

***Tad S. Rogers v. Forest City Stapleton, Inc. and FC
Stapleton II, LLC, 2015COA167M, 2015***

***Appellate Court Expands the Implied Warranty of
Habitability for Developers***

By

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Appellate Court Expands the Implied Warranty of Habitability for Developers

On November 19, 2015, the Colorado Court of Appeals expanded the implied warranty of habitability for developers in *Tad S. Rogers v. Forest City Stapleton, Inc. and FC Stapleton II, LLC*, 2015COA167, 2015. The issue addressed is when does an implied warranty of habitability run from a developer to a homeowner. A developer's implied warranty of habitability arises when the developer improves a lot for construction of a habitable dwelling. The Court of Appeals held that a claim for implied warranty of habitability (suitability) applies to a developer if 1) the developer improves the lot for a particular purpose, and 2) all subsequent purchasers rely on the developer's skill or expertise in improving the lot for that particular purpose.

The implied warranty of habitability was first applied to builder-vendors in 1964 in the seminal case of *Carpenter v. Donohoe*, 388 P. 2d 399 (Colo. 1964). The warranty is based on the premise that purchasers and a builder-vendor seldom have equal bargaining positions. An experienced builder is in a far better position to evaluate the structural condition of a house than most purchasers. The builder-vendor has the ability to observe otherwise concealed components such as wiring, plumbing, and other essential structural components not readily known or observable through inspection by the purchaser. To account for this consumer disadvantage, the builder-vendor expressly or impliedly represents that it has the expertise and knowledge necessary to construct a livable dwelling and that the home as constructed is habitable.

This implied warranty was first extended to developers in *Rusch v. Lincoln-Devore Testing Laboratory, Inc.*, 698 P. 2d 832 (Colo. App. 1984). Generally, this warranty is absent in sales of wholly undeveloped land. However, where a developer improves and sells land for the express purpose of residential construction, there is an implied representation that the property is suitable for that purpose. The Court of Appeals held that a purchaser does not have the ability to evaluate the quality of improvements to the land due to the disparity of expertise between the developer and purchaser and many of the alterations are not necessarily visible. Thus, if land is improved and sold for the purpose of residential construction and the developer has reason to know that the purchaser is relying on the developer's skill and expertise in making improvements, then the implied warranty arises.

In *Rusch*, an undeveloped lot was purchased from the developer. Mr. Rusch acted as his own contractor and hired Lincoln-Devore ("Lincoln") as the soils engineer. Lincoln investigated the lot and made recommendations for the foundation of the home. After the construction of the home, there was subsidence and lateral movement of the soil causing significant structural damage. The purchasers sued the developer and Lincoln. A verdict was entered in favor of the purchasers and an appeal followed. After holding that a developer could be exposed to a claim for implied warranty of habitability, the Court of Appeals remanded the case back to the trial court for retrial to determine if there was evidence to support a jury instruction on implied warranty.

Implied warranty of habitability for developers was addressed again in *Beeftu v. Creekside Ventures, LLC*, 37 P. 3d 526 (Colo. App. 2001). In *Beeftu*, the purchasers wanted a home with a walkout basement. They contracted with a builder to construct a home. The builder bought the lot from the developer. The grading plan the developer submitted to the City specifically stated that the lot purchased by the builder could not have a walkout basement. The final drainage report prepared by the engineering firm hired by the developer stated that the lot purchased by the builder “will be provided with adequate grading to convey water from the rear yards to the proposed street.” This type of grading is incompatible with lots for walkout basements. The developer graded the lot in accordance with the plan and report filed with the City.

The developer moved for summary judgment on the plaintiffs’ claim for breach of implied warranty of habitability alleging that plaintiff’s damages were caused by the builder constructing a walkout basement set one foot lower than permitted. The trial court granted the motion and dismissed the warranty claim. The builder settled before trial. At trial, the jury found the developer negligent but that it did not cause the plaintiff’s damages. Plaintiffs appealed.

