THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2011-CP-42-000618

Fireman's Fund Insurance Company, a/s/o Stig Wennerstrom, Appellant

v.

Searcy Custom Homes, LLC and B&B Plumbing, Inc., Respondents.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO CHARGE THE JURY ON THE ISSUE OF WARRANTY OF HABITABILITY?

2. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE PLAINTIFF/APPELLANT'S MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF THE WARRANTY OF HABITABILITY?

STATEMENT OF THE CASE

The case underlying this appeal rises out of a January 24, 2009 water leak (hereinafter the "Leak") that occurred at the home of Stig Wennerstrom, (hereinafter the "Home") located at 45 Falling Star Way in Landrum, SC. (R. p. 82, lines 11-23). Mr. Wennerstrom made a claim for the damages caused by the Leak pursuant to an insurance policy he had with the Plaintiff/Appellant, Fireman's Fund Insurance Company (hereinafter "FFIC"). (*Id.*). Because FFIC paid Mr. Wennerstrom for the damages, they were subrogated to Mr. Wennerstrom's rights to the extent of their payment under the policy. (*Id.*).

FFIC filed its complaint against the Respondents in the Spartanburg County Court of Common Pleas on February 9, 2011 as subrogee of its insured, Stig Wennerstrom. (Plaintiff's Complaint). Subsequent to written discovery and deposition testimony, on September 18, 2013 FFIC moved for and was granted leave to Amend its Complaint pursuant to Rule 15, SCRCP. In its Amended Complaint FFIC alleged damages associated with a water leak that occurred at the home of its insured. (R. pp 3-16).

Trial upon the Amended Complaint was conducted before the Honorable J. Mark Hayes, II, on September 30th, October 1st, and October 2nd, 2013. (R. p. 69). At the close of FFIC's case in chief, FFIC moved for a directed verdict, which was denied. (R. p. 496 lines 1-3). At the close of all evidence, FFIC renewed its motion for a directed verdict (R. p. 601, lines 3-4), which was also denied. (R. p. 603, lines 20-21). Prior to closing arguments, the trial court refused to charge the jury on the issue of warranty of habitability. (R. p. 603, lines 16-18). Finally, after

the jury rendered its verdict for the Respondents, FFIC moved the Court for a jury notwithstanding the verdict (R. p. 679, lines 16-17), which was also denied. (R. p. 679, line 24-p. 680, line 2). This appeal deals specifically with the Warranty of Habitability count that was set forth in FFIC's Amended Complaint. (R. pp. 9-10).

FACTS

Respondent Searcy Custom Homes, LLC, (hereinafter "Searcy"), built the Home under a contract (hereinafter the "Contract") with Stig Wennerstrom. (R. p. 243, lines 19-25). In contracting with Mr. Wennerstrom to construct the Home, Searcy held itself out to Mr. Wennerstrom as a competent builder that could build a home that Mr. Wennerstrom could live in. (R. p. 243, lines 2-5). Searcy took over the project to build the Home in its very early stages and took full responsibility for the construction of the Home. (R. p. 243, line 6-p. 245, line 4). During the course of construction, Searcy had the final say on how the Home was built and what was used to construct it. (R. p. 249, lines 11-16). Under the Contract, Searcy was paid a fee to build the Home. (R. p. 248, lines 19-23). When Searcy first contracted to build the Home, there was nothing at the site that could be in any way considered a home. (R. p. 241, lines 14-17). Searcy was solely responsible for obtaining the certificate of occupancy for the Home. (R. p. 248, lines 13-14). Before Searcy built the Home and got the certificate of occupancy, there was no Home and it could not be occupied and used as a home. (R. p. 248, lines 7-9). After Searcy obtained the Home's certificate of occupancy, it was suitable and legal to use and occupy as a home. (R. p. 248, lines 10-12).

