# COMMENT

## Home Sales: A Crack in the *Caveat Emptor* Shield

A hundred years ago a home buyer's own inspection was a reliable gauge of whether a house he was buying was structurally sound and habitable. In those days a seller's cry of *caveat emptor* was understandably honored. But times have changed. The facility with which a seller can conceal the seemingly endless number of potentially troublesome conditions which can develop in today's modern home is disturbing.[1] This comment will spotlight the national trend away from the *caveat emptor* doctrine in the wake of a rising tide of claims based on passive concealment and implied warranty and will show how the Georgia courts have reacted.

### I. PASSIVE CONCEALMENT

Historically, the general rule has been that a cause of action for the mere failure, or a passive failure, to disclose facts of which the defendant has knowledge will not lie.[2] The rule is justifiable when applied to situations in which the undisclosed fact should be obvious to both parties or in which the seller has no reason to think that the buyer is acting under any misapprehension.[3] There have been, however, some "singularly unappetizing" cases in which owners have been permitted to unload upon innocent buyers dwellings known by the owners to be infested with termites.[4] Although there are other exceptions[5] to the general rule, the focus in this part of this comment will be on the "passive concealment" exception, which places upon the seller a duty of disclosure in cases in which he has special know-

1. "Building construction by modern methods is complex and intertwined with governmental codes and regulations. The ordinary home buyer is not in a position, by skill or training, to discover defects lurking in the plumbing, the electrical wiring, the structure itself, all of which is usually covered up and not open for inspection." Tavares v. Horstman, 542 P.2d 1275, 1279 (Wyo. 1975).

2. W. PROSSER, LAW OF TORTS, §106, at 695-96 (4th ed. 1971), *citing, inter alia,* Lord Cairns in Peek v. Gurney, L.R. 6 H.L. 377 (1873).

3. *Id.* at 696.

4. *Id.* at 696, *citing* Hendrick v. Lynn, 37 Del. Ch. 402, 144 A.2d 147 (1958); Fegeas v. Sherrill, 218 Md. 472, 147 A.2d 223 (1958); Swinton v. Whitinsville Sav. Bank, 311 Mass. 677, 42 N.E.2d 808 (1942).

5. Other exceptions noted by Professor Prosser are situations in which the seller has communicated a misleading statement or a half truth which amounts to a lie and situations in which there exists a confidential or fiduciary relation between owner and buyer. W. PROSSER, LAW OF TORTS, §106, 696-97 (4th ed. 1971).

ledge, not apparent to the buyer, and is aware that the buyer is acting under a misapprehension as to facts which would be of importance to him and would probably affect his decision.[6]

Passive concealment has probably been most actionable in cases involving latent dangerous physical conditions of land,[7] but the doctrine has now generally been extended to the concealment of any facts or conditions basic to a sale, even though the concealment causes only pecuniary loss.[8] Factual distinctions between passive concealment and active concealment cases are sometimes subtle, and in states which refuse to recognize passive concealment as a legitimate theory of recovery, such distinctions can be crucial. The rationale for the distinction has been said to be that active concealment is "morally more reprehensible"[9] and seems to amount to misrepresentation by conduct. How much concealment activity of a vendor is necessary to translate his conduct from the passive to the active category? If a vendor simply stands in front of a superficial crack in the foundation of his house as he is negotiating with a prospective purchaser, is the vendor's conduct in obstructing the purchaser's view active or passive? Since the cases are not clear on this point, there appears to be some room for argument on either side of the issue.

An illustrative case is *Gayne v. Smith.*[10] There, the vendor, knowing that by special charter provision the Bridgeport Hydraulic Company had a right to condemn the land region in which the farm sold to the purchaser was located, remained silent prior to the vendee's purchase. He was silent, that is, to the purchaser. As to others, including the town clerk, he was not so silent; he asked them not to mention the facts to the purchaser. The court held that the vendor was not liable for his concealment. It appears that the facts could have been interpreted either way in this case. The vendor's conduct was passive as to the purchaser in that he remained silent in the vendee's presence, but it was also active to a certain extent in that he took positive steps to prevent others from telling the purchaser the truth. The court's decision would indicate that it considered the vendor's conduct to have been passive in nature. The decision, however, could have been affected by the fact that the charter provision had been made a matter of public record and could have been ascertained by the purchaser without reliance on the vendor.

