2016 IL App (1st) 113508-U
Nos. 1-11-3508, 1-12-1130 & 1-12-1578 (cons.)

THIRD DIVISION
May 11, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BOARD OF MANAGERS OF THE FILM EXCHANGE LOFTS CONDOMINIUM ASSOCIATION, Plaintiff-Appellant, v. FITZGERALD ASSOCIATES ARCHITECTS, P.C., an Illinois corporation, Defendant-Appellee, WABASH DEVELOPMENT, LLC., an Illinois Limited Liability Company, *et al.* Defendants.	)	Appeal from the Circuit Court of Cook County. No. 03 L 014000 The Honorable Marcia Maras, Judge Presiding.
BOARD OF MANAGERS OF THE BUENA POINTE CONDOMINIUM ASSOCIATION, Plaintiff-Appellant, v. PIEKARZ ASSOCIATES P.C., an Illinois Professional Corporation, and MASONRY CONSTRUCTION CORPORATION, an Illinois	)	Appeal from the Circuit Court of Cook County. No. 09 L 014800 The Honorable Sanjay Tailor, Judge Presiding.

Corporation, Defendants-Appellees, BURLING BUILDERS, INC., an Illinois Corporation, *et al.*, Defendants.	)	
BOARD OF MANAGERS OF THE RESIDENCES OF RIVERWOODS CONDOMINIUM ASSOCIATION, Plaintiff-Appellant, v. HARTSHORNE PLUNKARD LTD., Defendant-Appellee, and RIVERWOODS DEVELOPMENT, LLC, *et al.* Defendants.	)	Appeal from the Circuit Court of Cook County. No. 06 CH 18503 The Honorable Stuart Palmer, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* judgment of circuit court concluding that no cause of action for breach of implied warranty of habitability could be asserted against architects in Illinois that were alleged to have submitted defective architectural designs in connection with three condominium construction projects affirmed. The class of defendants subject to breach of implied warranty of habitability claims does not extend to architects.

¶ 2 This consolidated appeal involves the disposition of three cases in which claims of breach of implied warranty of habitability were advanced against architects. In each of the three cases,

the circuit court, for various reasons, concluded that no such cause of action could be instituted against architects in Illinois. Traditionally, a cause of action for breach of implied warranty of habitability could only be properly asserted against developers or builder-vendors; however, in *Minton v. Richards Group of Chicago*, 116 Ill. App. 3d 852, 855 (1983), this court concluded that a breach of implied warranty of habitability claim could be asserted against a subcontractor responsible for latent construction defects where an innocent purchaser of defective construction is unable to obtain relief against a builder-vendor due to its insolvency. On appeal, we are asked whether our decision in *Minton* should be "extended" to permit breach of implied warranty of habitability claims to be filed against architects responsible for design defects when the developer-vendors of condominium complexes are insolvent. For the reasons contained herein, we conclude that architects are not subject to claims of breach of implied warranty of habitability and affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Although each of the three consolidated appeals requires this court to resolve the same substantive issue—whether a cause of action for breach of implied warranty of habitability may be advanced against architects—we will briefly set forth the relevant pleadings and the lower court proceedings to understand the nature and procedural posture of each case.

¶ 5 Appeal No. 1-11-3508

¶ 6 The first consolidated case involves claims of construction and design defects made in connection with the renovation and development of the Film Exchange Lofts Condominium (Film Exchange Condo or Condo), a 73-unit residential condominium complex located at 1307 South Wabash in Chicago. Following the completion of the construction project, the Board of Managers of the Film Exchange Lofts Condominium Complex (Film Exchange Board or Board),

on behalf of the individual condominium unit owners, brought suit against various parties involved in the construction project including Wabash Development, LLC (Wabash) and Chicago Metro Developers, LLC (Chicago Metro), the two developers involved in the project, American Home Building Company, (American Home), the general contractor, and several subcontractors. Included in the Film Exchange Board's initial complaint were claims for breach of contract, breach of implied warranty of habitability, and breach of implied warranty of good workmanship. The Board's initial complaint did not include any claims against Fitzgerald Associates Architects, P.C. (Fitzgerald), the architect of the project; rather, Fitzgerald was merely identified as a respondent in discovery. As discovery ensued, however, the Board filed a motion to convert Fitzgerald from a respondent in discovery to a defendant. In its motion, the Board alleged:

> "FITZGERALD was the architect that designed the conversion of the Condominium. Plaintiff's investigation and evidence indicate that FITZGERALD'S design was deficient in that FITZGERALD (1) failed to properly evaluate the condition of the masonry façade and specify necessary repairs of the steel lintels, concrete frame components and masonry repair and tuckpointing and (2) failed to proper[l]y evaluate the condition of the slabs of the parking decks and specify the necessary repair to deterioration caused by the corrosion of the embedded steel reinforcing in the floor slabs and failed to include designs for the lower level garage that would provide for positive drainage to the floor causing or contributing to the reported deficiencies. ***
>
> Due to claims of insolvency by Wabash LLC and [Chicago Metro] Developers LLC, the Board may bring a claim against FITZGERALD for breach of implied warranty of

habitability resulting from FITZGERALD'S design defects under the authority of *Minton v. Richards*."

¶ 7 The circuit court granted the Film Exchange Board's motion over Fitzgerald's objection. In a detailed written order, the court explained its rationale as follows:

"The next issue is whether *Minton* applies to architects. We find that Fitzgerald had the same relationship to the developer and homeowners as the subcontractors. Wabash and Developers hired subcontractors and architects to design and construct the complex. Although subcontractors are normally immune from liability arising out of a contract between an owner and general contractor or developer, *Minton* extended the right to recover when the developer or general contractor becomes insolvent in order to protect the innocent purchaser. Because Wabash and [Chicago Metro] are insolvent, Plaintiff should be able to recover from these secondary parties. This does not create a new cause of action, as Fitzgerald argues, because a plaintiff must still show insolvency as in *Minton*.

Further, the implied warranty of habitability includes defects in design, materials or workmanship. [Citations]. If *Minton* extends the warranty to subcontractors who use defective materials or deficient workmanship, it must also apply to architects who deficiently design.

The parties disagree over whether Fitzgerald's designs were defective, but [the Board] must only show probable cause to convert a respondent in discovery to a defendant. We find that Plaintiff must be given a chance to seek a remedy against Fitzgerald."

¶ 8 Accordingly, the Film Exchange Board's ninth amended complaint, the complaint that gave rise to the instant appeal, included a breach of implied warranty of habitability claim against Fitzgerald. Specifically, the complaint alleged:

> "FITZGERALD inadequately designed the conversion of the Condominium in at least the following respects:
>
> (A) Failed to properly evaluate the condition of the masonry façade and specify necessary repairs to the steel lintels, concrete frame components and masonry repair and tuckpointing;
>
> (B) Failed to properly evaluate the condition of the slabs of the parking decks and specify the necessary repair to deterioration caused by the corrosion of embedded steel reinforcing in the floor slabs; and
>
> (C) Failed to include design for the lower level garage that would provide for positive drainage to the floor, causing or contributing to ponding and surface deterioration of the lower level garage floor slab."

¶ 9 The Film Exchange Board further alleged that a claim for breach of implied warranty of habitability could be asserted against Fitzgerald because no relief for the latent defects could be obtained against the developers, Wabash and Chicago Metro, or the general contractor, American Home, given that those entities were de facto dissolved and/or insolvent.

¶ 10 Fitzgerald, in turn, filed a motion for summary judgment arguing, in pertinent part, that "Illinois law does not permit a cause of action based on the implied warranty of habitability against a design professional." Specifically, Fitzgerald argued that every case in which the implied warranty has been properly raised involved a defendant who was responsible for some

kind of "actual construction." Given that there was no dispute that Fitzgerald did not perform any construction tasks, it argued that judgment in its favor was warranted.

¶ 11 In response, the Film Exchange Board asserted that cases applying the implied warranty of habitability have emphasized that the party responsible for the defect is the party who should bear the burden of repairing the defect where the home buyer has no recourse against the developer-seller. Accordingly, the Board argued that if the implied warranty were not extended to architects, that "ruling would leave a buyer with no recourse for design defects when there is no recourse to the developer."