It is undisputed that the Leak was caused by the failure of the connection between the Home's water supply line and the bidet in an upstairs bathroom of the Home. (R. p. 278, lines 6-15 and R. p. 569, lines 22-25). The connection failed because it was subjected to pressure that exceeded the capability of the connection. (R. p. 569, lines 22-25). The high pressure in the

Home's supply line was in turn caused by the failure of the Home's pressure reducing valve (hereinafter "PRV"). (R. p. 278, lines 6-10). According to Randall Blythe, the principal of Respondent B&B Plumbing, Inc., the PRV failed because it was subjected to high water pressure coming from the local water supply. (R. p. 532, lines 13-19). Mr. Blythe, who was qualified as a plumbing expert at trial (R. p. 500, lines 4-6), further testified that he knew the pressure in the local water system at the time the Home was under construction was "far more than 80 pounds." (R. p. 534, lines 1-3). When tested after the leak occurred, the pressure in the local water system was so high that it broke the gauge (R. p. 276, lines 18-22)[1].

At trial, FFIC presented evidence that it paid $300.504.34 to repair the Home. (R. p. 188, lines 20-21). Mark Searcy, principal of Respondent Searcy, admitted that $300.504.34 was a fair and reasonable cost to repair the damage caused by the Leak. (R. p. 271, lines 2-13).

ARGUMENTS

I. THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY ON THE ISSUE OF WARRANTY OF HABITABILITY.

A. Standard of Review for Failure to Charge a Jury

Under South Carolina law, "It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge. *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (S.C., 2000) *citing Sanders v. Western Auto Supply Co.*, 256 S.C. 490, 497, 183 S.E.2d 321, 325 (1971). If the trial court's failure to charge the jury on a relevant issue is prejudicial, that is grounds for reversal on appeal. *Fairchild v. S.C. DOT,* 398 S.C. 90, 727 S.E.2d 407 (S.C. 2012).

[1] It should be noted that FFIC's designated expert, Roger Harris, opined that he did not know what had caused the PRV to fail, but that the high water pressure in the local supply would cause it to experience accelerated wear. (R. p. 569, lines 6-8). In addition, Mr. Harris opined that as a man-made instrument, his common sense and engineering experience dictated that the PRV would not last forever, and when, not if, it failed, the water pressure that Mr. Blythe knew to be well over 80 PSI, and that had broken the gauge the first time it was tested, was going to cause this loss. (R. p. 363, lines 12-25).

B. History and Import of the Warranty of Habitability

South Carolina first recognized what is now commonly known as the implied warranty of habitability in 1968. *Rogers v. Scyphers*, 251 S.C. 128, 161 S.E.2d 81 (S.C., 1968). Two years later, the warranty of habitability, then discussed as an implied warranty of fitness for the purpose for which a home is intended, was first applied by the Supreme Court of South Carolina. *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (S. C. 1970). In *Rutledge*, the Supreme Court outlined the reasoning behind the existence of the implied warranty of habitability, in which it eschewed the doctrine of caveat emptor, and espoused caveat venditor, stating:

> "The seller holds himself out as an expert in such construction and the prospective purchaser, if he buys, is forced to a large extent to rely on the skill of the builder. This is true because the ordinary purchaser is precluded from making a knowledgeable inspection of the completed house not only because of the expense and his unfamiliarity with building construction, but also because the defects are usually hidden rendering inspection practically impossible. Under such circumstances, the purchaser is at the mercy of the builder-vendor.
>
> The doctrine of caveat emptor is inapplicable to such a transaction as the above. Both the seller and purchaser know that the essence of the transaction is the purchase of a habitable dwelling and that a knowledgeable inspection by the buyer is impossible. Since this is true, it is proper that there should be an implied warranty that the dwelling is fit for the purposes for which it is intended."

Id. at S.C. 412, S.E.2d 795.

Six years after *Rutledge*, the Supreme Court was confronted with a case in which the purchaser of a home sued the developer rather than the builder of the home, alleging liability based upon the warranty of habitability. *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728 (S.C., 1976). In *Lane*, the Court expanded the doctrine of caveat venditor, as espoused in *Rutledge*, to encompass an entity that did not build the home in question. *Id.* In doing so, it further clarified the reasoning for the existence of the warranty of habitability, to wit: "[The seller's] liability is not founded upon fault, but because it has profited by receiving a fair price

and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." *Id.* at S.C. 503, S.E.2d 731.

The next time the South Carolina Supreme Court's commitment to the doctrine of caveat venditor, and its progeny, the warranty of habitability, was tested, it struck down the necessity of privity to recover under the implied warranty. *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980). In its decision, the *Terlinde* court reiterated the policies laid out in both *Rutledge* and *Lane*, summarizing as follows: "The only logical application of these principles requires a holding that an implied warranty for latent defects extends to subsequent home purchasers for a reasonable amount of time." *Id.* at S.C. 399, S.E.2d 770.

