

CAVEAT EMPTOR
AND THE DISGRUNTLED BUYER

Margaret Shea Burnham
Nexsen Pruet, PLLC
Greensboro, North Carolina

(updated April 2008)

(original manuscript prepared by
Margaret Shea Burnham and Edward P. Lord)

TABLE OF CONTENTS

| | | |
|----|---|----|
| I. | What is the North Carolina translation of “caveat emptor”? | 1 |
| A. | Residential – failure to inspect synthetic stucco before closing | 1 |
| B. | Access – no right to use access easement shown on survey | 3 |
| C. | Residential “log home” – defect in construction | 4 |
| D. | Commercial – septic system | 5 |
| 1. | Future development – expanded capacity for restaurant | 5 |
| 2. | Future development – system not suitable for family day care | 6 |
| E. | Residential – septic system failure prevented use for “residential” purposes as required by restrictive covenants | 6 |
| F. | Commercial – fill | 7 |
| G. | Residential – pest control | 10 |
| 1. | Action against seller | 10 |
| 2. | Action against termite company | 11 |
| H. | Real Estate Titles | 11 |
| I. | Acreage/Square footage | 12 |
| 1. | Acreage | 12 |
| 2. | Square footage | 14 |
| J. | Flood zone | 15 |

| | | |
|------|---|----|
| K. | “Swamp land” | 15 |
| L. | Water availability..... | 16 |
| M. | Structural inspection | 16 |
| N. | Planned roads..... | 17 |
| O. | Erosion | 17 |
| P. | Drainage..... | 17 |
| II. | Exceptions to caveat emptor | 17 |
| A. | Implied warranties | 17 |
| B. | Seller’s duty to disclose “material” facts..... | 18 |
| III. | What is the impact on third parties? | 19 |
| A. | Lender liability? Not! | 19 |
| B. | Attorney liability in the context of due diligence..... | 19 |
| 1. | Title..... | 19 |
| 2. | Access..... | 20 |
| 3. | Utilities | 20 |
| 4. | Flood zone | 20 |
| | Exhibit A..... | 21 |

I. WHAT IS THE NORTH CAROLINA TRANSLATION OF "CAVEAT EMPTOR"?

"Caveat emptor" literally translates to "let the buyer beware." It has been recognized in North Carolina since at least 1797. See Galbraith v. Whyte, 2 N.C. 464 (1797) (recognizing caveat emptor in the context of a purchase of personal property). This manuscript looks at the evolution of this common law doctrine in North Carolina and what it means to the North Carolina real estate lawyer. This manuscript does not cover statutory requirements (e.g., the federal environmental laws related to the "innocent purchaser") or statutory disclosures that alter the common law doctrine.

A. Residential – Failure To Inspect Synthetic Stucco Before Closing

In Swain v. Preston Falls East, L.L.C., 156 N.C. App. 357, 576 S.E.2d 699, *rev. den.*, 357 N.C. 255, 583 S.E.2d 290 (2003), the Supreme Court denied a petition for discretionary review of a Court of Appeals decision which affirmed summary judgment for defendants. The Court of Appeals concluded plaintiff's inaction amounted to *contributory negligence as a matter of law*.

Typical of the types of claims brought in these cases, the Complaint included:

- negligence;
- breach of implied warranty of merchantability;
- negligent misrepresentation;
- gross negligence;
- unfair and deceptive practices; and
- negligence *per se*.

The seller, Marshall Gurley, was not sued. Presumably this was because of the disclosure signed by the seller, which included the following:

This home has been constructed with a synthetic stucco system. Other homes featuring the same or similar stucco system have experienced structural problems due to moisture absorption and rotting wood beneath the stucco façade. Any questions regarding stucco on this home or warranty coverage for stucco-related problems should be directed to the builder and/or seller.

Id. at 359, 576 S.E.2d at 701.

Perhaps for the same reason, the realtors were off the hook, and not sued, although the case doesn't explain the absence of the realtors as parties. This is so despite a reference in the opinion that both the seller and the buyers' real estate agent had told the buyers that the synthetic stucco "would not be problematic as long as it was properly maintained." Id. at 359, 576 S.E.2d at 699.

