."[3] Since *Hartley*, North Carolina's implied warranty of habitability has been broadened and clarified.[4] Until recently, however, the implied warranty of habitability benefited only purchasers of new homes. In *Gaito v. Auman*[5] the North Carolina Supreme Court extended the warranty to the purchasers of a previously occupied home who had discovered a latent defect.[6] *Gaito* clarified whether purchasers who are not the first occupants have a cause of action for breach of the warranty of habitability and addressed the limits of the requirement that the home be "new" at the time of purchase.

Plaintiffs Sam and Eleanor Gaito sued Howard Auman, Jr., to recover the cost of replacing an inadequate air conditioning system in their home.[7] Auman was in the business of building houses and had finished construction on the Gaito's home in 1973.[8] From 1974 to 1978 the home had been rented to three different individuals.[9] The third renter experienced problems with the central air conditioning system and attempted unsuccessfully to have it repaired.[10]

1. 286 N.C. 51, 209 S.E.2d 776 (1974).

2. The rationale for limiting the implied warranty to situations in which the vendor is the builder is that builder-vendors hold themselves out as experts in construction, and purchasers have no real choice but to rely on the builders' skill. Rutledge v. Dodenhoff, 254 S.C. 407, 413-14, 175 S.E.2d 792, 795 (1970). When the vendor is not the builder of the home, the doctrine of *caveat emptor* generally prevails in the absence of fraud or misrepresentation. *Id.* at 412-13, 175 S.E.2d at 794. The implied warranty, however, might apply when the vendor has control over construction even though the vendor is not the actual builder. *See* Humber v. Morton, 426 S.W.2d 554, 561 (Tex. 1968) ("It is . . . highly irrational to make a distinction between the liability of a vendor-builder who employs servants and one who uses independent contractors."); UNIF. LAND TRANSACTIONS ACT § 2-309(b), 13 U.L.A. 539 (1977) (warranty applies to work contracted for by the vendor).

3. *Hartley*, 286 N.C. at 62, 209 S.E.2d at 783.

4. *See infra* notes 58-62 and accompanying text.

5. 313 N.C. 243, 327 S.E.2d 870 (1985).

6. *Id.* at 251, 327 S.E.2d at 876.

7. *Id.* at 244, 327 S.E.2d at 872.

8. *Id.* at 245, 327 S.E.2d at 872-73.

9. *Id.* at 245, 327 S.E.2d at 873.

10. *Id.* The renter contacted Auman about the problem, and Auman sent Alvin LeGrand to the home to attempt repairs. After being sued by the Gaitos, Auman filed a third party complaint against LeGrand, who allegedly had supplied and installed the air conditioner in the home; the trial court granted LeGrand's motion to dismiss the case against him based on the statute of limitations. *Id.* at 244-46, 327 S.E.2d at 872-73.

It is unclear whether the renter might have had a cause of action against Auman for breach of

The Gaitos, aware of both the home's age and its previous tenants, purchased the home in April 1978.[11] They moved in two months later and shortly thereafter experienced problems with the air conditioning system.[12] After contacting Auman several times, the Gaitos paid for repairs to the system.[13] They later learned that the problem was due to the inadequate size of the air conditioning unit.[14]

The Gaitos brought suit against Auman, alleging breach of an implied warranty of habitability.[15] They alleged that the air conditioning system continued to malfunction despite attempts to correct the cooling problem.[16] Auman argued that the implied warranty of habitability was inapplicable because the Gaitos' home had not been "recently completed" at the time they purchased it.[17] He also argued "that the tenancies which intervened between construction and purchase by [the Gaitos] rendered the warranty inapplicable"[18] and that the warranty did not extend to an air conditioning unit.[19]

The jury found Auman had breached an implied warranty of workmanlike quality and awarded the Gaitos $3,655.[20] The question presented on appeal, whether a four-and-one-half year old house could be considered a "new dwelling" for warranty purposes, was a question of first impression in North Carolina.[21] The North Carolina Court of Appeals held that in cases of latent defects "the implied warranty of habitability extends to all sales of residential housing by a builder-vendor to the initial vendee within the maximum statute of limitations period of 10 years."[22] Because the Gaitos had filed their action well within this ten year period, the court of appeals affirmed the trial court's judgment.[23]

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an implied warranty of habitability. North Carolina has not adopted an implied warranty of habitability with respect to leasing arrangements. The doctrine as applied in other jurisdictions recognizes that it is "the landlord's obligation to keep his premises in a habitable condition." Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir.) (violations of housing code alleged by tenants in suit by landlord for nonpayment of rent), *cert. denied*, 400 U.S. 925 (1970). For further discussion of the implied warranty of habitability, see Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444 (1974); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?*, 40 FORDHAM L. REV. 123 (1971).

