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Torts - Strict Liability and the Home Contractor - Kriegler v. Eichler Homes, Inc., 269 Cal, App. 2d 224, 74 Cal. Rptr, 749 (1969)

Anthony Gaeta Jr.

not been determined against him and that he was entitled to a hearing. This suggests that, setting aside the problem of abuse of remedy,[21] to be entitled to a hearing, a habeas corpus applicant need only assert new facts which, if true, would entitle him to relief.[22] By clarifying the word "ground," the present case seems to have refined the guidelines established in *Sanders*.

THOMAS J. DONOVAN

Torts—STRICT LIABILITY AND THE HOME CONTRACTOR—*Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969)

In 1957 plaintiff purchased a home that had been constructed by the defendant in 1951. In 1959 the radiant heating system that had been installed during the home's construction failed, resulting in property damage. Recovery was sought from the defendant on the theory of strict liability [1]

The trial court held that regardless of negligence, defendant was liable on the theory of strict liability because the heating system was defective when installed.[2] The court of appeals affirmed and held, *inter alia*, that the doctrine of strict liability in tort would be applied for the first time in California to sales of real estate.[3]

The traditional defense to an action for damages arising after the sale of realty has been caveat emptor.[4] Although it has lost much of its force in the area of chattels[5] it has persisted in the area of realty Two reasons for this persistence have been advanced: 1) the purchaser has the opportunity to inspect the premises for defects, and if he desires further

21. In the instant case the government did not plead abuse of remedy, so the court under the doctrine of Price v. Johnston, 334 U.S. 266 (1948), could not deny a hearing on this basis. It has been suggested that in order for a court to deny a hearing on the basis of abuse of remedy such abuse must have been the result of a deliberate decision based on an improper motive. Pollak, *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 143 (1963). Hearings have been denied prisoners on the basis of abuse of remedy. *E.g.*, Wong Doo v. United States, 265 U.S. 239 (1924); Jones v. Montana, 232 F Supp. 771 (D. Mont. 1964).

22. If the facts are identical, a hearing may be denied. A recent second circuit decision reversed, on an appeal by the New York Attorney General, a District Court's granting of a hearing on a second habeas corpus application on the ground that the facts were identical and had previously been determined against the petitioner on the merits. Schnitzler v. Follette, 406 F.2d 319 (2d Cir. 1969).

1. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).
2. *Id.*
3. *Id.*
4. 4 S. WILLISTON, CONTRACTS § 926 (rev. ed. 1936).
5. *See* UNIFORM COMMERCIAL CODE §§ 2-314, 315.

protection, can bargain to have express warranties inserted in the deed;[6] 2) it is difficult in sales of realty to determine exactly what quality the seller should be held to impliedly warrant.[7] The modern trend of decisions, however, has been to find home contractors liable when they are also the vendor. The theories of liability asserted have been implied warranty,[8] negligence in the construction,[9] and tort liability where an unreasonable risk to persons existing in the realty has not been disclosed to the vendor.[10] In *Kriegler*, however, the court used none of the above theories and, while making no mention of caveat emptor,[11] held the contractor strictly liable.[12]

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6. *See* Druid Homes, Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961); Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963), *aff'd on rehearing*, 31 Ill. 2d 189, 201 N.E.2d 100 (1964); Combow v. Kansas City Ground Inv. Co., 358 Mo. 934, 218 S.W.2d 539 (1949); Bearman, *Caveat Emptor in Sales in Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

7. *See* Druid Homes, Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961); Dennison v. Harden, 29 Wash. 2d 243, 186 P.2d 908 (1947); W PROSSER, TORTS 408 (3rd ed. 1964).

8. Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803 (S.D. 1967). While the plaintiffs could not recover under the theories of negligence or fraud and deceit, the vendor-builder was held liable to the purchaser for a breach of implied warranty of reasonable workmanship and habitability. Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) The vendor-builder was held liable for damages under an implied warranty that the home was constructed in good workmanlike manner and was suitable for human habitation. *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

9. Rogers v. Scyphers, 161 S.E.2d 81 (S.C. 1968). The vendor-builder was held liable to the purchaser for personal injuries sustained as a result of defective construction caused by the builder's negligence.

10. *Id.*, RESTATEMENT (SECOND) OF TORTS § 353 (1965).

11. Although the court made no mention of caveat emptor, it relied heavily on the decision of the New Jersey Supreme Court in Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965), where the court dismissed the maxim as a defense to the action. The New Jersey court felt that an application of caveat emptor would disregard the realities of the situation. It further stated:

> Caveat emptor developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale.