The home inspector was also conspicuously absent from the list of defendants. But the opinion explained that the home inspector disclosed in his report that "he was not qualified to evaluate the [synthetic stucco] and thus did not inspect it." Id. at 359, 576 S.E.2d at 701.

The Court of Appeals relied on standard black letter law of negligence, having no trouble finding contributory negligence as a matter of law. The citations are instructive for the test expected of today's home buyer:

Actionable negligence occurs when a defendant owing a duty fails to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions... or where such a defendant of ordinary prudence would have foreseen that the plaintiff's injury was probable under the circumstances. Where a person having the capacity to exercise ordinary care...fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence.

Id. at 361, 576 S.E.2d at 702 (citations and quotations omitted).

The holding against plaintiffs was based on the buyers having received "adequate notice" of the problems with synthetic stucco both generally and specifically as to the townhouse "to give rise to a duty to obtain an inspection of the [synthetic stucco] to protect themselves from an unwise real property purchase." Id. Ironically, the case does not mention the term "caveat emptor" or "buyer beware."

Lesson: you can't rely on verbal assurances when you're on notice that you should not be relying on what you were just told.

Note: see also Everts v. Parkinson, 147 N.C. App. 315, 555 S.E.2d 667 (2001) (another synthetic stucco case).

B. Access – No Right To Use Access Easement Shown On Survey

In a recent unpublished opinion, the Court of Appeals in Driver v. Bagley, 157 N.C. App. 572, 579 S.E.2d 523 (2003) (table), reversed a trial court's finding in a non-jury trial in favor of plaintiffs' claim of negligent misrepresentation. The plaintiffs' original claims were:

- false representations with intent to deceive; and
- negligent misrepresentations.

In this opinion, there is a not-so-subtle jab at the plaintiff, Ron Driver. The court pointed out that he was not only a licensed real estate agent (for all of one year), he had received some training with respect to boundary lines. Worse, he admitted he knew a buyer "needed to exercise reasonable diligence" and was familiar with the terms "let the buyer beware" and "caveat emptor. . . ." Id. at *2.

In the buyers' favor, they were given a survey which showed an access easement. The defendants promised to extend the existing driveway to plaintiffs' building site and had the funds to do so escrowed at closing. And, they were told expressly by the sellers' agent that the driveway access shown on the survey "could be used to access the property." Id.

In this context, the Court hammered the plaintiffs for relying on Bagley's survey (there go survey affidavits) and failing to make any effort to locate the property line as between the subject property and the adjacent subdivision. The Court of Appeals again relied on the same theme as in Swain:

[W]here the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the mistake or discrepancy but failed to do so the absence of reasonable diligence is established as a matter of law. It is generally held that one has no right to rely on representations as to the condition, quality or character of property, or its adaptability to certain uses,

where the parties stand on equal footing and have equal means of knowing the truth.

Id. at *3 (citations and quotations omitted).

The Court's holding was that the plaintiffs failed to exercise reasonable diligence – that they had the opportunity and capacity to conduct a survey *prior to* closing. The Court didn't put much weight on the fact that it was only *after* closing that the neighboring subdivision placed “no trespassing” signs and blocked access by parking a truck.

Lesson: don't rely on seller's due diligence without a “reliance” letter by the provider of the due diligence.

Note: See also Vickery v. Construction Co., 47 N.C. App. 98, 266 S.E.2d 711 (1980) (jury question as to whether buyer reasonably relied on agent or whether buyer should have made inspection of driveway); Marriott Financial Services, Inc. v. Capitol Funds, Inc., 288 N.C. 122, 217 S.E.2d 551 (1975) (even if buyers purchased land under “mistaken assumption” that driveway permit had been obtained, buyer assumed risk for obtaining necessary permits).

C. Residential “Log Home” – Defect In Construction

The unpublished case of White v. Huett, 152 N.C. App. 478, 567 S.E.2d 841 (2002) (table), is unusual in that it primarily relies upon Virginia law, although the land is in North Carolina. As to one claim, though, “fraudulent concealment of a material fact,” the Court looked at North Carolina law. The only defendant was the seller.