¶ 12 The court[1] presided over a hearing on the motion, and in open court, granted Fitzgerald's motion for summary judgment. In doing so, the court reasoned that it was "clear that *Minton* does not apply to architects" and that the policy reasons that warranted *Minton*'s extension of the implied warranty of habitability in *Minton* to subcontractors did not apply equally to architects.

¶ 13 The Film Exchange Board seeks review of the circuit court's order.

¶ 14 Appeal No. 1-12-1130

¶ 15 The second consolidated case involves claims of construction defects in connection with a residential condominium complex located at 4344-4360 North Broadway in Chicago, known as Buena Pointe Condominiums. The 4344-4360 North Broadway Partnership (the North Broadway Partnership or Partnership) was formed to develop, construct, and sell individual units in the Buena Pointe Condominium complex. At the time of the Partnership's formation, it was comprised of two general partners: NE Development, Inc. (NED), and Mark Zahorik. NED subsequently entered into a written contract with Piekarz Associates, P.C., (Piekarz) to provide architectural services in connection with the project and Piekarz retained Stearn-Joglekar, Ltd., a

[1] We note that a the circuit court judge who granted Fitzgerald's motion for summary judgment was different than the one who granted the Board's motion to convert Fitzgerald from a respondent in discovery to a defendant.

structural engineering firm, to act as a consultant on the project. The Partnership, in turn, contracted with Burling Builders, Inc., (Burling) to serve as the general contractor on the project. After being named the general contractor of the project, Burling retained a number of subcontractors, including Masonry Construction Corporation (Masonry), and worked commenced on the Buena Pointe condominium project.

¶ 16 The Board of Managers of the Buena Pointe Condominium Association (the Buena Pointe Board or the Board) subsequently brought suit against the general contractor of the project (Burling), the architect of the project (Piekarz), and the subcontractor that provided masonry work on the project (Masonry). The Board's amended complaint advanced claims of breach of implied warranty of good workmanship against Burling and breach of the implied warranty of habitability against Burling, Piekarz and Masonry. In support of its breach of implied warranty of habitability claim against Piekarz, the Buena Pointe Board alleged that North Broadway Partnership, the developer-seller, and its general partners were insolvent and that no recourse could be obtained from those entities. With respect to the substantive basis for its claim, the Board alleged that Piekarz breached the implied warranty of habitability because

> "PIEKARZ designed and/or caused the Condominium to be designed with the following defects:
>
> (a) [The plans] called for the shelf angles at all corners of the building to be installed at different heights on both sides of the corners, contributing to masonry cracking;
>
> (b) The design did not provide for sufficient floor slab stiffness to control slab deflection or, alternatively, provide adequate control mechanisms within the masonry walls to prevent brick cracking; and

(c) Reviewed and approved [the structural engineers's] drawings that contained design defects."

¶ 17 Piekarz, in turn, filed a motion to dismiss the Buena Pointe Board's amended complaint. Specifically, Piekarz invoked section 2-619.1 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2010)), and argued that dismissal was proper because a cause of action for breach of implied warranty of habitability "does not reach architects." Specifically Piekarz argued: "Illinois courts have held [ ] parties that perform the actual construction work, as well as the sellers of the property, liable under a theory of implied warranty of habitability. However, there is just simply no authority for the proposition that the implied warranty of habitability extends to an architect like [Piekarz] ***. Because the implied warranty of habitability does not reach architects, [Piekarz] cannot be held liable for breaching it."

¶ 18 In response to Piekarz's motion to dismiss, the Buena Pointe Board argued, in pertinent part, that the policy behind the creation and application of the warranty supported extending a cause of action for breach of implied warranty of habitability to architects. Specifically, the Buena Pointe Board observed that the recognized "purpose of the implied warranty [of habitability] is to protect innocent purchasers" and argued that if the warranty was not applicable to architects, "an innocent homeowner who has no recourse to the developer would be required to suffer a loss caused by design defects, which would effectively narrow the scope of the implied warranty of habitability only to defects resulting from poor workmanship." The Buena Pointe Board further argued that the applicability of the implied warranty of habitability should not be dependent on whether the defect at issue is caused by poor workmanship versus poor design. In doing so, the Board noted that the implied warranty of habitability is designed to protect a homeowner's expectation that the home, when completed, would be reasonably suited

for its intended use and that a homeowner's "expectation is defeated by the existence of any defects, whether they are design or construction defects."