Id. at —, 207 A.2d at 326.

12. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969). The doctrine has been developed in California by Justice Traynor. *See* Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (concurring opinion). The concurring opinion became the opinion of the court in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

As established in *Greenman v. Yuba Power Products, Inc.*[13] in proving strict liability, the plaintiff need only show that the manufacturer has placed a defective product on the market and that his injury was due to the defect. The court stated that:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.[14]

The court relied on *Greenman* and *Vandermark v. Ford Motor Co.*[15] in applying strict liability for the first time to sales of real estate. The court noted that the plaintiff must prove that he was injured as a result of a defect in design and manufacture of which he was not aware that made the instrumentality unsafe for its intended use, and that he was injured while using the instrumentality in a way it was intended to be used. It was further pointed out that the reasoning behind the doctrine applied to any case of injury resulting from the risk-creating conduct of a seller in any stage of the production and distribution of goods.[16]

In *Kriegler*, the doctrine of strict liability in tort received its most ad-

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13. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

14. Such liability for defective products is "strict" in the sense that it is unnecessary to prove the defendant's negligence and since the liability is in tort, the defendant cannot avail himself of the usual contract or warranty defenses which might be available in an action for breach of warranty. The purpose of imposing such strict liability was said to be to insure that the cost of injuries resulting from defective products are borne by the manufacturers who put such products on the market, rather that by the injured persons, who are powerless to protect themselves. *See* Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) in a case dealing with the manufacturing of defective carpeting in which the New Jersey Supreme Court stated:

> Under the strict liability in tort doctrine, as in the case of express or implied warranty of fitness or merchantability, proof of the manufacturer's negligence in the making or handling of the article is not required. If the article is defective, i.e., not reasonably fit for the ordinary purposes for which such articles are sold and used, and the defect arose out of the design or manufacture or while the article was in the control of the manufacturer, and it proximately causes injury or damage to the ultimate purchaser or reasonably expected consumer, liability exists.

Id. at —, 207 A.2d at 313.

See also Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), one of the nation's leading cases in the products liability field.

15. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

16. Barth v. B.F Goodrich Tire Co., 265 Cal. App. 2d 253, 71 Cal. Rptr. 306 (1968).

vanced development.[17] By holding the contractor liable, the court has, in effect, made the home purchaser an equal to the chattel purchaser in the field of vendee's protection. In so doing, the court noted that there was no meaningful distinction between the mass production and sale of automobiles and homes, and that the pertinent overriding policy considerations were the same. The court felt that the public interest dictated this result and that the ancient legal distinctions that make no sense in today's society should be discarded in the law's growth to meet the changing needs and mores of our contemporary world.[18]

ANTHONY GAETA, JR.

Constitutional Law—RIGHT OF FREE SPEECH—*Tinker v. Independent Community School District*, 89 S. Ct. 733 (1969).

Plaintiffs, minor school children, sought to enjoin local school authorities from enforcement of a regulation prohibiting the wearing on school premises of black armbands in protest of the war in Viet Nam.[1] The district court dismissed the complaint, thus upholding the action of the school authorities,[2] and a divided court of appeals affirmed.[3] The Supreme Court granted certiorari[4] to consider the question of whether or not the action of the school authority in this case was a permissible limitation of the right of free speech guaranteed to citizens of states by the first and fourteenth amendments.

The Supreme Court, following the holding of the Fifth Circuit in *Burnside v. Byars*,[5] held that for the school authority to justify the abridgment of the right to free speech,[6] school officials must be able to

17. The court cited Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) as authority for its decision. In *Schipper*, the court held that the builder-vendor was liable to the purchaser on the basis of strict liability for personal injury. In *Kriegler*, the damage was to property. *See* 51 CORNELL L. Q. 389 (1966); 41 WASH. L. REV. 166 (1966).

18. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

1. 89 S. Ct. 733 (1969). The ages of the children ranged from thirteen to sixteen; their protest was part of an organized group including both adults and children.

2. 258 F Supp. 971 (S.D. Iowa 1966).

3. 383 F.2d 988 (8th Cir. 1967).

4. 390 U.S. 942 (1968).

5. 363 F.2d 744 (5th Cir. 1966).

6. Id. at 748:

> [School officials] cannot infringe upon their students' right to free and unrestricted expression as guaranteed them under the First Amendment where the exercise of such rights in the school buildings and school rooms