The Court of Appeals found that while the lot may not have been suitable for a walkout basement, there was evidence that the lot was suitable for residential construction. The developer graded the lot in accordance with the plans submitted to the City and played no role in the construction of the home. The decision to build a home with a walkout basement was the builder’s. The developer never

represented that a home with a walkout basement could be built on the lot. Thus, the Court upheld the trial court's ruling.

In *Rogers*, supra, Forest City was the developer for a mixed-use community with about 12,000 residences. The lots were sold to builders who built homes on the lots and sold them to homeowners. Forest City did not build the homes, did not select the builders or impose architectural control over the styles of the homes that could be built on the individual lots. Park City Metropolitan District ("PCMD") was responsible for installing the public infrastructure, including the roads. PCMD hired Forest City as the development manager. Forest City made recommendations to the PCMD board regarding which trade contractors it should hire to install the infrastructure. The board considered these recommendations and then entered into contracts with trade contractors of its choice to build the infrastructure.

After Forest City sold a vacant lot to a homebuilder, Rogers then contracted with that homebuilder to construct a residence on the lot. He paid an extra fee to the builder for the home to include space for a basement that could be built later. The home had a foundation drain designed to collect water into a sump pit that pumped water out into the yard. After Rogers moved into the home, he noted that the sump pump was operating more often than he had expected. He hired engineers to investigate and discovered that the ground water level was higher than anticipated. Rogers sued Forest City for breach of implied warranty claiming that Forest City impliedly warranted to him that his lot was suitable for a home with a basement that could be finished without risk of damage caused by high ground water. The jury found in favor of Rogers and Forest City appealed.

After the Court of Appeals acknowledged the decisions in *Rusch* and *Beeftu*, it concluded that an implied warranty of suitability exists when a developer sells a vacant lot if 1) the developer improves the lot for a particular purpose, and 2) the purchaser relies on the developer's skill or experience in improving the lot for that particular purpose. The remaining question was whether an implied warranty extends to a homeowner who is not the first purchaser of the lot. The trial court relied on *Jordan v. Talaga*, 532 N.E. 2d 1174 (Ind. Ct. App. 1989) in holding that the implied warranty from a developer does extend to subsequent purchasers.

In *Jordan*, the developer improved a lot for the purpose of residential construction, sold it to a builder who constructed a residence on the lot, and then sold it to the homeowners. The improvements performed by the developer for the lot included an easement on the edge of the lot for a drainage ditch that would contain known periodic storm drainage. After purchase, the homeowners' lot repeatedly flooded, and they sued the developer for breach of implied warranty.

In extending the implied warranty from the developer to the homeowners, the Court of Appeals sought to protect homeowners from unscrupulous developers from selling unsuitable land with latent defects. While *Forest City* provided cases showing that other states have come to a different conclusion and that there should be privity of contract, the Court of Appeals declined to follow those positions. The Court also rejected the argument that it would be unfair to impose a warranty of habitability on a developer for a house that has not yet been constructed by a builder. Instead, the Court of Appeals held that if a developer uses its skill and expertise in improving the land, and the subsequent purchasers rely on that skill

and expertise, it is fair to impose an implied warranty of suitability for those improvements made by the developer.

The Court of Appeals also concluded that the jury instruction provided did not accurately set forth the law on implied warranty. The Court of Appeals then offered the following jury instruction:

For the homeowner to recover from the developer on the homeowner's claim for breach of implied warranty, you must find by a preponderance of the evidence that:

- 1) the developer improved the lot for a particular purpose; and
- 2) all subsequent purchasers, including the homeowner, relied on the developer's skill or expertise in improving the lot for that particular purpose; and
- 3) the lot was not suitable for the particular purpose for which the developer improved the lot and for which subsequent purchasers relied on it being suitable; and
- 4) that unsuitability caused the homeowner's damages.

Based on the holding in *Rogers*, developers must be careful in improving vacant land and clearly disclose any limiting conditions for the improved lot so builders comply with the plans and reports approved by the local building authorities. Developers should also seek indemnification from the builder in case the builder fails to comply with development plans and reports. A Developer might also request that an owner hold the developer harmless for any damages that result from any non-compliance by the owner's builder.

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