¶ 19 The circuit court, after presiding over hearings on the motion, filed a written order granting Piekarz's motion to dismiss. In doing so, the court did not determine the ultimate issue as to whether the implied warranty of habitability could be invoked against architects; rather, the court held that the Buena Pointe Board could not seek recourse from Piekarz for breach of an implied warranty of habitability because Burling, the general contractor, was solvent. The court explained: "the [Buena Pointe] Board's recovery for breach of implied warranty of habitability should come from Burling, because the warranty does not apply where the defendants, like Masonry and Piekarz, are merely subcontracted by the builder."

¶ 20 The Buena Pointe Board responded by filing a motion to reconsider. In doing so, the Board noted that Burling's solvency did not preclude it from asserting a breach of implied warranty claim against Piekarz because, Piekarz had not, as the trial court erroneously stated, been subcontracted by the general contractor; rather, Piekarz's contract had been with one of the general partners of the Partnership and the Board had pled that the Partnership and its general partners were, in fact, insolvent.

¶ 21 In another written order, the circuit court admitted that it misstated that Piekarz had contracted with Burling, but nonetheless denied the Buena Pointe Board's motion to reconsider, concluding that "there is no authority to support the proposition that the warranty extends to architects." Relying on its interpretation of published case law, the court concluded that the implied warranty of habitability recognized in *Minton* "applies to subcontractors who participate in the actual construction of the property, but not architects who do no physical work at the project site. *** Here, Piekarz was not tasked with 'building a home of sound structure' as

contemplated by *Minton*, but rather provided designs for the home." Instead, the court found that "an architect's liability is only limited to damages for breach of contract related to defeated expectations."

¶ 22 Thereafter, Piekarz filed a motion requesting the circuit court to make a Rule 304(a) finding, which the circuit court granted. The Buena Pointe Board's appeal followed.

¶ 23 Appeal No. 1-12-1578

¶ 24 The final consolidated appeal involves claims of construction and design defects that occurred on the premises of the Riverwoods Condominium, an eight-story residential condominium building located in Melrose Park, Illinois. Riverwoods Development, LLC, and Riverwoods Condo, LLC, were the developers of the project, the construction of which began in 2004. Renzi Construction and Development, Inc., (Renzi) was the general contractor of the construction project and Hartshorne Plunkard, Ltd. (Hartshorne) entered into a contract to provide architectural services on the construction project.

¶ 25 Following the completion of construction and sale of the individual condo units, the Board of Managers of the Residences of Riverwoods Condominium Association (Riverwoods Board or Board) filed a complaint and several amendments thereto against multiple parties involved in the development, construction and sale of the condominium for purported errors in the design and construction of the property. Specifically, the Riverwoods Board advanced claims of breach of contract, breach of implied warranty of habitability, and breach of implied warranty of good workmanship against the developers, Riverwoods Development and Riverwoods Condo. The Board's fourth amended complaint also included claims for breach of implied warranty of habitability against Renzi, Hartshorne, and six individual subcontractors.

With respect to Hartshorne, the Riverwoods Board alleged that Hartshorne "designed the Condominium with the following defects ***:

"(a) Failed to provide proper details and specifications for a perimeter railing along the exit path from the public sundeck to Stair 9;

(b) Lack of proper details and specifications for the railing around the perimeter of the roof decks;

(c) Failed to design and specify a second exit path from the private patio on the roof;

(d) Failed to design and specify a second exit path from the public deck with the hot tub;

(e) Failed to design and specify a vapor retarder either in the roofing assembly or in the ceiling assemblies;

(f) Failed to design and specify a traffic bearing membrane over the precise balcony slabs;

(g) Failed to properly design and specify the joints between the balcony slabs and the adjacent masonry services;

(h) On information and belief, approved the construction of the second floor garage ramp using a composite steel and concrete slab, rather than the case-in-place slab with concrete beams as originally designed, and further:

(i) Failed to design and specify a protective coating on the top surface of the ramp;

(ii) Failed to design and specify a minimum G90 galvanizing for the steel deck of the ramp; and

(iii) Failed to design and specify the protection of the bottom exposed surface of the deck with a durable paint;

(i) Designed the second floor garage deck to be constructed of a composite steel and

concrete slab, which is improper for a parking garage slab, and further:

(i) Failed to design and specify placement of negative bending moment reinforcing over supports;

(ii) Failed to design and specify a protective coating on the top surface of the slab;

(iii) Failed to design and specify a minimum G90 galvanizing for the steel deck; and

(iv) Failed to design and specify the protection of the bottom exposed surface of the deck with a durable paint.