Unlike *Gayne* most cases contain facts which are fairly easy to distin-

6. *Id.* at 697. In Wilhite v. Mays, 140 Ga. App. 816, 232 S.E.2d 141 (1976), the Georgia Court of Appeals decided to create a new theory of recovery for Georgia home buyers based primarily on this exception. *See* note 17, *infra,* and accompanying text.

7. *Id., citing, inter alia,* Southern v. Floyd, 89 Ga. App. 602, 80 S.E.2d 490 (1954).

8. *Id.* at 698.

9. Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation,* 8 W. RES. L. REV. 10 (1956); Note, *Fraud-Fraudulent Concealment In Sale of Realty-Termites,* 22 BOS. U.L. REV. 607 (1942).

10. 104 Conn. 650, 134 A. 62 (1926).

guish as between active and passive concealment. In *Jenkins v. McCormick*,[11] the plaintiff sued to recover damages for the defendant contractor's fraudulent concealment of a defective tile floor in the new house sold to the plaintiff. After pouring the concrete for the basement floor, the contractor allowed the concrete to dry before the surface was properly troweled. Realizing that the concrete would crack within a short period of time, the defendant nevertheless laid asphalt tile over the defective floor. The floor did indeed crack, and the plaintiff sought to recover $1,145.61 for the damages incurred. The Supreme Court of Kansas held that the petition was sufficient to state a cause of action for fraudulent concealment.

Of course, the argument against allowing recovery for passive concealment is *caveat emptor*, which, translated into a definitive rule means, *inter alia*, that a seller is under no duty to disclose material facts about the subject matter of a sale, unless an exception exists.[12] It has been said in modern times, however, that the rule may be more accurately stated "*caveat venditor*, or let the seller beware."[13] A favorite reference of judge and scholar alike is Cardozo, *The Nature of the Judicial Process*, from which is quoted a passage designed to salve the wounds of those who are wont to cling to stare decisis in hopes of perpetuating the doctrine of *caveat emptor*: " 'If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.' "[14]

## II. PASSIVE CONCEALMENT—GEORGIA

The fountainhead of the *caveat emptor* rule in Georgia, as that doctrine is used in cases involving passive concealment, was the case of *Collier v. Harkness*.[15] There, a vendee brought suit against the vendor of land on which a grist and saw mill were situated. The bill alleged that the vendor has misrepresented the amount of profits which the mill had produced, thus inducing the vendee to sign the sales agreement. Unsympathetically, the Georgia Supreme Court said:

> In the sale of property, especially of real estate, which may be seen of

11. 184 Kan. 842, 339 P.2d 8 (1959).

12. Keeton, *Rights of Disappointed Purchasers*, 32 TEXAS L. REV. 1 (1953). *See* note 5, *supra*, for exceptions in addition to passive concealment.

13. *Id.* at 2. *See also* Young and Harper, *Quaere: Caveat Emptor or Caveat Venditor*, 24 ARK. L. REV. 245 (1970).

14. Tavares v. Horstman, 542 P.2d 1275, 1278 (Wyo. 1975), *quoting* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 152 (1921). *See also* Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Peel, *The Expanding Scope of Liability in the Home Construction Enterprise*, 5 LAND & WATER L. REV. 637 (1970); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

15. 26 Ga. 362 (1858).

> all men, the law imposes a duty upon the vendee as well as the vendor. And it refuses assistance to those who have it abundantly in their hands to take care of themselves. Every one who is, *sui juris*, capable of contracting and being contracted with, is his own guardian. And *caveat emptor* is the well settled doctrine of the old common law.[16]

Thus implanted, the doctrine of *caveat emptor* dominated the claim of passive concealment until the 1977 decision of *Wilhite v. Mays*,[17] in which the court held that fraud in the form of passive concealment is a legitimate exception to the rule of *caveat emptor*.[18]