11. *Gaito*, 313 N.C. at 245, 327 S.E.2d at 873.

12. *Id.*

13. The facts as stated by the appellate court indicated that the Gaitos received no response from Auman. *Gaito*, 70 N.C. App. 21, 23, 318 S.E.2d 555, 556 (1984).

14. *Gaito*, 313 N.C. at 246, 327 S.E.2d at 873. Plaintiffs presented expert testimony that the accepted standard for cooling at the time of construction was a 20 degree differential from the outside temperature. The expert testified that the house should have been equipped with a four-ton capacity unit instead of the three-and-one-half ton capacity unit actually installed. *Id.*

15. *Id.* at 244, 327 S.E.2d at 872.

16. *Id.*

17. *Id.* The "recently completed" standard was incorporated into the original statement of the implied warranty of habitability set forth in *Hartley*, 286 N.C. at 62, 209 S.E.2d at 783. *See infra* note 57 and accompanying text.

18. *Gaito*, 313 N.C. at 251, 327 S.E.2d at 876.

19. *Id.* at 252, 327 S.E.2d at 877; *see infra* notes 37-42 and accompanying text.

20. *Gaito*, 313 N.C. at 246, 327 S.E.2d at 873.

21. *Gaito*, 70 N.C. App. at 22, 318 S.E.2d at 556.

22. *Id.* at 28-29, 318 S.E.2d at 559-60 (referring to statute of limitations found in N.C. GEN. STAT. § 1-52(16) (1983)).

23. *Id.* at 29, 318 S.E.2d at 560.

The court did not specifically conclude that it would have reached the same result had plaintiffs been subsequent purchasers of the home, rather than merely subsequent inhabitants, but it did note that the logic of its holding would apply to subsequent purchasers.[24]

The North Carolina Supreme Court affirmed the court of appeals' decision[25] but rejected the court of appeals' holding that a home could be deemed new for warranty purposes throughout the statute of limitations period.[26] The supreme court adopted a case by case approach, forcing courts to make a factual determination whether the home in question was "recently completed."[27] Concluding that the Gaitos' house was recently completed, the supreme court held that the Gaitos had a cause of action against Auman even though they were not the first occupants of the home. However, the court specifically disavowed any inference that its decision would apply to subsequent purchasers as well as to subsequent occupants.[28]

The court decided *Gaito* after considering the policy reasons for the development of the implied warranty of habitability in North Carolina as an exception to the rule of *caveat emptor*.[29] The court noted that North Carolina's implied warranty doctrine is representative of the growing national trend to hold builder-vendors accountable for latent defects in residential structures.[30] After reviewing decisions from other jurisdictions concerning how long a home may be considered recently completed for warranty purposes,[31] the court adopted a reasonableness standard.[32] The reasonableness standard forces the fact finder to determine whether the house was "new" at the time of the purchase in light of the circumstances of the particular case. Factors that may be considered in making the determination are "the age of the building, the use to which it has been put, its maintenance, the nature of the defects and the expectations of the parties."[33]

The court refused to bar the suit solely because a tenancy intervened between construction of the home and the sale to the plaintiff homeowners.[34] It

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24. *Id.* at 29 n.1, 318 S.E.2d at 560 n.1.

25. *Gaito*, 313 N.C. at 247, 327 S.E.2d at 874.

26. *Id.* at 246, 327 S.E.2d at 874.

27. *Id.* at 250, 327 S.E.2d at 876.

28. *Id.* at 251, 327 S.E.2d at 876.

29. *Id.* at 248, 327 S.E.2d at 875.

30. *Id.* Thirty-nine states and the District of Columbia have adopted an implied warranty of habitability in the sale of a new home. *See* Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 REAL EST. L.J. 291, 303-06 (1980); Annot., 25 A.L.R.3D 383, 413-15 (1969 & Supp. 1985).

31. *Gaito*, 313 N.C. at 249, 327 S.E.2d at 875 (citing Sims v. Lewis, 374 So. 2d 298 (Ala. 1979); Barnes v. Mac Brown & Co., 264 Ind. 227, 342 N.E.2d 619 (1976); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 298 A.2d 529 (1973); Waggoner v. Midwestern Dev., 83 S.D. 57, 154 N.W.2d 803 (1967)).