(j) Failed to design and specify proper flashing of the windows;

(k) Failed to design and specify proper details for through-wall flashing;

(l) Failed to properly design and specify a proper coating and anchors for the balcony railings;

(m) Failed to design and specify end dams at window lintels and sills;

(n) Failed to design and specify window perimeter flashing; and

(o) Failed to design and specify expansion joints in the exterior masonry."

¶ 26 The Board's complaint further alleged that the developers, Riverwoods Development and Riverwoods Condo, and the general contractor, Renzi, were no longer in business and were "de facto dissolved and otherwise insolvent," and thus the Board had no recourse against those entities for the damages that resulted from latent design defects.

¶ 27 Thereafter, Hartshorne filed a motion to dismiss plaintiff's complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)). As a threshold matter, Hartshorne argued that plaintiff's cause of action was barred by the express terms of the Owner-Architect Agreement, which explicitly stated that Hartshorne's services were provided for the exclusive benefit of the owner, Riverwoods Condominium, LLC, and that no other entity was

entitled to base any cause of action on that Agreement. Hartshorne also emphasized that neither the Board nor any of the individual unit owners had privity of contract with Hartshorne. Finally, Hartshorne argued that even if the Riverwoods Board's complaint was not barred by the express terms of the Owner-Architect Agreement, dismissal of its breach of implied warranty of habitability claim was warranted because the appellate "court's decision in *Minton* has been limited to the specific facts of that case and has not been applied to extend the implied warranty of habitability to an architect in any reported case." Hartshorne also challenged the applicability of *Minton* because, notwithstanding plaintiff's allegation that the owner, developer, and general contractor were all insolvent and de facto out of business, each of the corporations were considered to be in "good standing" with the Illinois Secretary of State.

¶ 28 The circuit court, after presiding over a hearing on the motion, granted Hartshorne's motion to dismiss. In doing so, the court reasoned in open court as follows:

> "The architect, here is the way I look at the architect and the case law, and one might call my outlook on this somewhat conservative. I think the state of the law is that for the implied warranty of habitability to apply there has to be privity of contract. That is the state of the law. Certain exceptions have been carved out in the instance of insolvency for subcontractors. There is not a case that says that an architect or design professional falls within that exception. There is a strong argument that the policy behind *Minton* should not apply. I guess the argument is because the architect does not get his hands dirty and is not there to do that. So my feeling about the state of the law is such that the architect is not subject to this claim at this point. I could take the position that, well, I guess other judges have that I will extend it that way. I don't look at it that way. I don't think the state of the law is such that you have to have privity and then you have some

narrow exceptions to that that the architect should be forced to undergo further litigation with regard to this absent an appellate court ruling. That's the way I look at it. *** With regard to *Minton* and the architect, I'm not willing to go so far to apply *Minton* to the architect. *** I will dismiss with regard to the architect."

¶ 29 The Riverwoods Board's appeal followed.

¶ 30 ANALYSIS

¶ 31 On appeal, the three condominium boards argue that the decisions of the circuit court refusing to extend *Minton* to architects frustrates the public policy behind the implied warranty of habitability, which is to protect homeowners against loss for design and construction defects in their new homes. They contend that "[n]othing differentiates contractors from architects to justify immunizing architects from the application of *Minton*" and that "homeowners who suffer a loss because of design defects are no less deserving of recovery than homeowners who suffer a loss because of workmanship defects."