Passive concealment in Georgia has been a little-utilized theory of recovery. While there are several decisions setting out a cause of action in cases where the owner affirmatively misrepresents the condition of his property,[19] until 1976, there were only two Georgia cases which concerned the issue of *caveat emptor* versus passive concealment.[20] In *Beasley v. Burton*,[21] the defendant vendee alleged that the vendor had concealed the existence of an encumbrance on real estate sold. The court held that in the absence of any specific representation by the vendor, the purchaser could not allege fraud on the part of the vendor, although the vendee had no knowledge of the encumbrance at time of sale.[22]

In *Davis v. Pittman*,[23] Pittman filed suit against Davis, who had sold Pittman's predecessor in title certain realty under which Davis knew a sewer had been constructed. When a house was erected on the lot the consequent pressure exerted on the sewer pipe caused the pipe to give way, thus releasing water to flow from the pipe to the surface and to undermine the foundation of the house. Citing *Davis v. Hopkins*,[24] Pittman alleged that Davis had an affirmative duty to reveal the location of the sewer to his vendee. Noting that it could find no authority in Georgia for the proposition that mere concealment was sufficient to sustain such a recovery, the court held for the vendor.

*Hopkins*, the case distinguished in *Pittman*, deserves some mention here because it is a case which could potentially have been the first to carve out an identifiable passive concealment exception to the doctrine of *caveat emptor*. There, the facts were strikingly similar to those in both *Pittman* and *Wilhite*. Hopkins sued Davis for selling him a house under which a

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16. *Id.* at 365.
17. 239 Ga. 31, 235 S.E.2d 532 (1977).
18. *Id.*
19. *E.g.*, Holliday v. Ashford, 163 Ga. 505, 136 S.E. 524 (1926); Mangham v. Cobb, 160 Ga. 182, 127 S.E. 408 (1925); Emlen v. Roper, 133 Ga. 726, 66 S.E. 934 (1910).
20. Davis v. Pittman, 70 Ga. App. 504, 28 S.E.2d 664 (1944); Beasley v. Burton, 32 Ga. App. 727, 124 S.E. 368 (1924).
21. 32 Ga. App. 727, 124 S.E. 368 (1924).
22. *Id.*
23. 70 Ga. App. 504, 28 S.E.2d 664 (1944).
24. 50 Ga. App. 654, 179 S.E. 213 (1934). *See* note 25, *infra*, and accompanying text.

sewer line had been constructed. Davis had bought the property when there was an open ravine on the land through which the sewer line was later laid. Sometime after the sale the presence of the sewer caused the front yard to cave in, which damaged the house almost beyond repair. The court, in affirming the judgment for the plaintiff-vendee, approved the following charge to the jury: "If there was a concealed defect in the lot, known to the seller, or which by exercise of ordinary prudence should have been known by him, and which an ordinarily prudent examination would have discovered, the seller was bound to reveal it to the purchaser. . . ."[25] Davis had denied knowing the exact location of the sewer but did admit that he filled in part of the ravine with rubbish, barrels, and other materials—the one factor which the court in *Pittman* used to distinguish the case. In light of the above quote, it is unclear why the court in *Pittman* felt justified in distinguishing *Hopkins* simply because there, the vendor himself filled the land with unsuitable fill materials, whereas in *Pittman* the vendor took no such action.[26] Possibly, the court in *Pittman* considered the vendor's actions in *Hopkins* to constitute active concealment—the seller did not mention the defect in issue but took active steps to prevent discovery. While the quote from *Hopkins* appears to establish a passive concealment exception to the rule of *caveat emptor*, subsequent cases in which that quote is cited do not contain passive concealment fact situations.[27] The result has been that the influence of *Hopkins* has waned considerably in recent years.[28]

Such was the backdrop for the decision of *Wilhite v. Mays*.[29] In *Wilhite*, the vendor sold Mays a house equipped with a septic tank which overflowed during rainy weather and which Wilhite, the vendor, was never able to repair. Mays brought suit against Wilhite, seeking damages for fraud and against Cartledge,[30] the contractor, for negligent construction of the sewerage system.[31] The jury returned a verdict in favor of Mays.