32. *Gaito*, 313 N.C. at 250, 327 S.E.2d at 876.

33. *Id.* at 250, 327 S.E.2d at 876.

34. *Id.* at 251, 327 S.E.2d at 876. The UNIF. LAND TRANSACTIONS ACT (ULTA), 13 U.L.A. 539 (1977), would extend the implied warranty of habitability to subsequent occupants. The ULTA is a comprehensive model act dealing with contractual transfers of real estate. It was approved by the National Conference of Commissioners on Uniform State Laws in August 1975 and was recom-

noted that "[t]here are many kinds of structural defects upon which the presence of tenants can have little or no effect."[35] Thus, the court held that whether the house had been occupied prior to the plaintiffs' purchase was merely one of the factors to be considered by the fact finder in deciding whether the builder-vendor had breached the implied warranty of habitability.[36]

The supreme court addressed two issues the court of appeals did not consider. The first was whether the implied warranty of habitability covers an air conditioning unit.[37] Noting that the warranty as set forth in *Hartley*[38] applied to the dwelling together with all of its fixtures,[39] the court rejected defendant's argument that only those fixtures that are essential utilities to the home are protected by the implied warranty.[40] Following the test previously established by the North Carolina courts,[41] the court found that the proper inquiry was whether the builder-vendor had failed to meet the prevailing standard of workmanlike quality, not whether the affected fixture was an essential utility.[42] The implied warranty of habitability, therefore, covers faulty air conditioning units.

The second new issue addressed by the court was how damages should be calculated in a case involving breach of the implied warranty of habitability.[43] The court noted that

> [t]he rule as stated in *Hartley* is that a vendee can maintain an action against a builder-vendor for damages for the breach of implied warranty of habitability "either (1) for the difference between the reason-

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mended for enactment in all states. *Id.* at 539. Although ULTA has not yet been adopted in any state, it was approved in 1978 (after 1977 amendments) by the American Bar Association. *See* Note, *Summary of the Uniform Land Transactions Act*, 13 REAL PROP. PROB. & TR. J. 672, 672 (1978).

ULTA § 2-309(b) provides:

> A seller, other than a lessor, in the business of selling real estate impliedly warrants that the real estate is suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by him and completed no earlier than 2 years before the date the contract to convey is made will be:
>
> (1) free from defective materials; and
>
> (2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

The Commissioner's comments to § 2-309 provide in part that "[t]he warranty of suitability arises in the case of used, as well as new, buildings or other improvements on the real estate." 13 U.L.A. at 611 comment 1. Section 2-309 applies only to homes purchased within two years of completion of construction.

35. *Gaito*, 313 N.C. at 251, 327 S.E.2d at 876.

36. *Id.* The court reasoned that the underlying purpose of the warranty is to protect homeowners from defects within the sole knowledge of the builder-vendor. *Id.*

37. *Id.* at 252, 327 S.E.2d at 877. Auman did not assert at the trial or court of appeals level that the warranty did not cover the air conditioning system. His argument to the supreme court on this issue was probably inspired by the statement in Chief Judge Hedrick's dissent from the court of appeals' opinion that the implied warranty "does not apply to an air-conditioning unit that was installed in a house at the time of construction of the house four-and-one-half years before that house was sold to the plaintiffs." *Gaito*, 70 N.C. App. at 29-30, 318 S.E.2d at 560 (Hedrick, C.J., dissenting).

38. *See Hartley*, 286 N.C. at 62, 209 S.E.2d at 783.

39. *Gaito*, 313 N.C. at 252, 327 S.E.2d at 877.

40. *Id.*

41. *See* Griffin v. Wheeler-Leonard & Co., 290 N.C. 185, 225 S.E.2d 557 (1976).

42. *Gaito*, 313 N.C. at 252, 327 S.E.2d at 877.