The plaintiffs noticed “a black tarp on part of the floor and mildew stains on the ceiling and walls. Plaintiffs also noticed a log broken off from an exterior corner of the house.” Id. at *1. Notwithstanding this, the plaintiffs signed an “as is” contract. For an unexplained reason, the buyers testified they were unable to find an inspector to go to Holiday Island in Perquimans County in the time frame dictated in the contract for due diligence. Turns out the logs were installed *upside down*. Although this was not apparent to the buyers, it was apparent to the home inspector who inspected the log home *after* the closing. The Court's holding was to affirm directed verdict for the defendants. Id. at *4.

Lesson: “as is” means “as is.”

D. Commercial – Septic System

1. Future Development – Expanded Capacity For Restaurant

In Hearne v. Statesville Lodge No. 687, Loyal Order of Moose, Inc., 143 N.C. App. 560, 546 S.E.2d 414 (2001), the Court considered due diligence expected of a buyer of commercial property. The pre-existing use apparently did not tax the capacity of the septic field. However, the envisioned future use for a private club/restaurant exceeded existing capacity and buyers were unable to obtain a permit for expansion from the Iredell County Health Department. The opinion deals solely with the claims against the real estate agent. The real estate agent allegedly knew of the intended use and allegedly informed plaintiffs that the septic system was adequate for the proposed use. However, the buyer failed to obtain an independent investigation of capacity. The court held:

The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest. Before purchasing property, it is incumbent upon buyers to take reasonable steps to protect their own interest.

Id. at 562, 546 S.E.2d at 415 (citations and quotations omitted).

Lesson: Also be cautious relying on written representations if you can't rely on verbal representations.

Another septic case, relying on Hearne, came down equally hard on plaintiff for failure to conduct due diligence. In RD&J Properties v. Lauralea-Dilton Enterprises, LLC, 165 N.C. App. 737, 600 S.E.2d 492 (2004), the plaintiff purchased two mobile home parks. At issue was a "diverter pipe" which diverted excess sewage from one mobile home park's wastewater treatment facility to the other. The diverter pipe was installed by a prior owner. One of the defendants later notified the county health department of the existence of the diverter pipe and a note of the diverter pipe was made on the plat in the county's (public) file. The septic system subsequently malfunctioned. Following a recommendation from the health department, fill was added to the drain field and the problem was

(supposedly) cured. The two mobile home parks were later sold to plaintiff. The purchase agreement contained somewhat conflicting provisions. One provision said the property was sold "as is." The other provisions at issue were fairly standard representations and warranties. One provision concerned compliance with all laws (qualified "to the best of [seller's] knowledge"). The other concerned compliance with environmental laws (this time only qualified by "no knowledge"). The plaintiff brought claims for breach of contract, fraud and unfair trade practices and lost on all three claims at Summary Judgment. There was no explanation as to when the diverter pipe became "illegal," but it was apparently undisputed by all parties that at some point prior to closing the diverter pipe was no longer "legal." It was also undisputed that the buyer failed to conduct any due diligence, and was unable to show that the seller had any knowledge that the diverter pipe was in violation.

Note: see also Goff v. Realty and Insurance Co., 21 N. C. App. 25, 203 S.E.2d 65 (1974) (failure to inspect septic system barred claim in residential context); Deans v. Layton, 89 N.C. App. 358, 366 S.E.2d 560 (1988) (buyer "assumed risk" of a mistake by failing to obtain "perk" test prior to closing).

2. Future Development – System Not Suitable For Family Day Care

In Helms v. Holland, 124 N.C. App. 629, 478 S.E.2d 513 (1996), the purchasers bought the land for a family care facility. In the contract, purchasers inserted a provision stating that "[p]roperty must pass state inspection for family care home guidelines." After closing, "plaintiffs learned the septic system had previously malfunctioned and that the Department of Health had determined the system was not subject to repair and, therefore, the property was not suitable for use as a family day care facility." The Court noted that the purchasers "were already in the business of operating family care facilities and were familiar with the regulations governing such homes." Id. at 636, 478 S.E.2d at 517. Therefore, the fraud and negligent misrepresentation claims failed.