On appeal, Wilhite argued that, as a matter of law, his mere failure to mention the sewerage problems did not support a finding of fraud, thereby invoking the doctrine of *caveat emptor*. The court disagreed. Grouping the fraud of a property seller into the three categories of positive misrepresentation,[32] active concealment[33] and passive concealment, the court of ap-

25. 50 Ga. App. at 656, 179 S.E. at 214.

26. *See* Southern v. Floyd, 89 Ga. App. 602, 80 S.E.2d 490 (1954).

27. Windsor Forest, Inc. v. Rocker, 115 Ga. App. 317, 154 S.E.2d 627 (1967).

28. Davis v. Hopkins has not been cited for its treatment of passive concealment since 1967. *See* State Farm Mut. Auto Ins. Co. v. Wendler, 115 Ga. App. 452, 154 S.E.2d 829 (1967).

29. 239 Ga. 31, 235 S.E.2d 532 (1977).

30. Cartledge was dismissed from the suit in the lower court upon his motion for directed verdict.

31. Wilhite cross-claimed against Cartledge for any amount to which the court might find Mays entitled as against Wilhite, but the cross-claim was dismissed due to lack of venue.

32. Such would have been the type of fraud in the instant case if Mays had asked whether the septic tank operated properly and Wilhite had replied in the affirmative.

peals identified Wilhite's conduct as that of passive concealment.[34] Both positive misrepresentation and active concealment are actionable fraud in Georgia, but the court apparently could find no Georgia authority recognizing a passive concealment claim. Instead, to support its conclusion that passive concealment is actionable fraud, the court relied on Prosser's analysis and on the cases from other jurisdictions cited by Prosser.[35]

Possibly the key to the lower court's holding in *Wilhite* was the court's argument that the doctrine of *caveat emptor*, as expressed by Lord Cairns in 1873, is an outdated standard which has been transcended by the evolution of the modern home. The sale of a simple farmhouse is one thing; the sale of "a modern home, with complex plumbing, heating, air conditioning, and electrical systems which is possibly built on ground considered unsuitable for construction until recent years"[36] is quite another. A possible shortcoming of the lower court's decision is that it was made without reference to any Georgia cases (neither *Hopkins* nor *Pittman* was mentioned) or statutes on the subject of passive concealment.

In constrast, on certiorari, the supreme court's holding centered around GA. CODE ANN. §37-704 (1962). The court affirmed but ostensibly defused somewhat the impact of the lower court's basis for decision. In clarification of the court of appeals' identification of passive concealment as an exception to the rule of *caveat emptor*, the court said that "we are apprehensive that the rule stated by the Court of Appeals might be construed to be an exception to the general rule of *caveat emptor* in the purchase of realty without reference to the issue of fraud."[36.1] Since the action was one for damages by reason of fraud, the court said that GA. CODE ANN. §37-704 applies. That section provides that "[s]uppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case."

Thus, court's holding would indicate that home buyers such as Mays have had a cause of action under §37-704 available to them all along. But what is apparently obvious to the supreme court has not been so obvious to the citizens of Georgia—in no case annotated under §37-704 prior to *Wilhite* has a home buyer succeeded in recovering from a vendor who has passively concealed a defect in the land sold. Indeed, in at least one case noted under §37-704, a decision seemingly contrary to the *Wilhite* holding

33. As in a case in which the seller takes positive steps to prevent the buyer's discovery of the defect.

34. The court cited Southern v. Floyd, 89 Ga. App. 602, 80 S.E.2d 490 (1954) and Young v. Hall, 4 Ga. 95 (1848).

35. 140 Ga. App. at 818, 232 S.E.2d at 143.

36. *Id.*

36.1. 239 Ga. at 31, 235 S.E.2d at 533.

was reached.[36.2] Further, in *Wilhite* the supreme court said that it was apprehensive that the court of appeals' decision was made "without reference to the issue of fraud."[36.3] Arguably, however, the court of appeals did make its decision *with* reference to fraud, because the court there indicated that passive concealment fits into the third of the three general areas of fraud articulated in its opinion.[36.4]

It appears, then, that sellers in Georgia can no longer passively conceal known defects in their houses and expect to remain under the protective shield of the *caveat emptor* doctrine. An injured buyer need only prove fraud, in its passive concealment form, similar to that practiced upon Mays in *Wilhite* in order to recover under GA. CODE ANN. §37-704 (1962).