¶ 32 The architects, in turn, contend that the circuit court's rulings were entered in accordance with Illinois law because no implied warranty of habitability has ever been applied against architects; rather it has been consistently and uniformly limited to parties involved in the actual physical construction of residential buildings or in the sale of residential construction. Because none of the architects participated in the actual construction process, they argue that the implied warranty of habitability does not and cannot apply.[2]

[2] We note that this court granted leave to the American Institute of Architects—Illinois Counsel, the American Council of Engineering Companies of Illinois, the Illinois Society of Professional Engineers, the Illinois Professional Land Surveyors Association, and the Structural Engineers Association of Illinois to file an *amicus curiae* brief in support in support of the architects involved in this consolidated appeal in accordance with Illinois Supreme Court Rule 345. Ill. S. Ct. R. 345 (eff. September 20, 2012). The arguments contained in the *amicus curiae* brief are substantially the same as those advanced by the individual architects involved in this appeal.

¶ 33 A trial court's ruling on a motion for summary judgment is subject to *de novo* review. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009). The trial court's ruling on a motion to dismiss is also subject to *de novo* review. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 34 The implied warranty of habitability is a "judicial innovation" and "creature of public policy" (*Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 183 (1982)) that has been designed and "narrowly tailored" to provide recourse to residential dwellers when latent defects interfere with the habitability of their residences (*Board of Directors of Bloomfield Club Recreation Association v. Hoffman Group, Inc.*, 186 Ill. 2d 419 (1999)). This warranty represented a departure from accepted principles of real estate law and contract law, including *caveat emptor* and merger. *Peterson v. Hubschman Construction Co.*, 76 Ill. 2d 31, 38 (1979). Pursuant to the doctrine of *caveat emptor*, or "buyer beware," a vendee took the property at his risk, and if he failed to discover defects prior to taking control of the property, the vendee was precluded from instituting a cause of action against the vendor. *Id.* The principle of merger, in turn, applied in a similar manner. Pursuant to that doctrine, all agreements between the vendor and the vendee were held to have been merged into the deed to the property and unless any of the vendee's reservations were contained in the documents, the merger doctrine precluded the vendee from obtaining any recourse from the vendee for any latent defects discovered after the receipt of the deed. *Id.* Although the warranty has its roots in contract law, it exists independently from the contract itself. *Redarowicz*, 92 Ill. 2d at 183. The implied warranty of habitability was initially applied in the context of landlord-tenant law (*Jack Spring, Inc. v. Little*, 50 Ill. 2d 351 (1972)) to provide some degree of parity in landlord-tenant relationships where tenants traditionally had substantially less bargaining power and lacked the capacity to inspect and maintain the rented

property. *Board of Directors of Bloomfield Club Recreation Ass'n v. The Hoffman Group, Inc.*, 186 Ill. 2d 419, 424 (1999); *Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 745 (2008). Throughout the years, the scope of the warranty has been broadened to apply to other contexts.

¶ 35 For example, in *Peterson v. Hubschman Construction Co.*, 76 Ill. 2d 31, 38 (1979), our supreme court extended the reach of the warranty to the sale of newly constructed homes by builder-vendors. In that case, home buyers discovered defects in their home during the construction phase, and when the builder-vendor "failed to satisfactorily carry out th[e] agreement" to correct all of the defective conditions, the purchasers refused to close on their home and sued to get reimbursed for their earnest money as well as for the value of the labor and materials they contributed to the project. In reasoning that the implied warranty of habitability should apply in this context, the court explained:

> "Because of the vast change that has taken place in the method of constructing and marketing new houses, we feel that it is appropriate to hold that in the sale of a new house by a builder-vendor, there is an implied warranty of habitability which will support an action against the builder-vendor by the vendee for latent defects and which will avoid the unjust results of caveat emptor and the doctrine of merger. Many new houses are, in a sense, now mass produced. The vendee buys in many instances from a model home or from predrawn plans. The nature of the construction methods is such that a vendee has little or no opportunity to inspect. The vendee is making a major investment, in many instances the largest single investment of his life. He is usually not knowledgeable in construction practices and, to a substantial degree, must rely upon the integrity and skill of the builder-vendor, who is in the business of building and selling houses. The vendee

has a right to expect to receive that for which he has bargained and that which the builder-vendor has agreed to construct and convey to him, that is, a house that is reasonably fit for use as a residence." *Peterson*, 76 Ill. 2d at 39-40.