Lesson: Use a due diligence checklist (See Exhibit A attached hereto).

E. Residential – Septic System Failure Prevented Use For "Residential" Purposes As Required By Restrictive Covenants

In Lumsden v. Lawing, 107 N.C. App. 493, 421 S.E.2d 594 (1992), the Court of Appeals upheld a finding of a violation of the implied warranty that a lot would be suitable for use as a single family residence when the lot would not

support a septic field. The plaintiffs benefited by being the original purchasers so as to fit under an implied warranty theory. Also, the plaintiffs were aided by the restrictive covenants which limited the use of the property to "single-family residences." The court concluded that a "reasonable inspection by plaintiffs would not have disclosed that the lot was unsuitable for a septic tank." Therefore, the court affirmed the trial court's finding that the builder breached the implied warranty arising out of the restrictive covenants. A different panel of the Court of Appeals may well have concluded that a standard pre-closing "perk" test would have revealed soil unsuitability. Also, a different panel may have been more interested in what the plaintiffs would have learned about the history of the lot failing septic approval had the plaintiffs made inquiry of the County Health Department.

In Little v. Stogner, 162 N.C. App. 25, 592 S.E.2d 5 (2004), the Court of Appeals was again presented with a residential lot that did not perk. One interesting variation between this case and Lumsden is that Little involved the Residential Property Disclosure Act. One of the issues was whether the sellers, in opting not to make disclosures under the Act, thereby induced buyers to forego further inquiry. The court concluded enough smoke was present to create a jury question.

Lesson: Unless you are buying a new home from a builder, your due diligence (or lack thereof) will be scrutinized for fatal flaws. See Section II.A., below, for expanded coverage about the implied warranty exception to the caveat emptor doctrine.

F. Commercial – Fill

There are several reported decisions addressing new commercial buildings which later settled as a result of undisclosed fill.

An early case involving fill was Stanford v. Owens, 46 N.C. App. 388, 265 S.E.2d 617 (1980). Plaintiffs bought a tract of land upon which they intended to construct a restaurant. After construction commenced, the structure developed cracks. Alleged damages included the damage to the building caused by the instability of the soil and remedial measures to prevent further sinking.

The plaintiffs alleged that the defendants made the following statements to them:

- “a portion of the lot . . . had been filled, but the fill was of proper composition and compaction to support a restaurant building;”
- “the fill was far enough back on the lot that none of the restaurant should be located on the filled portion”, and
- “the land was fit” for the intended use.

Id. at 391, 265 S.E.2d at 620.

The Court concluded the representations were “nothing more than an expression of opinion.” The authority for the Court was a 1908 opinion which used, as an example of puffing, the following:

The alleged false statements concerning the productiveness of the land and its capacity to furnish support for cattle constituted no defense to the notes. They fall within that class of affirmations which, although known by the party making them to be false, do not as between vendor and vendee afford any ground for a claim of damages They come within the principle embodied in the maxim of the civil law, ‘**simplex commendatio non obligat.**’ [A simple recommendation does not bind.]

Williamson v. Holt, 147 N.C. 515, 518, 61 S.E. 384, 387 (1908) (emphasis added).

In Libby Hill Seafood Restaurants, Inc. v. Owen, 62 N.C. App. 695, 303 S.E.2d 565 (1983). The plaintiff brought claims of

- fraud;
- negligent misrepresentation;
- breach of express warranty; and
- unfair and deceptive trade practices.

The defendants were granted directed verdict and the Court of Appeals affirmed based on plaintiff’s contributory negligence as a matter of law. Id.

Evidence indicated that statements were made by the defendants about the location of the building site to the area previously used as a trash dump. The court

again found the statements were “mere opinion” and amounted to “vague speculation.” The court noted:

- the alleged representation was made by pointing to a place in the property;
- no measurements were taken as a result of the pointing; and
- no stakes or markers were laid.

Id. at 699, 303 S.E.2d at 568.