## III. IMPLIED WARRANTY

If the penetration made into the tenet of *caveat emptor* by passive concealment can be characterized as gradual and spotty, the assault on the doctrine via implied warranty has been swift and sure. One commentator has gone so far as to say that the entire doctrine of *caveat emptor* is "near its end,"[37] that the "last bastion"[38] of the doctrine is the sale of second-hand real property and that it is "only a matter of time"[39] until even that last "stronghold"[40] will be toppled.[41] One judge has likened the spread of

36.2. *See* Littlejohn v. Drennon, 95 G. 743, 22 S.E. 657 (1895). There, the plaintiff buyer brought an action against joint defendants, Drennon and Moore, for alleged fraud and deceit practiced upon her by both defendants. Drennon owned two houses sold to the plaintiff and Moore was secretary of the building and loan association which had a mortgage on the property. Moore was present when the purchase was consummated and even drew up the papers, but he did not disclose the existence of the mortgage, thereby leading the plaintiff to believe that title to the property was good. In addition to this alleged "wrongful silence," there was also evidence of an active attempt by Moore to defraud the plaintiff. And yet on demurrer, the plaintiff's complaint was dismissed. The supreme court affirmed. The court said: "In our opinion, the declaration states no cause of action whatever against the defendant Moore. No facts are set forth showing the existence of any confidential relations between him and the plaintiff, or any reason why she had a right to expect from him any disclosure as to the existence of mortgage. At the time of purchase she made no inquiry of him, and he simply kept silent concerning a matter about which he was not asked to make a statement." 95 Ga. at 745, 22 S.E. 657.

36.3. 239 Ga. at 31, 235 S.E.2d at 533.

36.4. "Thirdly, there is a situation where the seller knows of a material defect. He does not attempt to hide the problem from the prospective buyer and he does not prevaricate. He simply keeps his mouth shut." 140 Ga. App. at 817, 232 S.E.2d at 142.

37. Bixby, *Let the Seller Beware: Remedies for the Purchase of a Defective Home*, 49 J. URB. L. 533, 549 (1971).

38. *Id.*

39. *Id.*

40. *Id.*

41. For additional literature on the subject of implied warranties in the sale of new homes, *see* Young and Harper, *Quaere: Caveat Emptor or Caveat Venditor*, 24 ARK. L. REV. 245 (1970); Roberts, *The Unwary Home Buyer*, 52 CORNELL L.Q. 835 (1970); Halpern, *Courts*

cases on the subject to that of "wildfire."[42] The recent spate of cases which hold that an implied warranty of fitness of workmanlike construction or of habitability exists upon the sale of a new house is indeed imposing.[43]

Until 1931, the common law doctrine of *caveat emptor* operated with little or no opposition.[44] In 1931, however, an inroad was made by the English case of *Miller v. Cannon Hill Estates, Ltd.*[45] There, the purchaser contracted with the builder-vendor to buy a home which was being constructed at the time the contract was signed. The court found that the vendor was liable on an implied warranty that the house was to be built in a workmanlike manner and was fit for habitation. Part of the rationale for the holding was that while a person buying a completed home can inspect for flaws before signing his contract, a vendee purchasing an unfinished home has no such opportunity. Further, the court said that, unlike a used-home buyer who may desire to raze the old house as soon as he obtains ownership, one who buys a house still in the process of construction clearly intends to live in it. Bearman's criticism[46] of this line of thinking

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*Grant Protection to Buyers of New Houses*, 5 WHARTON Q. No.1, 33 (1970); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

