No. 119365

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

JOHN FATTAH, Plaintiff-Appellee, v. MIREK BIM AND ALINA BIM, Defendants-Appellants.	From The Appellate Court of Illinois, First District No. 14-0171 There Heard on Appeal from the Circuit Court of Cook County, County Department, Law Division No. 11 L 6937 The Honorable Sanjay T. Tailor, Judge Presiding

AMICUS BRIEF OF ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL

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Statement of Interest

The Illinois Association of Defense Trial Counsel (IDC) is made up of Illinois attorneys who devote a substantial portion of their practice to the representation of business, corporate, insurance, professional, governmental, and other individual defendants in civil litigation. For more than 50 years it has been the mission of the IDC to ensure civil justice with integrity, civility, and professional competence.

The IDC has a substantial interest in maintaining the continuity, uniformity and predictability of Illinois law. The IDC respectfully submits that this Court should hold that a waiver of the implied warranty of habitability applies to a subsequent purchaser. Moreover, the decision in this case will directly affect the interests of IDC members who are called upon to defend developers, general contractors, and subcontractors against claims for breach of the implied warranty of habitability.

The IDC's role as a representative of the defense bar in Illinois makes it uniquely situated to address the importance of preserving a defense to liability—not only the sound judicial and public policies that call for that defense, but also the reasons why it is essential to a reasonably priced insurance and housing market.

Argument

This Court should find, consistent with its prior rulings, that the implied warranty of habitability extends to subsequent purchasers and that a waiver of that warranty executed by the original purchaser should apply to a subsequent purchaser. To hold otherwise would extend the implied warranty beyond all reasonable scope to become what this Court has held it is not: a lifetime guarantee of construction. *VanHoldt v. Barba & Barba Construction, Inc.*, 175 Ill.2d 426, 434 (1997). Such a holding would remove the predictability from the pricing of homes and of insurance for that construction which would in turn not only harm those who construct homes, but, even more, those who purchase housing by unreasonably driving up the costs of construction.

I.
The nature of the implied warranty of habitability requires that it be found that it does not extend to a subsequent purchaser where a waiver of the warranty has been executed

The implied warranty of habitability is a creature of public policy. *Peterson v. Hubschman Construction Co.*, 76 Ill.2d 31, 41 (1979). The warranty exists independent of the contract of sale and in extending the warranty to subsequent purchasers, this Court held that privity is not required for its application. *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 183 (1982). This Court has also held that

a knowing waiver of the warranty is enforceable. *Board of Managers of the Village Centre Condominium Association, Inc. v. Wilmette Partners*, 198 Ill.2d 132, 141 (2001).

From the first cases recognizing the implied warranty of habitability and the applicability to subsequent purchasers, this Court has analogized the implied warranty of habitability to the warranty of merchantability in the Universal Commercial Code. See *Peterson*, 76 Ill.2d at 42-43; *Redarowicz*, 92 Ill.2d at 184. With these principles in mind, it is clear that the circumstances in this case require reversal in favor of the Bims.

A.
Privity is not required for the warranty to be effective, therefore privity should not be required for the waiver to be effective as to subsequent purchasers

First, in view of the fact that the warranty does not require privity between the parties for the warranty to apply in favor of a subsequent purchaser, there should likewise be no requirement that a subsequent purchaser be permitted to take advantage of the warranty where it has been waived by the original purchaser. Whether a subsequent purchaser is aware of an enforceable waiver of the warranty by the original purchaser should not have any effect on whether the waiver is applicable because the elements of contract are not required for the transfer where the warranty has

not been waived. *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 183 (1982). In this case there is no dispute that the original waiver is enforceable.

B.

There is nothing in the law that permits resurrection of rights merely by transfer of property and none should be created here

Second, there is no mechanism in the law that would affect the resurrection of the properly waived implied warranty of habitability in favor of a subsequent purchaser. Property is routinely transferred after the original construction. The sale of property should not be the vehicle to allow claims previously waived to be resurrected. The Appellate Court has created a situation wherein the sale of property creates a right of action in a subsequent purchaser that was unavailable to the seller.

C.

The Uniform Commercial Code shows that the waiver should be effective as to subsequent purchasers

Third, precluding previously waived claims to a subsequent purchaser is in keeping with the analogy made by this Court between the implied warranty of habitability to the Uniform Commercial Code's implied warranty of merchantability and fitness for a particular purpose. Looking to the Uniform Commercial Code

and the prior opinions of this Court applying it to cases involving the implied warranty of habitability, the court in *Country Squire Homowners Association v. Crest Hill Development Corporation*, 150 Ill. App. 3d 30, 31-33 (3rd Dist. 1986) held that the implied warranty of habitability was waivable provided a proper waiver is executed by the original purchaser.