43. *Id.* at 253, 327 S.E.2d at 877-78.

able market value of the subject property as impliedly warranted and its reasonable market value in its actual condition, or (2) for the amount required to bring the subject property into compliance with the implied warranty."[44]

The court determined that the appropriate measure of damages in an implied warranty case should be the cost of making the builder-vendor conform to the implied warranty of habitability unless a substantial part of what has been done must be undone to remedy the defect.[45] Because the evidence in *Gaito* showed that the problem with the air conditioning unit could be corrected without destroying a substantial part of the dwelling, the court did not disturb the jury's award of damages to the Gaitos in an amount equal to the cost of replacing the original air conditioner.[46]

Courts have recognized the implied warranty of habitability since 1931. In *Miller v. Cannon Hill Estates, Ltd.*[47] an English court held that the builder of a home impliedly warrants during the period of construction that the home will be built in an efficient and workmanlike manner and will be fit for habitation.[48] The 1957 case *Vanderschrier v. Aaron*[49] was the first American decision to recognize the implied warranty theory. The *Vanderschrier* court, like the *Miller* court, limited the warranty's application to the purchase of a home that was under construction.[50] The warranty, however, was later extended to completed homes.[51] Today, a substantial majority of jurisdictions has adopted the implied warranty of habitability.[52]

North Carolina first recognized the implied warranty of habitability in *Hartley v. Ballou*,[53] a case in which a homeowner sued the builder to recover damages incurred as a result of a faulty foundation.[54] The basement had flooded within weeks of occupancy, and subsequent repairs by the builder had not solved the problem.[55] Although the supreme court reversed on other grounds, it upheld the lower court's finding of an implied warranty of habitability:[56]

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44. *Id.* (quoting *Hartley*, 286 N.C. at 63, 209 S.E.2d at 783).

45. *Id.* at 253, 327 S.E.2d at 878. If destruction of a substantial part of the home would result from efforts to satisfy the implied warranty of habitability and the contractor has acted in good faith or the owner has taken possession before completion of the work, then the difference in value will be the appropriate measure of damages. *Id.*

46. *Id.* at 254, 327 S.E.2d at 878.

47. [1931] 2 K.B. 113.

48. *Id.* at 113.

49. 103 Ohio App. 340, 140 N.E.2d 819 (1957).

50. *Id.* at 341, 140 N.E.2d at 821.

51. *See, e.g.*, Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).

52. *See supra* note 30. For more information on the history and development of the implied warranty of habitability, see Bixby, *Let the Seller Beware: Remedies for the Purchase of a Defective Home*, 49 J. URB. L. 533 (1971); Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965), and Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967).

53. 20 N.C. App. 493, 498, 201 S.E.2d 712, 715, *rev'd on other grounds*, 286 N.C. 51, 209 S.E.2d 776 (1974).

54. *Hartley*, 286 N.C. at 55-57, 209 S.E.2d at 778-80.

55. *Id.*

56. *Id.* at 65-66, 209 S.E.2d at 785. The North Carolina Court of Appeals recently summarized the policy considerations that support the implied warranty of habitability:

> [I]n every contract for the sale of a recently completed dwelling . . . the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction . . . . This implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.[57]

Two 1976 decisions extended the warranty of habitability to separate structures sold along with the house[58] and to defects that did not make the house uninhabitable.[59] Later, in *Earls v. Link, Inc.*,[60] the North Carolina Court of Appeals determined that the statute of repose period for breach of the implied warranty of habitability is ten years from the last act giving rise to the claim for relief.[61] In *Earls* the court held that plaintiff could recover for breach of the implied warranty of habitability even though plaintiff had not discovered until nearly three years after purchase that the fireplace and chimney were defective.[62] Thus, after *Earls*, new homeowners were assured of warranty protection for latent defects, provided they discovered such defects within ten years. Whether a subsequent purchaser would be given the same right was uncertain.

The court of appeals took an initial step towards resolving this question in *Strong v. Johnson*.[63] In *Strong* the court considered whether recovery was due a

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> [B]y virtue of superior knowledge, skill, and experience in the construction of houses, a builder-vendor is generally better positioned than the purchaser to know whether a house is suitable for habitation. He also is better positioned to evaluate and guard against the financial risk posed by a [defect] . . . and to absorb and spread across the market of home purchasers the loss therefrom. In terms of risk distribution analysis, he is the preferred or "least cost" risk bearer. Finally, he is in a superior position to develop or utilize technology to prevent such defects; and as one commentator has noted, "the major pockets of strict liability in the law" derive from "cases where the potential victims . . . are not in a good position to make adjustments that might in the long run reduce or eliminate the risk."

George v. Veach, 67 N.C. App. 674, 680, 313 S.E.2d 920, 923-24 (1984) (quoting R. POSNER, ECONOMIC ANALYSIS OF LAW 140-41 (2d ed. 1977)).

57. *Hartley*, 286 N.C. at 62, 209 S.E.2d at 783.