42. Tavares v. Horstman, 542 P.2d 1275, 1282 (Wyo. 1975).

43. The list includes cases, the bulk of which were decided since 1970, from twenty-nine jurisdictions: F & S Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963); Cochran v. Keeton, 287 Ala. 439, 252 So.2d 313 (1971); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Pollard v. Saxe & Yolles Development Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (1970); Smith v. Berwin Builders, Inc., 287 A.2d 693 (Del. Super. 1972); Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584 (1975); Elmore v. Blume, 31 Ill. App.3d 643, 334 N.E.2d 431 (1975); Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969); Busenlener v. Peck, 316 So.2d 27 (La. App. 1975); Ramos v. Holmberg, 67 Mich. App. 470, 241 N.W.2d 253 (1976); Oliver v. City Builders, Inc., 303 So.2d 466 (Miss. 1974); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Centrella v. Holland Constr. Corp., 82 Misc.2d 537, 370 N.Y.S.2d 832 (1975); Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975); Dobler v. Malloy, 214 N.W.2d 510 (N.D. 1973); Yepsen v. Burgess, 525 P.2d 1019 (Or. 1974); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972); Padula v. J.J. Deb-Cin Homes, Inc., 298 A.2d 529 (R.I. 1973); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); Hollen v. Leadership Homes, Inc., 502 S.W.2d 837 (Tex. Civ. App. 1973); Rothberg v. Olenik, 128 Vt. 295, 262 A.2d 461 (1970); Gay v. Cornwall, 6 Wash. App. 595, 494 P.2d 1371 (1972); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975).

44. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

45. 2 K.B. 113 (1931).

46. In his article, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961), Bearman points out that while it is true that a completed home can to a limited extent be inspected for defects, it is equally true that most home buyers lack the competency to inspect for themselves or the resources with which to hire a skilled examiner. And even a skilled inspector cannot discover as much about the foundation of the house as the builder knows. Bearman therefore believes that a buyer of a finished home is forced to

has gradually been adopted and used as a springboard in several jurisdictions for expanding the application of implied warranties to cases in which completed new homes are sold.[47]

In recent years the former reticence expressed by judges on the subject of *caveat emptor* has grown into an attitude bordering on contempt. In *Humber v. Morton*,[48] the Supreme Court of Texas concluded that, "[t]he *caveat emptor* rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work."[49] And in *Bethlahmy v. Bechtel*,[50] the Supreme Court of Idaho, in the context of a discussion of both implied warranty and *caveat emptor*, stated:

> The old rule of *caveat emptor* does not satisfy the demands of justice in such cases. The purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime. To apply the rule of *caveat emptor* to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling houses, is manifestly a denial of justice.[51]

The dynamic mood of the day can probably be capsulized best in the following quote from the Supreme Court of Arkansas in *Wawak v. Stewart*:[52]

> Twenty years ago one could hardly find any American decision recognizing the existence of an implied warranty in the routine sale of a new dwelling. Both the rapidity and the unanimity with which the courts have recently moved away from the harsh doctrine of *caveat emptor* in the sale of new houses are amazing, for the law has not traditionally progressed with such speed.[53]

## IV. IMPLIED WARRANTY—GEORGIA

Georgia is one of a handful of states[54] which steadfastly continues to

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rely more heavily upon the builder's superior knowledge and skill than the vendee of an uncompleted home. In addition, he takes exception with the court's other argument in *Cannon Hill Estates*, that one who purchases an uncompleted home is more likely to live in it, his point being that it is usually fairly obvious that one who buys an existing home is buying to inhabit also.

47. *See e.g.*, Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964), Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

48. 426 S.W.2d 554 (Tex. 1968).

49. *Id.* at 562.

50. 91 Idaho 55, 415 P.2d 698 (1966).

51. 91 Idaho 55, 415 P.2d at 710.

52. 247 Ark. 1093, 449 S.W.2d 922 (1970).

53. 247 Ark. 1093, 449 S.W.2d at 923.

54. Not counting those states which have taken what could be called noncommittal posi-

support the doctrine of *caveat emptor*. In Georgia the doctrine is sustained not only by common law[55] but by statute[56] as well.

*McDonald v. Beall*[57] is the case upon which the Georgia law with respect to *caveat emptor* versus implied warranty is based. There, the plaintiff-vendee purchased certain mill property from the defendant-vendor for $1,750. During the course of the transaction, nothing was said about title to the property between the plaintiff and defendant, no deed or written obligation was conveyed or transferred, and the plaintiff never called upon the defendant for either a deed or proof of title. When the plaintiff lost possession of the property by paramount title, he brought an action against the defendant, alleging a breach of implied warranty of title and seeking the return of his $1,750. Deciding in the vendor's favor, the court said that in Georgia there is no implied warranty of title. The court, however, cited no authority for its statement.

