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***COMMENTARY***

*Caveat Homebuilder: Waivers of the Implied Warranty of  
Workmanship and Habitability Are No Longer Allowed in Arizona per  
Zambrano v. M & RC II LLC*

BY EDWARD GAO\*

“Plaintiff, to his horror, discovered that the house he had recently contracted to purchase was widely reputed to be possessed by poltergeists...”<sup>1</sup>

Thus begins the opinion in *Stambovsky v. Ackley*, a New York case taught in first-year Contracts casebooks nationwide to elucidate the doctrine of *caveat emptor*—that, in strictest form, a seller has no duty to disclose any information concerning the subject of the transaction.<sup>2</sup> A buyer of real property is therefore presumed to be responsible for inspecting the premises to discover any material defects.

Fortunately for Jerry Stambovsky, although “in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn’t a ghost of a chance...”, the Appellate Division of the Supreme Court of New York was “moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale,” because “[a]pplying the strict rule of *caveat emptor* to a contract involving a house possessed by poltergeists conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an inspection of every home subject to a contract of sale.”<sup>3</sup>

When it comes to newly constructed homes in Arizona, however, a buyer need not even send a structural engineer or Terminix man to inspect the property, much

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<sup>1</sup> *Stambovsky v. Ackley*, 169 A.2d 254, 255-56 (N.Y. App. Div. 1991).

<sup>2</sup> *Id.* at 257.

<sup>3</sup> *Id.* at 256-57 (almost certainly pointing finger guns at the word processor while drafting this delicious series of puns).

less the Ghostbusters—in 1979, Arizona jettisoned the doctrine of *caveat emptor* in favor of an implied warranty of workmanship and habitability.<sup>4</sup> Nevertheless, the presumptions contained within the doctrine of *caveat emptor* were central to public policy issues at play in the recent Arizona Supreme Court ruling in *Zambrano v. M & RC II LLC*.<sup>5</sup>

In *Zambrano*, the homebuyer’s problem was decidedly more mundane, but perhaps no less horrifying, than possession by poltergeist: she signed a form purchase and sale agreement with a builder-vendor that waived the implied warranty, instead substituting the builder-vendor’s express warranty, which did not generally warrant the workmanship or habitability of the home.<sup>6</sup> The central issue in the case was whether such a voluntary waiver was permissible under Arizona law.<sup>7</sup> Ultimately, a divided court held that it was not, on the basis that such a waiver, which was perhaps not truly voluntary, violated the public policy undergirding the implied warranty—in particular, the policy assumption that the doctrine of *caveat emptor* ignores the average homebuyer’s inability to uncover latent defects through a reasonable inspection.<sup>8</sup>

As a general matter, the freedom to contract is a “paramount public policy”<sup>9</sup> under Arizona common law, based on the principle that the parties to the contract are better situated than a court to determine whether contract terms are beneficial.<sup>10</sup> As such, “courts will not refuse to enforce a contract merely because one party made a bad deal, even when the terms are harsh.”<sup>11</sup> However, if a contract term runs so contrary to public policy interests that it “would be injurious to the public welfare,”<sup>12</sup> a court may declare the terms unenforceable. This is the substance of the tension in the *Zambrano* case—do the public policy interests behind the implied warranty of workmanship and habitability outweigh the freedom to contract as badly as one wishes? As it turns out, they do.

The implied warranty of workmanship and habitability is a guarantee from a builder-vendor that a home was built in a workmanlike manner, and that it is habitable.<sup>13</sup> The warranty, which is limited to latent defects that are not discoverable by a reasonable pre-purchase inspection,<sup>14</sup> is imposed by Arizona law

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<sup>4</sup> *Columbia W. Corp. v. Vela*, 592 P.2d 1294, 1298 (Ariz. App. 1979).

<sup>5</sup> *Zambrano v. M & RC II LLC*, 517 P.3d 1168 (Ariz. 2022).

<sup>6</sup> *Id.* at 1172.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1179.

<sup>9</sup> *Consumers Int’l, Inc. v. Sysco Corp.*, 951 P.2d 897, 899 (Ariz. App. 1997).

<sup>10</sup> *1800 Ocotillo, LLC v. WLB Group, Inc.*, 196 P.3d 222, 224 (Ariz. 2008).