58. In Lyon v. Ward, 28 N.C. App. 446, 221 S.E.2d 727 (1976), the court of appeals extended the implied warranty of habitability to a well that failed to provide an adequate water supply. Judge Hedrick noted in his majority opinion that the rule of *caveat emptor* " 'does a disservice not only to the ordinary prudent purchaser, but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work.' " *Id.* at 450, 221 S.E.2d at 729 (quoting Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968)).

59. In Griffin v. Wheeler-Leonard & Co., 290 N.C. 185, 225 S.E.2d 557 (1976), the North Carolina Supreme Court held that the jury must determine whether a breach of the implied warranty of habitability had occurred when inadequate waterproofing caused water to accumulate in the home's crawlspace. The court thus indicated that the warranty of habitability could be breached even when the home was still "livable." *Id.* at 201, 225 S.E.2d at 567.

60. 38 N.C. App. 204, 247 S.E.2d 617 (1978).

61. *Id.* at 207-08, 247 S.E.2d at 619. It was not clear whether the "last act of the builder" was the completion of construction or the sale of the home. For a discussion of this point, see *infra* notes 99-101 and accompanying text.

62. *Earls*, 38 N.C. App. at 208, 247 S.E.2d at 619.

63. 53 N.C. App. 54, 280 S.E.2d 37 (1981).

plaintiff who was not the initial purchaser of a defective home.[64] Plaintiffs had inherited the home three-and-one-half years after it had been sold to the decedent.[65] The trial court granted summary judgment for defendants on the ground that plaintiffs were not the initial vendees, but the court of appeals reversed, holding that "a person who inherits a dwelling may seek recourse for defects which his predecessor would have been entitled to pursue."[66] The court's finding was based on the State's constitutional provision that " 'every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law.' "[67] Although the court of appeals established that the plaintiff in a cause of action for breach of the implied warranty of habitability need not be the initial vendee, it did not decide whether the implied warranty extends to a subsequent purchaser of the property.[68]

In deciding *Gaito* the North Carolina Supreme Court held that the facts of a particular case should determine whether a home is "new" for warranty purposes.[69] This decision was consistent with the logic of the *Earls* court in that both courts recognized that the age of the home alone should not determine whether the homeowner has a cause of action.[70] Thus, the supreme court standard bars the homeowner's suit when the home's age at the time the deed is passed renders it unjust to continue to hold the builder-vendor liable for defects.

The age of the home, therefore, should be regarded merely as a factor to be considered in a test of reasonableness to determine whether the warranty has been breached. A reasonable standard was first applied by the Indiana Supreme Court in *Barnes v. Mac Brown & Co.*[71] The Indiana Supreme Court used the standard to determine whether there had been a breach of warranty by the builder-vendor, not to ascertain whether the warranty extended to the particular home in question.[72] The factors cited by the North Carolina Supreme Court as relevant to the determination whether a home is new for warranty purposes—the building's age, the manner in which it has been used, the way the building has been maintained, the nature of the defect, and the expectation of the parties[73]—are more relevant to the determination whether the warranty has been

64. *Id.* at 55, 280 S.E.2d at 38.

65. *Id.* at 54, 280 S.E.2d at 38.

66. *Id.* at 58-59, 280 S.E.2d at 40.

67. *Id.* at 58, 280 S.E.2d at 40 (quoting N.C. CONST. art. I, § 18).

68. *Id.* at 59, 280 S.E.2d at 40.

69. *Gaito*, 313 N.C. at 250, 327 S.E.2d at 876.

70. *Id.* The effect of the *Earls* decision was to preserve the homeowner's cause of action against the builder-vendor for a latent defect throughout the 10 year statute of repose period. *Earls*, 38 N.C. App. at 207-08, 247 S.E.2d at 619. The decision of the *Gaito* court, on the other hand, curtails the liability of the builder-vendor.

71. 264 Ind. 227, 342 N.E.2d 619 (1976). The language of the *Barnes* court was as follows:

> The standard to be applied in determining whether or not there has been a breach of warranty is one of reasonableness in light of the surrounding circumstances. The age of the home, its maintenance, the use to which it has been put are but a few factors entering into this factual determination at trial.

Id. at 229, 342 N.E.2d at 621.

72. *Id.* at 229, 342 N.E.2d at 621.