The other case often cited in support of the *caveat emptor* doctrine is *McDonough & Co. v. Martin.*[58] There, the plaintiff-vendor sold a large number of lots to the defendant-purchasers. When the defendants were evicted by paramount title from two of the lots, they refused to pay the note thereon. The plaintiff, disclaiming any implied warranty of title, brought an action to recover on the purchase-money note. The court sided with the vendor and said that "[t]he law is clear that where the buyer takes a quitclaim deed, that is a deed without any warranty, the maxim of *caveat emptor* applies."[59]

Georgia Code Ann. §29-302 is a codification of *McDonald* and *McDonough & Co.*[60] It says simply that "[i]n the sale of land there is no implied warranty of title."[61]

Current law in Georgia might best be evaluated by examining the two most recent decisions on implied warranty in the sale of a new home.[62] In

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tions on the subject, the list of states which have recently demonstrated open support for the rule of *caveat emptor* against implied warranty attacks in situations involving the sale of new houses has been narrowed to just four—Georgia, Maryland, Minnesota, and Ohio. Amos v. McDonald, 123 Ga. App. 509, 181 S.E.2d 515 (1971); Worthington Constr. Corp. v. Moore, 266 Md. 19, 291 A.2d 466 (1972); Buchman Plumbing Co., Inc. v. Regents of Univ. of Minn., 298 Minn. 328, 215 N.W.2d 479 (1974); Benson v. Dorger, 33 Ohio App.2d 110, 292 N.E.2d 919 (1972).

55. *See, e.g.*, McDonald v. Beall, 55 Ga. 289 (1875); McDonough & Co. v. Martin, 88 Ga. 675, 16 S.E. 59 (1891).

56. GA. CODE ANN. §29-302 (1969), which first appeared in the Code of 1895, as §3613.

57. 58 Ga. 289 (1875).

58. 88 Ga. 675, 16 S.E. 59 (1891). McDonough & Co. has been cited as recently as 1970, in Reynolds v. Wilson, 121 Ga. App. 153, 173 S.E.2d 256 (1970).

59. 88 Ga. at 684, 685, 16 S.E. at 62. As in McDonald v. Beall, discussed at note 57, *supra*, and accompanying text, the court cited no authority for its statement.

60. *See* the "Editorial Note" to GA. CODE ANN. §29-302 (1969).

61. GA. CODE ANN. §29-302 (1969).

62. Reynolds v. Wilson, 121 Ga. App. 153, 173 S.E.2d 256 (1970); Amos v. McDonald, 123 Ga. App. 509, 181 S.E.2d 515 (1971).

*Reynolds v. Wilson,*[63] a home buyer brought an action against his vendor on the theory that the builder impliedly warranted the house sold to be built in a workmanlike manner and fit for habitation. The action arose out of damages caused by water seeping into the basement of the house, allegedly as a result of the builder's failure to apply waterproofing to the outside walls of the dwelling and to employ proper grading techniques. Based on Ga. Code Ann. §29-302, *McDonough & Co.*, and *Walton v. Petty,*[64] the court held that the doctrine of *caveat emptor* applies to any sale of land and that there was no implied warranty as to the property.[65]

In *Amos v. McDonald,*[66] the court was faced with a similar situation. There, a purchaser brought an action against his vendor-builder for damages resulting from a fire allegedly caused by the defective construction of a chimney flue. The court held that, in the absence of knowledge of the defective condition or of fraud, no implied warranties were created.[67] The court grounded its decision on the case of *Dooley v. Berkner,*[68] a case which in turn is supported by *Walton v. Petty*. *Walton* is an important case because it was decided without reliance on either *McDonald* or *McDonough & Co.* and because it has been frequently cited in subsequent Georgia cases.[69] There, the plaintiff brought an action against his builder for failure to comply with a building code ordinance in the construction of the plaintiff's new home. After the defendant conveyed the warranty deed of the house to the plaintiff, wind raised one end of the carport roof, causing damages of $1,500 to a carport wall. The damage to the wall was allegedly caused by the defendant's failure to secure the carport roof to the walls in violation of a valid city ordinance. The court decided that the defendant was not liable to the plaintiff upon the theory of implied warranty and affirmed the lower court's dismissal of the action.