South Carolina next visited the issue of habitability in a case involving a custom built home. *Arvai v. Shaw*, 289 S.C. 161, 345 S.E.2d 715 (S.C. 1986). In *Arvai* the Court of Appeals upheld the trial court's dismissal of the case based on its assessment that the warranty of habitability did not apply to custom built homes. *Id.* The Supreme Court upheld the Court of Appeals' result, but struck down their reasoning, stating that whether a home was custom built or a "spec" home was not determinative, thus extending the warranty of habitability to custom homes. *Id.* at S.C. 164, S.E.2d 717.

Soon after the *Arvai* decision, the Supreme Court ruled on the warranty of habitability liability of a lumber company that liquidated newly constructed homes in order to satisfy materialman's liens. *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 384 S.E.2d 730 (S.C., 1988). In *Kennedy*, the Court took the opportunity to address a prior Court of Appeals ruling, *Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc.*[2], and revisited the reasoning behind the existence of the warranty of habitability and differentiated it from the warranty of workmanlike service. The *Kennedy* Court approved of the Court of Appeals'

[2] *Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897 (S.C. App., 1988).

reasoning ***under the facts*** in *Carolina Winds*, calling for the dismissal of the warranty of habitability, but looked with disfavor upon their concurrent dismissal of the companion warranty of workmanlike service claim. In doing so, the *Kennedy* Court seemed to imply that a warranty of habitability cannot exist where a builder builds a custom home under a contract that is not designated as a sale. (Transcript pp. 522 and 533). However, such a reading of that case is contrary to the law and the public policy of the State of South Carolina.

C. Applicability of the Warranty of Habitability

Under the law of South Carolina, "in constructing a home, a builder warrants that the home is fit for its intended use as a dwelling, that the home was constructed in a workmanlike manner, and that the home is free of latent defects." *Fields v. J. Haynes Waters Builders*, 376 S.C. 545, 658 S.E.2d 80 (S.C., 2008). While the *Fields* Court's holding seems to be clear cut and without qualification, the case law regarding the warranty of habitability has categorically required the existence of a "sale" of a ***new*** home to trigger the existence of the warranty of habitability. *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (S. C. 1970). In addition, the holding in *Kennedy*, as it discusses *Carolina Winds*, seems to foreclose the basic holding in *Arvai*- that custom home builders[3] are subject to the warranty of habitability. *Arvai v. Shaw*, 289 S.C. 161, 345 S.E.2d 715 (S.C. 1986). As all three of these cases; *Rutledge*, *Arvai* and *Kennedy* have continued to meet with the approval of subsequent courts[4] there must be a way that they can be reconciled, both with each other, as well as with the public policy that gave birth to them.

The answer is found by returning to the fundamental reasoning behind the implied warranty of habitability. First, direction as to what constitutes a sale, for the purposes of triggering the warranty, can be found in the *Arvai* decision: "in Lane we held that a transaction between an innocent purchaser and the vendor who places a new home in the stream of

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[3] Who by definition contract to ***build*** a home as opposed to contracting to ***sell*** a home.
[4] *See e.g., Smith v. Breedlove*, 661 S.E.2d 67, 377 S.C. 415 (S.C., 2008) and *Fields v. J. Haynes Waters Builders*, 376 S.C. 545, 658 S.E.2d 80 (S.C., 2008).

commerce should be governed by the doctrine of caveat venditor." *Id.* at S.C. 163, S.E.2d 716. In other words, one important distinction is whether or not the builder is responsible for placing the home in the stream of commerce. This is in accordance with the ruling in *Kennedy*, where the Court stated, "We are persuaded that building a house which one knows or should know will later be sold by a party to an innocent buyer is an act adequate to constitute placing that house into the stream of commerce." *Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 346, 384 S.E.2d 730, 737 (S.C., 1988). But as the ruling in *Carolina Winds*, makes clear, simply building the home – placing it in the stream of commerce – is not enough. *Carolina Winds Owners' Ass'n, Inc. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897 (S.C. App., 1988). In *Carolina Winds*, the builder was NOT subject to the warranty of habitability. *Id.* Why? Because the builder in that case was not a party to the transaction that placed the new home in the stream of commerce. *Id.* In *Carolina Winds* a developer sold the new homes to the purchasers, and thereby stood to profit from the exchange. *Id.* This result is consistent with the ruling in *Lane*- "[The seller's] liability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 503, 229 S.E.2d 728, 731 (S.C., 1976).