73. *See supra* text accompanying note 33.

breached.[74] Requiring the fact finder to determine whether a home is new before determining whether the warranty has been breached adds an unnecessary step to the analysis of implied warranty of habitability cases. The supreme court should have upheld the court of appeals' decision that the warranty extended through the ten year repose period[75] and held that the factors it presented as determinative of whether a home is new were factors to be considered in determining whether the warranty had been breached. This approach would have simplified the analysis of implied warranty of habitability cases.

In addition to affirming the court of appeals' opinion that the warranty extended throughout the ten year repose period, the supreme court should have approved the court of appeals' observation that the logic of a decision allowing the Gaitos to recover might allow subsequent purchasers to recover.[76] Instead, the supreme court's decision made clear that the court was not adopting the lower court's dictum.[77] Courts in other jurisdictions, however, have allowed subsequent or remote purchasers to recover from the builder-vendor.[78] Despite the North Carolina Supreme Court's refusal to recognize the viability of an implied warranty claim by a subsequent purchaser, such a proposition seems to follow logically from the *Gaito* holding. Extension of the *Gaito* holding to subsequent purchasers, however, could raise a privity problem. Indeed, the jurisdictions refusing to extend the implied warranty to subsequent purchasers most often do so because of lack of privity between the purchaser and the builder-vendor.[79] Because the Gaitos purchased the house directly from defendant,[80] privity of contract was not at issue. Two recent decisions, however, suggest that

74. Other jurisdictions have come to the same conclusion. *See, e.g.*, Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980); Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo. 1979).

75. *See supra* note 23 and accompanying text.

76. *Gaito*, 70 N.C. App. at 29 n.1, 318 S.E.2d at 560 n.1. The supreme court did not mention whether lack of privity between the builder-vendor and the subsequent purchaser would cause a problem in allowing a person other than the original contracting party to recover.

77. *Gaito*, 313 N.C. at 251, 327 S.E.2d at 876.

78. *See* Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980) (second purchaser); Moxley v. Laramie Builders, 600 P.2d 733 (Wyo. 1979) (second purchaser). Other cases in which the implied warranty of habitability has been extended to subsequent purchasers include Blagg v. Fred Hunt Co., 272 Ark. 185, 612 S.W.2d 321 (1981); Duncan v. Schuster-Graham Homes, 194 Colo. 441, 578 P.2d 637 (1978); Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 441 N.E.2d 324 (1982); Barnes v. Mac Brown & Co., 264 Ind. 227, 342 N.E.2d 619 (1976); Hermes v. Staiano, 181 N.J. Super. 424, 437 A.2d 925 (Law Div. 1981); McMillan v. Brune-Harpenau-Torbeck Builders, 8 Ohio St. 3d 3, 455 N.E.2d 1276 (1983); Elden v. Simmons, 631 P.2d 739 (Okla. 1981); Gupta v. Ritter Homes, 646 S.W.2d 168 (Tex. 1983); and Gay v. Cornwall, 6 Wash. App. 595, 494 P.2d 1371 (1972). The underlying policy reason for permitting recovery is that the builder-vendor possesses greater knowledge than the average purchaser; mere lack of privity between the buyer and seller, therefore, should not justify barring a breach of warranty claim. *See Barnes*, 264 Ind. at 229, 342 N.E.2d at 620.

79. *See, e.g.*, H.B. Bolas Enter. v. Zarlengo, 156 Colo. 530, 535, 400 P.2d 447, 450 (1965); Coburn v. Lenox Homes, Inc., 173 Conn. 567, 571-72, 378 A.2d 599, 601-02 (1977); Oliver v. City Builders, Inc., 303 So. 2d 466, 469-70 (Miss. 1974) (Inzer, J., specially concurring); John H. Armbruster & Co. v. Hayden Company-Builder Dev., 622 S.W.2d 704, 705 (Mo. Ct. App. 1981); Herz v. Thornwood Acres "D," 86 Misc. 2d 53, 58, 381 N.Y.S.2d 761, 764 (Justice Ct. 1976), *aff'd per curiam*, 91 Misc. 2d 130, 397 N.Y.S.2d 358 (App. Term. 1977); Brown v. Fowler, 279 N.W.2d 907, 910 (S.D. 1979).

A second reason given for refusing to extend the implied warranty to subsequent purchasers is that it is a policy decision that should be made by the legislature and not the judiciary. *See Coburn*, 173 Conn. at 573-74, 378 A.2d at 602.