In defense of the realtor, the court added that the plaintiff knew the realtor defendant was “a real estate professional, not a contractor, builder, soil engineer or gas barrier installer.” The buyer was “under a duty to conduct independent investigations before commencing its costly venture.” The court went on to say that “a duty to disclose is simply not at issue here,” a suggestion used in a later opinion as authority for the proposition that disclosures are not an issue in *any* commercial context.

The final of the restaurant trilogy of cases is C.F.R. Foods, Inc. v. Randolph Development Co., 107 N.C. App. 584, 421 S.E.2d 386 (1992). This case again involved a restaurant constructed on fill. The unusual twist here was that the developer, in preparing outparcels, discovered the site had some fill consisting of “buried organic material including trees and tree stumps.” As a result, the defendant “contracted to have the unsuitable materials removed . . . the lot was ‘excavated, undercut, and backfilled’ to a level consistent with the anticipated floor level of the mall.” The defendant proceeded to have the outparcels “smooth, graded and sown with grass.” Id. at 585, 421 S.E.2d at 387.

Based on the “appearance” that the lot was “ready to build,” the plaintiff did not conduct any soil due diligence tests. (Although the court pointed out that plaintiff made time to conduct due diligence “relative to traffic flow, national demographics, and the ‘come to’ aspects of the proposed restaurant location.”)

In reliance on Libby Hill, the court concluded: “We note that this was a transaction involving commercial real estate between two commercial parties. Accordingly, defendant owed no duty of disclosure to plaintiff.” Id. at 589, 412 S.E.2d at 389. This statement of the holding in Libby Hill is broader than the actual holding in Libby Hill.

The most recent case on fill is State Properties, LLC v. Ray, 155 N.C. App. 65, 574 S.E.2d 180 (2002), rev. den., 356 N.C. 694, 577 S.E.2d 889 (2003). In that case, the contract for sale required the Rays to provide the buyer surveys, environmental reports and similar information. The Rays also represented that there were no underground storage tanks and no portion of the property had been used as a landfill. Despite these obligations, the Rays failed to provide the buyer with two environmental reports that indicated potential subsurface contamination and a DOT map that showed a "drained pond, debris filled." Before closing, the plaintiff had a Phase I environmental report completed. The Rays again told the engineers making the report that they were not aware of any environmental problems, and that nothing had been buried on the property. However, the Phase I report did note that significant grading had occurred that might have hidden debris or waste-related problems. The Phase I did not recommend any further investigation. A pre-closing subsurface analysis also revealed fill material and buried organics to a depth of five feet, among other problems, but concluded that the site was satisfactory for its intended use as a Winn Dixie supermarket.

After closing, the plaintiff discovered that the extent of the problems with the property was greater than originally understood. Plaintiff sued the Rays for breach of contract, negligent misrepresentation, fraud, and unfair and deceptive trade practices. At trial, the plaintiff prevailed on claims of breach of contract, fraud, and unfair and deceptive trade practices. The court, however, granted a JNOV as to all claims but breach of contract. The Court of Appeals reversed, and ordered the jury verdict reinstated. The Court of Appeals found that the plaintiff had created an issue of fact as to whether the plaintiff reasonably relied on the Rays' misrepresentations (and failure to disclose as required by the contract), and whether the plaintiff conducted a reasonable investigation, and that the jury verdict should stand. The Court of Appeals also upheld the breach of contract claim, and distinguished this case from Libby Hill and similar cases by noting that the plaintiff *withheld* reports it was obligated to provide under the contract. In addition, the Court of Appeals noted that the Rays made false affirmative representations in the contract regarding the presence of fill. Finally, the Court of Appeals noted that the plaintiff did conduct an independent investigation of the property.

Lesson: Looks can be deceiving.