Therefore, the test to determine if the builder of a new home is subject to the warranty of habitability is simple- Is the builder responsible for placing the new home in the stream of commerce, and if so, was that builder a party to (and therefore stood to profit from) the transaction (whether or not it is called a "sale") that placed the home in the stream of commerce? This test reconciles the rulings in *Carolina Winds*, *Rutledge* and *Arvai*, while continuing to protect innocent purchasers, some of whom would be remote under the ruling in *Terlinde*[5], but

[5] *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980).

ONLY as to those builders who have the opportunity to benefit from the transaction that gives rise to the warranty.

D. Applicability of the Warranty of Habitability to the Facts of This Case

Stig Wennerstrom contracted with Searcy, a custom home builder, to build the Home. In doing so, Mr. Wennerstrom relied upon Searcy to provide a home that was fit and safe for use as a dwelling. The undisputed evidence, derived solely from the testimony of the Respondents, was presented to the jury that: 1) The pressure in the local water supply at the time the Home was built was well in excess of the expected capability of the Home's plumbing fixtures to withstand; 2) Even though the Home was equipped with the PRV, the excessive pressure in the local system overwhelmed the PRV, and; 3) That when the PRV failed and the existing pressure from the local water system entered the Home, it was the direct and proximate cause of the damages that are the subject of FFIC's Amended Complaint. In other words, the Home contained a latent defect in that it could not safely withstand the water pressure from the local supply and that latent defect inevitably caused damage to the Home.

Despite these facts, the trial court ruled refused to charge the jury on the issue of warranty of habitability, ostensibly because it found, as a matter of law, that there was no transaction or "sale" between Mr. Wennerstrom and Searcy that would give rise to the warranty of habitability. (R. p. 603, lines 5-11). An adoption of this ruling as law in the State of South Carolina would completely denude the ruling in *Arvai*. More significantly, it would signal the end of any protections innocent purchasers currently have under South Carolina law against harms caused by latent defects in homes that have been placed into the stream of commerce under contracts to build custom homes.

It is not hard to imagine a scenario where Mr. Wennerstrom sells his $3,000,000 (R. p. 249, lines 9-10) home in the Cliffs (R. p. 239, lines 13-14) to some subsequent purchaser who thereafter discovers some latent defect in the Home. Under the trial court's ruling, the innocent

purchaser would be completely bereft of the protections afforded to other innocent purchasers under the ruling in *Rutledge* for warranty of habitability, simply because their custom home was built under a contract that did not say "sale" on it, even though the effect of that contract would be exactly the same- a new home was built and placed into the stream of commerce. In the words of the Kennedy Court (when discussing the economic loss rule):

> "[T]he opinion reaches a result which is repugnant to the South Carolina policy of protecting the new home buyer. The result is that a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions."

Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 341-42, 384 S.E.2d 730, 734-35 (S.C., 1988).

In order to avoid such repugnancy, both in this case and in future cases, FFIC would urge this Court to find that not only did the law of South Carolina require that the trial court charge the jury on the warranty of habitability, but that its failure to do so was prejudicial to the Appellant[6], and remand this case to the trial court for a new trial. *Fairchild v. S.C. DOT,* 398 S.C. 90, 727 S.E.2d 407 (S.C. 2012).

II. THE TRIAL COURT ERRED IN FAILING TO GRANT THE PLAINTIFF/APPELLANT'S MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF THE WARRANTY OF HABITABILITY

A. Standard of Review for Failure to Grant a Motion for Directed Verdict

In South Carolina, when determining the merits of a directed verdict, "the trial court is required to view the evidence and the inferences which reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion where either the evidence yields more than one inference or its inference is in doubt." *Harvey v. Strickland*, 350

[6] The prejudicial effect of the failure to charge will be more fully addressed in the second issue on appeal. Counsel for FFIC also pointed out to the trial court that the burden associated with the warranty of habitability claim was one which did not require finding fault on the part of the defendants. (R. p. 588, line 24- p. 589, line 1). The exclusion of the warranty claim prejudicially forced FFIC to satisfy a higher burden of fault.