80. *Gaito*, 313 N.C. at 245, 327 S.E.2d at 873.

lack of privity should not bar a suit by a subsequent purchaser. In *Strong v. Johnson*[81] the court of appeals did not bar plaintiffs who had inherited the defective residence from the initial vendee from recovery in an action for breach of an implied warranty of habitability.[82] Furthermore, the North Carolina Supreme Court in *Oates v. Jag, Inc.*[83] recently determined that in a negligent construction case the homeowners should not be denied relief solely because they were subsequent purchasers and lacked privity with the builder-vendor.[84]

Although the court of appeals in *Oates* stated that North Carolina has not extended the concepts of products liability law to the construction of houses,[85] it is conceivable that North Carolina will do so if it adopts the philosophy shared by a number of other jurisdictions—namely, that homes should be treated like consumer products.[86] If North Carolina courts were to follow such a philosophy, lack of privity between the plaintiff-homeowner and the builder-vendor would not be a problem because products liability law expressly allows a plaintiff not in privity with the product manufacturer to bring suit.[87]

The national trend has been towards extension of the implied warranty of habitability.[88] This trend is due in part to a recognition by the courts that as society has become more mobile, more housing has been mass produced in accordance with uniform designs. Homes have been analogized to consumer goods and builder-vendors to manufacturers of such goods.[89] Courts thus have been more willing to impose liability on builder-vendors who, with superior knowledge of current construction practices, place defective homes into the marketplace.[90] Furthermore, the fact that the subsequent purchaser does not know the builder-vendor "does not negate the reality of the 'holding out' of the builder's expertise and reliance which occurs in the market place."[91]

The use of arbitrary factors such as the intervening sale of the property[92] or the age of the house[93] as a means to bar a homeowner's cause of action reflects courts' refusal to appreciate the underlying policy considerations supporting

81. 53 N.C. App. 54, 280 S.E.2d 37 (1981).

82. *Id.* at 57-58, 280 S.E.2d at 40.

83. 314 N.C. 276, 333 S.E.2d 222 (1985), *rev'g* 66 N.C. App. 244, 311 S.E.2d 369 (1984).

84. *Id.* at 279, 333 S.E.2d at 225. The court in *Oates*, however, commented that many jurisdictions deny a subsequent purchaser relief for latent defects based on a theory of implied warranty of habitability; it did not rule on the validity of such a claim in the case before it because it found that the homeowners' complaint sufficiently stated a claim for negligence. *Id.*

85. *Oates*, 66 N.C. App. at 246-47, 311 S.E.2d at 370.

86. *See* Moxley v. Laramie Builders, 600 P.2d 733, 735 (Wyo. 1979).

87. N.C. GEN. STAT. § 99B-2(b) (1985) provides that

> [a] claimant who is a buyer, as defined in the Uniform Commercial Code, of the product involved, or who is a member or a guest of a member of the family of the buyer . . . may bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty; and the lack of privity of contract shall not be grounds for the dismissal of such action.

88. *See supra* note 78 and accompanying text.

89. *See* Barnes v. Mac Brown & Co., 264 Ind. 227, 229, 342 N.E.2d 619, 620-21 (1976).

90. *Id.*

91. Terlinde v. Neely, 275 S.C. 395, 398, 271 S.E.2d 768, 769 (1980).

92. *See* Moxley v. Laramie Builders, 600 P.2d 733, 736 (Wyo. 1979).

93. *See Gaito*, 70 N.C. App. at 27, 318 S.E.2d at 559.

adoption of the implied warranty theory. These courts distinguish houses from other products and refuse to hold the more knowledgeable and experienced builder to standards commensurate with his or her experience. They also fail to realize that allowing the action to go forward despite the fact that the house is not new when purchased or that the homeowner is not the initial purchaser does not put the builder-vendor in any worse position than he or she would have been in had the home been purchased brand-new and occupied by the initial purchaser throughout the ten-year statute of repose period. In either case, the latent defect would have to be discovered within a reasonable period of time[94] or the suit would be barred.