¶ 36 Following *Peterson*, courts have expanded the reach of the implied warranty to other entities. In *Tassan v. United Development Co.*, 88 Ill. App. 3d 581 (1980), this court extended the implied warranty of habitability to a developer-seller of a condominium complex that was not involved in the actual construction of the building. In doing so, we reasoned:

"As the supreme court noted in *Peterson*, the fundamental reason for requiring an implied warranty of habitability to attach to the sale of new homes by a builder-seller is 'because of the unusual dependent relationship of the vendee to the vendor.' (71 Ill. 2d at 41). Purchasers from a builder-seller depend on his ability to construct and sell a home of sound structure. Purchasers from a developer-seller depend on his ability to hire a contractor capable of building a home of sound structure. The buyers here had no control over United's [the developer-seller] choice of a builder. United stood in the best position to know which contractor could perform the work adequately. The dependent relationship here between the buyers and United is the same as if United was a builder-seller. Necessarily, we hold that United could be deemed to have made an implied warranty of habitability in this case." *Tassan*, 88 Ill. App. 3d at 587.

¶ 37 Thereafter, in *Minton*, this court determined the implied warranty of habitability should be extended to the subcontractors of a builder-vendor where the builder-vendor has been dissolved as an entity and is insolvent. We explained our rationale as follows:

"Purchasers from a builder-vendor depend on his ability to construct and sell a home of sound structure and his ability to hire sub-contractors capable of building a home of

> sound structure. The plaintiffs here had no control over the choice of RGC [the builder] to paint the eves and windows of their home, and RGC was in the better position to know which subcontractor could perform the work adequately.
>
> In this case we agree with the reasoning in *Redarowicz* that the purpose of the implied warranty is to protect innocent purchasers. For that reason, we hold that in this case where the innocent purchaser has no recourse to the builder-vendor and has sustained loss due to the faulty and latent defect in their home cause by the subcontractor, the warranty of habitability applies to such contractor." *Minton*, 116 Ill. App. 3d at 854-55.

¶ 38 Although the scope of the implied warranty of habitability has increasingly expanded, post-*Minton* courts have thus far have declined to extend the warranty of habitability to design professionals or architects, parties not involved in the actual construction process.[3] In *Paukovitz v. Imperial Homes, Inc.*, 271 Ill. App. 3d 1037 (1995), a homebuyer brought a cause of action for breach of implied warranty of habitability against the home designer that had drawn up plans for the home and then sold those plans and some of the home's shell materials to the home builder. The Third District concluded that the circuit court properly dismissed the plaintiff buyer's claim against the designer. In doing so, the court reasoned:

> "Illinois courts recognize an implied warranty of habitability arising out of contracts for sale of homes between builder-venders and buyers. [Citation.] In order to prevail,

[3] We note that in support of their argument that the implied warranty of habitability applies to architects, the condominium boards cite to several cases that contain language referring to "improper design" as a basis for a breach of implied warranty of habitability claims. None of the cases cited by the condo boards, however, ever applied the warranty to architects or other professionals solely involved in the design of a residence. See, *e.g.*, *Eickmeyer v. Blietz Organization, Inc.*, 284 Ill. App. 3d 134 (1996); *Grove v. Huffman*, 262 Ill. App. 3d 531, 538 (1994); *Naiditch v. Shaf Home Builders, Inc.*, 160 Ill. App. 3d 245, 264 (1987); *Fischer v. G&S Builders*, 147 Ill. App. 3d 168, 175 (1986).

> the plaintiff must prove that the defendant was the builder-vender of the home. [Citation].
>
> It is undisputed that Imperial [the designer] did no construction on [plaintiff home-buyer's] home. It only supplied the shell materials and the plans which Vignali [the builder] then used to construct the residence. The parties do not cite, and we are unable to find, any reported cases in which a court held that the supplier of plans and shell materials was a builder-vendor for the purposes of the implied warranty of habitability. Moreover, in every case cited by [the plaintiff] to support his contention that Imperial was the builder-vendor, the defendant had conducted some kind of construction work on the home in question. Inasmuch as Imperial did not contribute to the actual construction of [plaintiff's] home, we find that it was not a builder-vendor which could be liable for the breach of the implied warranty of habitability." *Paukovitz*, 271 Ill. App. 3d at 1038-39.