S.C. 303, 308, 566 S.E.2d 529, 532 (2002). "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Quesinberry v. Rouppasong*, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998).

B. Directed Verdict Should Have Been Granted

Searcy contracted to build the Home. The total cost of the Home was over $3,000,000, and while Mark Searcy, the principal and sole owner (R. p. 237, line 24- p. 238, line 8) of Respondent Searcy Custom Homes, LLC, could not remember what Searcy was paid to build the Home, he certainly benefitted from that transaction. (R. p. 248, lines 24-25). In building the Home and getting its certificate of occupancy, Searcy was solely responsible for taking what, "wasn't even an address" (R. p. 240, lines 3-4) and making it into a home that was legal to occupy (R. p. 248, lines 10-12). Under the law as laid out in *Rutledge* and discussed above, Searcy impliedly warranted that the home was safe for use for its intended purpose- that it was habitable. *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (S. C. 1970).

Liability under the warranty of habitability does not require proof of fault, merely that the home in question be new, that it contained a latent defect when it was built and that the latent defect proximately caused the plaintiff's damages. *Id.* The undisputed evidence dictates that the Home contained a latent defect when built- it was not capable of withstanding the ambient pressure in the local water system. It is also undisputed that when the Home inevitably succumbed to the excessive water pressure in the local system, and that the fair and reasonable cost to repair the subsequent damage to the Home was $300.504.34.[7]

All of this evidence was presented to the jury before the close of FFIC's case in chief, and counsel for FFIC properly moved the trial court for a directed verdict at the close of its case. That motion was denied. It can be argued that some of the evidence presented in FFIC's case in

[7] FFIC's damages expert, Scott Klaben testified regarding other elements of damages. For the purposes of this Appeal, FFIC stipulates to the undisputed amount- $300.504.34.

chief, namely the amount of pressure in the local system at the time the Home was being constructed, was presented to the jury by a source that the jury could choose not to find credible- FFIC's paid expert, Roger Harris. However, after the testimony of the respondent's experts, Randall Blythe and Chuck Hafner, the evidence of the water pressure in the local system, and what happened as a result of it were not only undisputed, but ***admitted***, by the Respondents,[8] removing any reasonably drawn inference that the evidence wasn't as admitted. Accordingly, FFIC moved for a directed verdict at the end of all of the evidence. Despite the Respondents' categorical admissions as to the cause of the damages to the Home, as well as their admission that the costs to repair those damages was fair and reasonable, the trial court again denied FFIC's motion.

The trial court's denial of the Appellant's directed verdict was clear error. *Quesinberry v. Rouppasong,* 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998). The appropriate remedy for this given these undisputed facts, one that would provide surety and protect innocent purchasers of homes in South Carolina, would be to correct the trial court's error and direct a verdict for the Appellant in the amount that the Respondents have admitted was a fair and reasonable cost to repair the damages to the Home- $300.504.34. In the alternative, the Appellant would ask that this Court remand this matter to the trial court for the sole purpose of directing a verdict for $300.504.34 in favor of the Appellant.

CONCLUSION

The trial court had three opportunities, in the form of the Appellant's directed verdict at the end of its case in chief; its motion for directed verdict at the end of all evidence, and; finally its motion for judgment notwithstanding the verdict at the end of the trial to properly apply the law of the State of South Carolina. The trial court failed to avail itself of all three opportunities.

[8] Both Respondents were represented by the same counsel, Jason Imhoff, and Mr. Hafner and Mr. Blythe were the only experts offered by the Respondents.

It therefore falls to this Court to rectify the trial courts errors. For the reasons stated, this Court should reverse the judgment of the circuit court, direct a verdict in favor of the Appellant, or remand the case to the trial court so that it can be dispensed with in accordance with the law as this Court deems just and proper.

Respectfully submitted,

Date: 1/8/15

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CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Brief complies with Rule 211(b), SCACR.

Date: 2/5/15

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CERTIFICATE OF SERVICE OF REPLY BRIEF AND FINAL BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE COMPANY

Appellant, Fireman's Fund Insurance Company, by and through counsel, certifies that it served a true and correct copy of the foregoing Reply Brief and Final Brief of Appellant on Respondents via Electronic Mail and UPS in the manner below described, on the **6th day of January, 2015** (as follows:

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