Thus, the quadripartite underpinnings of the Georgia law on implied warranty are *McDonald, McDonough & Co., Walton,* and Ga. Code Ann. §29-302. And since the above statute is merely a restatement of the law produced by the first two cases, the bases of the Georgia law can be reduced to the above three cases. But neither *McDonald* nor *McDonough & Co.* had any connection with implied warranty of workmanlike construction or of habitability in the sale of new houses—in both cases the implied warranties urged on the respective courts by the vendees extended only to title. Further, neither court cited any authority for adopting the rule of *caveat emptor* with respect to title. Nevertheless, Georgia courts cite

63. 121 Ga. App. 153, 173 S.E.2d 256 (1970).
64. 107 Ga. App. 753, 131 S.E.2d 655 (1963).
65. Reynolds v. Wilson, 121 Ga. App. 153, 173 S.E.2d 256 (1970).
66. 123 Ga. App. 509, 181 S.E.2d 515 (1971).
67. 123 Ga. App. at 510, 181 S.E.2d at 517.
68. 113 Ga. App. 162, 147 S.E.2d 685 (1966).
69. *See, e.g.*, Reynolds v. Wilson, 121 Ga. App. 153, 173 S.E.2d 256 (1970); Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028 (1906).

*McDonald* and *McDonough & Co.* for the broader rule that there are no implied warranties of any kind in the sale of real property.[70] *Walton* suffers from similar infirmities. In *Walton,* the authorities cited by the court of appeals were especially weak in light of the recent change in the law across the country.[71] There, the court justified its support of the *caveat emptor* doctrine by citing *American Jurisprudence, Corpus Juris Secundum,* and *Williston on Contracts*—works which mirror the majority view as of the date of their publication and which, in 1963, the date of the *Walton* decision, naturally sponsored the view that the doctrine of *caveat emptor* was still intact. The only other authority cited by the *Walton* court was the Oregon case of *Steiber v. Palumbo,*[72] a case expressly overruled in 1974.[73]

## V. Conclusion

Home buyers in Georgia have much more legal leverage as a result of recent trends in the law. For the vendee who finds to his chagrin that his vendor has passively concealed an inconspicuous but serious or expensive defect in the new or used house sold, *Wilhite v. Mays,* can be cited with considerable confidence as the basis for recovery. New home buyers in cases where serious workmanship faults develop into costly damages or dangerous hazards soon after purchase are not as fortunate in Georgia. But in view of the fact that, since the last Georgia case dealing with *caveat emptor* versus implied warranty in new home sales,[74] an onslaught of cases has been decided across the country in favor of the vendee,[75] the chances of overturning the Georgia law and recovering under a theory of implied warranty are greatly improved. When one considers that the same rationale used by the court of appeals in *Wilhite* to make fraudulent passive concealment an actionable theory of recover has also been used in other states to support recovery for an implied warranty of habitability,[76] it is difficult to deny the fact that the time for change in the Georgia law as to implied warranty is ripe.

Chix Miller

70. *Walton* has been cited with approval in one federal case, one Georgia Supreme Court case, and eight Georgia Court of Appeals cases since 1963.

71. *See* note 41, *supra.*

72. 219 Or. 479, 347 P.2d 978 (1959).

73. Yepsen v. Burgess, 525 P.2d 1019, 1022 (Or. 1974).

74. Amos v. McDonald, 123 Ga. App. 509, 181 S.E.2d 515 (1971).

75. *See* note 43, *supra,* and accompanying text.

76. *See, e.g.,* Tavares v. Horstman, 542 P.2d 1275, 1279 (Wyo. 1975), in which the court's comments about the complexities of modern houses are very similar to the comments of the court in *Wilhite. See* note 35, *supra,* and accompanying text.