G. Residential – Pest Control

1. Action Against Seller

In Childress v. Nordman, 238 N.C. 708, 78 S.E.2d 757 (1953), the issue before the court was liability of the seller for termites found after closing. The court viewed the evidence of termites deficient since the proof only indicated termite infestation as of that date, not an earlier date. The court noted that plaintiffs failed to put on scientific evidence of “the probable time of the entry of the termites into the dwelling by evidence of the habits or propensities of these insects in respect to forsaking old haunts and invading new ones.” Id. at 711, 78 S.E.2d at 760. Rather, the plaintiffs solely relied on the evidence that the termites were discovered shortly after closing, which was confirmed by the plaintiffs’ “termite eradicator.” The court could have just as easily denied plaintiffs’ claim as a result of the lack of due diligence prior to closing. See Robertson v. Boyd, 88 N.C. App. 437, 363 S.E.2d 672 (1988) (buyer’s claim alleging fraud for failure to disclose termite damage dismissed for, among other reasons, failure to investigate).

2. Action Against Termite Company

Although caveat emptor has been used to repeatedly strike down claims made by a disgruntled buyer, the Court of Appeals noted that the doctrine does not shield a professional hired by the buyer. The court had no trouble distinguishing Childress:

The defendant here, however, is not the vendor, but an extermination company engaged for the sole purpose of providing the buyer with assurance that the house he planned to purchase was free of termites. Clearly this distinction goes to the reasonableness of the buyer’s reliance upon the accuracy of the representation. Where, as here, the buyer has relied, to his detriment, on representations made by an independent pest-control inspector who was paid for his inspection report and unquestionably could foresee the buyer’s reliance upon the accuracy of the report, we find Childress distinguishable.

Plow v. Bug Man Exterminators, 57 N.C. App. 159, 162, 290 S.E.2d 787, 789 (1982).

H. Real Estate Titles

Part of the due diligence is the title search. The North Carolina Court of Appeals has held that verifying an accurate legal description in a deed is part of the buyer's due diligence:

[W]e hold that the mistake or discrepancy in the deed that plaintiff complains of should have been discovered through the exercise of due diligence . . . plaintiff certainly had both the capacity and opportunity to discover that the 1.283 acre tract was not included in the deed by simply comparing the deed legal description with the survey

Grubb Properties, Inc. v. Simms Investment Co., 101 N.C. App. 498, 502, 400 S.E.2d 85, 88 (1991). There is no explanation for why the closing attorney was not a defendant.

See also Greene v. Rogers Realty and Auction Co., Inc., 159 N.C. App. 466, 586 S.E.2d 278 (purchaser at auction sale has duty to verify correct legal description), 159 N.C. App. 665, 583 S.E.2d 428 (2003) (withdrawn from bound volume).

Note: See also Gibson v. Lambeth, 86 N.C. App. 264, 357 S.E.2d 404 (1987) (foreclosure purchaser subject to caveat emptor doctrine).

The Court of Appeals has recently reminded us that purchasing land at a tax foreclosure is subject to "caveat emptor." See Beneficial Mortgage Co. of N.C., Inc., v. The Barrington and Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705 (2004) (quoting a 1951 case in which the Court admonished that "the defendant purchased a 'pig in the poke,' but when he opened the bag he found no pig").

In a related context, the Court of Appeals considered an error in an access easement. In Swaim v. Simpson, 120 N.C. App. 863, 463 S.E.2d 785 (1995), aff'd per curiam, 343 N.C. 298, 469 S.E.2d 553 (1996), the buyer thought he was buying an easement in order to use some otherwise landlocked property for residential use. Unfortunately, the easement for "ingress, egress and regress" to get to the lot wasn't broad enough to permit the buyer to use the easement for utility lines to get

utilities to his residence. The stated rationale was that extending the access easement to permit a buried utility cable was over burdening the easement.

I. Acreage/Square Footage

1. Acreage

Acreage disputes have been summarized in an opinion by the Court of Appeals:

We note that in cases involving misrepresentations as to quantity or acreage, our courts appear to have taken a somewhat more tolerant attitude toward those contending they have been defrauded than is apparent in cases involving misrepresentations as to patent or latent defects or the quality or character of property purchased. Perhaps a reason for any such distinction arises from the fact that the acreage of property within given boundaries is not apt to be as obvious to or as readily ascertainable by the buyer as are the true facts in many cases involving patent or latent defects or the quality or character of property. The science of surveying land and determining the acreage contained within boundaries, which frequently create forms unknown to students of geometry, remains beyond the abilities of the ordinary buyer in sales of real property. The precise acreage of a given tract of land is often so difficult to determine that a general custom of drafting deeds and other legal documents to convey a stated amount of acreage "more or less" has developed in this and other jurisdictions. When these facts are combined with the former custom still frequently followed of conveying land according to old deeds and without a survey, it would appear that our courts have properly imposed upon sellers of real property a requirement that any representations they make, as to the acreage of a tract of land with which they are more familiar than the buyer either is or may reasonably become, be correct and that they be bound by such representations.