Most courts that have adopted the implied warranty of habitability have imposed a reasonableness standard for determining the warranty's duration.[95] That is, the purchaser is given a reasonable length of time in which to discover defects. The jury in each case decides whether the warranty was in effect at the time the purchaser discovered the defect; the statute of limitations begins to run after the defect is discovered.[96]

North Carolina adheres to a reasonableness standard for deciding when a cause of action accrues,[97] but also imposes a second tier limitation, a statute of repose, which bars implied warranty actions brought ten years after the last act of the builder-vendor giving rise to the purchaser's cause of action.[98]

It is unclear whether the last act of the defendant under the statute of repose is completion of construction or sale to the first purchaser. This question raises the problem of two conflicting policies—giving the purchaser a reasonable time to discover the latent defect and preventing prolonged liability for the builder. The language of North Carolina's statute of repose implies that the date construction was completed or the date the home was sold, whichever occurred later, is the operative date.[99] This interpretation would be fairer to the purchaser who buys after the home has remained vacant for some time and thus needs time to discover the defect. This interpretation also follows the trend towards greater purchaser protection. In at least two other states, however, statutes of repose adopted for implied warranty actions have been construed to run from the date construction is completed.[100] Because the purpose of such a stat-

94. *See, e.g.*, Elden v. Simmons, 631 P.2d 739, 741 (Okla. 1981); Terlinde v. Neely, 275 S.C. 395, 398-99, 271 S.E.2d 768, 770 (1980); Moxley v. Laramie Builders, 600 P.2d 733, 736 (Wyo. 1979).

95. See cases cited *supra* note 78.

96. Elden v. Simmons, 631 P.2d 739, 741 (Okla. 1981).

97. *Earls*, 38 N.C. App. at 208, 247 S.E.2d at 617 (applying the predecessor of N.C. GEN. STAT. § 1-52(16) (1983) to implied warranty of habitability case).

98. N.C. GEN. STAT. § 1-52(16) (1983).

99. *See id.* There is a separate statute of repose, *id.* § 1-50, which requires that an action for damages resulting from the defective condition of an improvement to real property be brought within "six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement." *Id.* § 1-50(5)a. Although not applied in *Gaito*, the statute implies that an act by the defendant subsequent to the completion of construction may be the triggering event for the statute of repose.

100. *See* Greene v. Green Acres Constr. Co., 36 Colo. App. 439, 441, 543 P.2d 108, 110 (1975) (discussing COLO. REV. STAT. § 13-80-127 (1973)); Sponseller v. Meltebeke, 280 Or. 361, 366, 570 P.2d 974, 976 (1977) (discussing OR. REV. STAT. § 12.135 (1977)); *see also* Note, *Liability of the*

ute of repose is to protect the builder-vendor from prolonged liability, North Carolina should follow these states and recognize completion of construction as the last act of the defendant. If the statute were to run from the date of first sale by the defendant, the defendant could face prolonged liability if unable to sell the home soon after construction, a result inconsistent with the underlying purpose of the statute of repose.[101]

The *Gaito* court was unwilling to adopt a rule that would automatically give the first purchaser of a home the right to sue a builder-vendor for latent defects if the defect was discovered soon enough to allow the purchaser to sue under North Carolina General Statute section 1-52(16).[102] This decision thus puts the builder-vendor in a better position than if he or she had sold the home immediately after construction. In light of the North Carolina Supreme Court's failure to address whether the warranty extends to subsequent purchasers,[103] the *Gaito* decision represents a step backward from recognition and approval of the policy considerations underlying the implied warranty of habitability.[104] If the court's concern was with protecting the builder-vendor from endless liability, it could have accomplished this goal by treating the age of the house and its prior use as factors affecting the builder-vendor's liability for breach of the warranty; these factors, in conjunction with the statute of repose, sufficiently protect the builder-vendor from endless liability.[105]

The court in *Gaito* reached the only fair conclusion it could on the facts of this particular case. To have found that the Gaitos' home was not "recently completed" for warranty purposes would have meant that their cause of action would be barred for reasons unrelated to the defect in question. Even though the conclusion in the *Gaito* case was correct, the court created precedent that is inconsistent with the policy rationale supporting the implied warranty of habitability. Thus, the decision stands out as one refusing to recognize the need in North Carolina for a more modern approach in protecting homeowners.

CAROLYN WHITNEY MINSHALL

Builder-Vendor Under the Implied Warranty of Habitability — Where Does It End?, 13 CREIGHTON L. REV. 593, 600 (1979) (discussing Colorado and Oregon statutes).

101. In most cases of delayed sale the home will be occupied by renters who will have an opportunity to discover any defects within the repose period. Of course, if the warranty does not extend to renters, the defects might not be repaired.

102. N.C. GEN. STAT. § 1-52(16) (1983); *see supra* note 98 and accompanying text.

103. *See Gaito*, 70 N.C. App. at 29 n.1, 318 S.E.2d at 560 n.1

104. *See supra* notes 92-94 and accompanying text.

105. *Gaito*, 70 N.C. App. at 28, 318 S.E.2d at 559.