¶ 39 Most recently, the fourth division of this court in *Board of Managers of Park Point at Wheeling Condominium Association v. Park Point at Wheeling, LLC.*, 2015 IL App (1st) 123452, addressed this very issue and concluded that the implied warranty of habitability did not extend to architects. In that case, a condominium board filed suit against multiple parties involved in the design, construction, and sale of a condominium complex, including the project's developer-seller, the original general contractor and its successor, several subcontractors, and the project's architect. The basis for the condominium board's breach of implied warranty of habitability claim against the architect was that the architect's designs for the common elements and limited condo elements in the building were defective, which in turn, led to water and air infiltration problems, the repairs of which amounted to $4 million dollars. In its complaint, the board

alleged that it had no recourse against the developer, the original general contractor, or the successor general contractor due to insolvency. The trial court dismissed the breach of implied warranty of habitability claim against the architect, and the fourth division of this court upheld the dismissal.

¶ 40 In making its decision, the fourth division initially noted that "generally speaking, only builders or builder-sellers warrant the habitability of their construction work. Engineers and design professionals such as the Hirsch architectural firm provide a service and do not warrant the accuracy of their plans and specifications. *** ' Absent an express contractual provision to the contrary, an architect does not guarantee the owner a perfect plan or a satisfactory result. The architect is not liable for mere errors of judgment, and liability attaches only when the architect's conduct falls below the standard of skill and care exercised by others engaged in the same profession, and in the same locality.' " *Id.* ¶ 15, quoting Sam A. Mackie, *Architect's Negligence*, 33 Am. Jur. Proof of Facts 3d 57, § 5 (1995). The court then conducted a review of Illinois case law recognizing and applying the implied warranty of habitability as well as a review of relevant decisions from other jurisdictions. The court concluded that "two principles become clear from the case law. First, the implied warranty of habitability of construction is traditionally applied to those who engage in construction. Second, architects do not construct structures, they perform design services pursuant to contracts which set out their obligations and courts have consistently declined to heighten their express contractual obligations by imposing a warranty of habitability of construction." *Id.* ¶ 22. In upholding the circuit court's dismissal, the fourth division expressly declined to extend the First District's prior holding in *Minton*, explaining:

> "In our opinion, however, *Minton* is properly limited to subcontractors such as the painting firm in *Minton* that have helped with the physical construction or the construction-sale of the property. The court emphasized that the implied warranty of habitability of construction arises between the builder-seller and the buyer because of their 'unusual dependent relationship.' *Minton*, 116 Ill. App. 3d at 854. Property buyers such as the plaintiffs in *Minton* 'depend upon [the builder-seller's] ability to construct and sell a home of sound structure and his ability to hire subcontractors capable of building a home of sound structure.' *Minton*, 116 Ill. App. 3d at 854. The role that the Hirsch architectural firm had in erecting the subject condominiums did not create a dependent relationship with the buyers like the one that existed in *Minton*. The fact that the builders of the subject condominium complex are now alleged to be insolvent does not justify expanding *Minton*'s holding to an entirely different category of defendant. There is no allegation that this architect took part in the construction or the construction-sale of real property and therefore, we find that this architect should not be subject to the implied warranty of habitability of construction." *Id.* ¶ 26.

¶ 41 After conducting our own review of this issue, we agree with the decision reached by our colleagues in the Fourth Division and with the arguments advanced by the architects in this case and conclude that architects are not subject to breach of implied warranty of habitability claims. In doing so, we affirm the circuit court's order granting Fitzgerald's motion for summary judgment on the Film Exchange Board's breach of implied warranty of habitability claim. We likewise affirm the circuit court's order granting Piekarz's motion to dismiss the Buena Pointe Board's breach of implied warranty of habitability claim. Finally, we affirm the judgment of the

circuit court dismissing the Riverwoods Board's breach of implied warranty of habitability claim against Hartshorne.

¶ 42 The judgment of the circuit court is affirmed.

¶ 43 Affirmed.