Marshall v. Keaveny, 38 N.C. App. 644, 648, 248 S.E.2d 750, 753 (1978) (citations omitted).

A well recognized exception in the acreage cases is Norburn v. Mackie, 262 N.C. 16, 136 S.E.2d 279 (1964). There, the seller's broker knew the buyer was physically unable to inspect the land and knew the buyer was relying on his representation as to acreage.

2. Square Footage

The Court of Appeals has drawn a distinction between square footage that is easy to measure (e.g., a rectangle) versus difficult to measure (e.g., "complex in design").

On the one hand, in Marshall v. Keaveny, 38 N.C. App. 644, 649, 248 S.E.2d 750, 754 (1978), the Court of Appeals was unsympathetic when the purchaser had access to the house and failed to make any effort to measure it:

[T]he person seeking to bring an action for the alleged misrepresentations of square footage had full opportunity to and in fact did inspect the house and could have determined the square footage therein for himself by simple measurements and mathematical computations. Absent facts to the contrary made known to a seller at the time of his representations as to the square footage of a house to be sold, the seller is entitled at this point in the history of public education to assume that his prospective buyer possesses the mathematical skills required for determining the square footage contained in the house. The seller is also entitled to assume that his buyer will make such determination during his actual inspection of the house if he believes it material. The same is not true, however, where the much more difficult and precise science of surveying a tract of land and determining its acreage is involved.

On the other hand, in Brown v. Roth, 133 N.C. App. 52, 514 S.E.2d 294 (1999), the Court of Appeals sided with the buyer where the house was described as "complex in design, not a simple rectangular house, and [the] square footage [was] difficult to ascertain." The square footage was reported to be 3,484 heated square feet, but it was actually only 3,108. The realtor relied on the square footage

in an appraisal. Although the court agreed that the realtor's reliance on the appraiser for square footage was "some evidence" of compliance with the standard of care, it was not conclusive. Id. at 56, 514 S.E.2d at 297. Therefore, summary judgment was inappropriate on breach of fiduciary duty and negligent misrepresentation claims. See also John v. Robbins, 764 F. Supp. 379 (M.D.N.C. 1991) (question of fact as to buyer's reliance on square footage of a "contemporary house with triangular offsets").

J. Flood Zone

In Clouse v. Gordon, 115 N.C. App. 500, 445 S.E.2d 428 (1994), the purchaser brought an action for damages against the seller, selling agent and surveyor for failure to disclose the property was in a flood zone. There was no explanation why the attorney was not included as a defendant.

Evidence that supported the buyer included:

- no disclosure was made to the buyer about the property being subject to flooding; and
- the buyer had a survey done which showed the property was not in a flood zone (the survey did not show the creek).

Evidence that hurt the buyer included:

- the buyer had an opportunity to walk the property (at which time "she noticed a creek");
- the buyer grew up near a flood plain;
- the buyer could have inquired of neighbors about flooding from the creek;
- the flood plan was public record; and
- the buyer had an attorney at closing.

Id. at 504, 445 S.E.2d at 430.

The court found that the realtor had no duty to determine the flood plain. The surveyor apparently settled prior to the appeal.

Another flood zone case is Taylor v. Gore, 161 N.C. App. 300, 588 S.E.2d 51 (2003), rev. den., 358 N.C. 380, 597 S.E.2d 775 (2004). There, the plaintiff's claims of fraudulent and negligent misrepresentation failed in part based on Clouse v. Gordon. However, the Court of Appeals concluded that the plaintiff was

entitled to proceed on its claim for rescission based on mistake because the seller supplied the survey with the erroneous flood zone information.