<sup>11</sup> *Zambrano*, 517 P.3d at 1173.

<sup>12</sup> Restatement (Second) of Contracts § 178 cmt b (Am. L. Inst. 1981).

<sup>13</sup> *Sirrah Enters., LLC v. Wunderlich*, 399 P.3d 89, 91 (Ariz. 2017).

<sup>14</sup> The author notes that a poltergeist would likely fall under the implied warranty.

“to protect innocent purchasers and hold builders accountable for their work”<sup>15</sup> on the presumption that “homebuyers possess vastly unequal bargaining power, expertise, and knowledge as compared with the builder-vendor.”<sup>16</sup> “The ordinary home buyer is not in a position, by skill or training, to discover defects lurking in the plumbing, the electrical wiring, [or] the structure itself, all of which is usually covered up and not open for inspection.”<sup>17</sup> Indeed, even a standard home inspection by a professional inspector would only encompass a “visual, not technically exhaustive” inspection that “will not identify concealed conditions or latent defects.”<sup>18</sup> This unequal bargaining power, coupled with large-scale developments that are struggling to keep pace with housing demand despite their scale,<sup>19</sup> leaves the average homebuyer with what the *Zambrano* court held was an illusory choice “to either purchase the home under terms directed by the builder-vendor or forego the purchase altogether.”<sup>20</sup>

On the above bases, the Arizona Supreme Court held that the implied warranty of workmanship and habitability may not be waived, even contractually.<sup>21</sup> To enforce such a waiver “would likely spell the end for the implied warranty and eliminate [its] protections.”<sup>22</sup> In so doing, the waiver would be “injurious to the public welfare” in the sense that it would destroy the implied warranty’s protection of what “is usually the most important and expensive purchase of a lifetime.”<sup>23</sup>

Considering the prevalence of implied warranty waivers in standard builder-vendor purchase and sale agreements, the *Zambrano* case will have substantial ripple effects throughout the Arizona homebuilding industry. Beyond generating a lot of new work for the lawyers who serve builder-vendors<sup>24</sup> (which, hopefully, will still be abundant by the time I graduate), the *Zambrano* ruling reopens conditions

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<sup>15</sup> *Richards v. Powercraft Homes, Inc.*, 678 P.2d 427, 430 (Ariz. 1984).

<sup>16</sup> *Zambrano*, 517 P.3d at 1176.

<sup>17</sup> *Columbia W. Corp.*, 592 P.2d at 1298.

<sup>18</sup> ARIZ. CHAPTER AM. SOC’Y HOME INSPECTORS, STANDARDS OF PROFESSIONAL PRACTICE FOR ARIZONA HOME INSPECTORS § 3.1 (2015).

<sup>19</sup> Michael Lieb, *If Cities Don’t Solve Metro Phoenix’s Housing Crisis, Everyone Will Pay*, AZCENTRAL (Feb. 20, 2022), <https://www.azcentral.com/story/opinion/op-ed/2022/02/20/phenix-has-housing-supply-crisis-ignore-cost-all/6805418001/> (quoting economist Elliot Pollack stating that “I’ve been doing this work since 1969, and this is the worse housing supply/demand imbalance I’ve ever seen.”).

<sup>20</sup> *Zambrano*, 517 P.3d at 1176.

<sup>21</sup> *Id.* at 1179.

<sup>22</sup> *Id.* at 1177.

<sup>23</sup> *Id.* (quoting *Columbia W. Corp.*, 592 P.2d at 1299).

<sup>24</sup> *Builders Unable to Limit Warranties in Supreme Court Ruling*, WOOD SMITH HENNING BERMAN: NEWSROOM (Oct. 5, 2022), <https://www.wshblaw.com/publication-builders-unable-to-limit-warranties-in-supreme-court-ruling/> (“We recommend that builders and vendors immediately update their purchase contracts to remove any language attempting to disclaim implied warranties.”)

of liability that many builder-vendors had likely written off in their long-term strategic planning. While it is unlikely that any builder-vendors in Arizona have been mixing ectoplasm in with the drywall compound, at the economies of scale at which they are operating, even the most fastidious builder-vendors must consider the possibility that latent defects they previously thought waived might... come back to haunt them.