No Illinois court has applied these principles to a circumstance in which a subsequent purchaser of real estate is seeking to utilize an implied warranty against a manufacturer where a waiver has been executed. However, in *MAN Engines & Components v. Shows*, 434 S.W.3d 132, 133, 140 (2014), the Texas Supreme Court held that:

> A manufacturer largely controls its own fate. When a manufacturer disclaims implied warranties, such express language necessarily applies downstream to subsequent purchasers, as Buyer #2 cannot tenably boast a greater warranty than that given to Buyer #1. ...
>
> In any event, manufacturers only face the specter of implied-warranty claims if they do not exclude or modify implied warranties, which Texas law undeniably permits. MAN contends that allowing downstream purchasers to make implied warranty claims will render it impossible for manufacturers to disclaim implied warranties, since manufacturers cannot as a practical matter provide downstream purchasers with notice that implied warranties are being disclaimed under section 2.316. But this result only occurs if, under section 2.318, courts allow a buyer of used goods to sue a party "other than the immediate seller" for breach of the

> implied warranty. As we state above, a downstream purchaser cannot obtain a greater warranty than that given to the original purchaser, so if the manufacturer at the point of original sale makes a valid disclaimer of implied warranties, that disclaimer extends to subsequent purchasers. We have never held otherwise, nor do we do so today. In other words, implied warranties, as well as valid disclaimers of such, move with the used good, by operation of law, from purchaser to purchaser.

These same principles should guide this Court to reverse the Appellate Court's ruling that the waiver signed by the original purchaser was able to be used by the subsequent purchaser to bring an action against the Bims.

II.

The dilatory effects of allowing the subsequent purchaser to not take subject to the waiver

Just as a buyer of used goods has the ability to inspect the product and determine its performance from the prior owner, so too does the purchaser of used real estate have the opportunity to inspect the property and perform all forms of due diligence to satisfy himself of the soundness of his purchase. The subsequent purchaser of real estate is invariably represented by counsel and a real estate agent, both experienced in the process and inspections prior to the closing. In addition, a subsequent purchaser has the benefit of insurers and mortgage brokers, both with interests

aligned with the purchaser in determining the condition of the home before they involve themselves in the transaction. In short, a subsequent purchaser has a panoply of protections, in addition to the seller's statutory disclosure requirements, to ensure that the property he is purchasing is free of defects.

In contrast, the developer enjoys no such protection. The developer has no information about the subsequent sale of the property and no control over the inspection, due diligence process, and disclosure process. Thus the developer has no opportunity to inform the subsequent purchaser of the waiver of the implied warranty of habitability that was executed in his favor. The subsequent purchaser, with an army of professionals to aid him, needs only to ask the seller if a waiver of the implied warranty of habitability was executed and with that answer the subsequent purchaser will then have the information with which to make an informed decision on whether to proceed with the sale.

The balance of interests and costs between simply making a subsequent purchaser subject to the same waiver of the implied warranty of habitability as the original purchaser weighs heavily in favor of reversal. Allowing the Appellate Court's decision to stand will have several dilatory effects.

First, developers with a waiver in their favor will flood the Illinois recorder offices with filings of the waiver. This will force a high unnecessary cost on the county recorders. Typically, these waivers are not filed, but if the Appellate Court ruling stands, notice through the recorder's office will be the only way to put parties on notice of the waiver. This form of constructive notice would be less effective as compared with simply making subsequent purchasers subject to the waiver and allowing them to discover the waiver in the course of their due diligence process. The parties to the subsequent transaction can then determine for themselves whether the existence of the waiver affects the value of the home and the price to be paid. Allowing the implied warranty of habitability to be revived would also be inconsistent with this Court's holding in *Peterson* that waivers reflect the actual agreement of the parties to the waiver. *Peterson*, 76 Ill.2d at 43.

Second, it is typical that when the insurance policies related to the construction are purchased by those involved in the construction of residential building the existence of a waiver of the implied warranty of habitability is priced into the policy. If liability that was waived years before is now resurrected, premiums will have to be substantially raised to cover these losses. The

individuals who will suffer from this increased costs will not be insurers or their insureds (though they will both suffer in the short term), but rather the purchasers of new homes onto whom these increased costs will be passed.

Third, this change in the law would unfairly and unjustly punish defendants in currently pending cases that relied on the waiver and had no opportunity to file the waiver with the recorder in order to protect themselves from suit by a subsequent purchaser.

Fourth, when coupled with this Court's recent opinion in *Henderson Square Condominium Association v. Lab Townhomes, LLC*, 2015 IL 118139, there will essentially be unlimited liability for developers. The General Assembly imposes statutes of limitation and a statute of repose on causes of action to limit in some fashion claims made against defendants for a variety of reasons, including so cases "may be proved with the utmost certainty and before adequate proof has become stale or entirely lost." *Horn v. Chicago*, 403 Ill. 549, 560 (1949). All of these purposes will be defeated if subsequent purchasers are unbound by a waiver of the implied warranty of habitability executed by the original purchaser.

Conclusion

This Court should reverse the ruling of the Illinois Appellate Court and restore the judgment of the trial court because to do otherwise would have a myriad of deleterious, unjust, and unfair results that will do little to protect home owners and will in fact harm all Illinoisans. There is no basis in Illinois law or in the law of the analog from the Uniform Commercial Code for the implied warranty of habitability that is waived by the initial purchaser to be reanimated for the benefit of a subsequent purchaser simply by the sale of the property. For all of these reasons, the Illinois Association of Defense Trial Counsel urges reversal.

Respectfully submitted:

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POINTS AND AUTHORITIES

Supreme Court Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix and pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is ten pages.

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