K. "Swamp Land"

An unlucky buyer opted to purchase a 300+ acre wooded tract along the Chowan River and Albemarle Sound. The seller showed the property by boat. The seller persuaded the buyer that the acreage could be used for a future residential development and that at least \$75,000 worth of timber could be realized. Closing occurs. Subsequently, purchasers:

attempted to build a road through the tract, but they were told that a road was not feasible and could not be supported because there were fourteen feet of peat on the ground. After much delay, plaintiffs finally contracted with a logging company to remove the timber, but their special equipment, designed to operate in peat, sank and had to be removed with other equipment.

Williams v. Jennette, 77 N.C. App. 283, 285, 335 S.E.2d 191, 193 (1985) (emphasis added).

Despite seller's representations, which included a map of a proposed residential subdivision, the court found no sympathy for the plaintiffs:

[W]e hold that the plaintiff had no right to rely solely on the representation of the seller of the land in this case. A vendor of land in its natural, undeveloped state cannot fraudulently misrepresent the condition or potential uses of that land, unless the vendor induces the purchaser to forego inquiry or investigation of the land.

Id.

L. Water Availability

In Calloway v. Wyatt, 246 N.C. 129, 97 S.E.2d 881 (1957), the buyer sued for damages related to water supply. The court held the buyer was not entitled to rely on seller's representations when the buyer failed to exercise simple due diligence (buyer didn't turn on spigots) or to make other investigation.

M. Structural Inspection

In an early case, the North Carolina Supreme Court, in Harding v. Southern Loan and Ins. Co., 218 N.C. 129, 132, 10 S.E.2d 599, 602 (1940), concluded that a buyer has no claim when the buyer had full opportunity to inspect a hotel property but failed to inquire as to water, heating and plumbing systems, the roof and other conditions.

N. Planned Roads

In Wake Stone v. Hargrove, 101 N.C. App. 490, 400 S.E.2d 464 (1991), the Court concluded that the buyer and seller had equal and adequate means to ascertain mistake in location of new highway.

If, however, the realtor has knowledge of a pending new thoroughfare, the realtor will be liable for nondisclosure upon inquiry by buyer as to factors affecting value. See Powell v. Wold, 88 N.C. App. 61, 362 S.E.2d 796 (1987).

O. Erosion

In Blackwell v. Dorosko, 93 N.C. App. 310, 377 S.E.2d 814 (1989) [Blackwell I], the issue was significant erosion to beach front property. Upon inquiry about erosion, the realtor indicated that he did not know of any erosion problem at Kure Beach, indicating that he knew only of an erosion problem at nearby Carolina Beach. The realtor offered to obtain information about erosion from the homeowners' association and the offer was declined. All claims were dismissed at the Court of Appeals in Blackwell I. Upon petition for rehearing, the Court of Appeals reversed and remanded, only as to the defendant realtor and real estate firm, holding that a question of fact existed as to realtor's offer to obtain further information about erosion. Blackwell v. Dorosko, 95 N.C. App. 637, 383 S.E.2d 670 (1989) [Blackwell II].

P. Drainage

In Griffin v. Wheeler-Leonard & Co., Inc., 290 N.C. 185, 225 S.E.2d 557 (1976), the North Carolina Supreme Court had no trouble dismissing plaintiffs' claim involving water in the crawl space. Plaintiffs' evidence was that the homeowner noticed standing water in the crawl space ("it was wet, very wet"). When he mentioned this to the realtor, who was inside the house at the time, the realtor said "it was probably left over from construction" and "should dry up." Such statements do not create a warranty. Id. at 200, 225 S.E.2d at 567.

II. EXCEPTIONS TO CAVEAT EMPTOR

A. Implied Warranties

There are two noted exceptions to “caveat emptor.” The first was expressed in 1974 when the North Carolina Supreme Court handed down its decision in Hartley v. Ballou, 286 N.C. 51, 209 S.E. 2d 776 (1974) (recognizing implied warranty of workmanlike construction by builder to buyer); the second was set forth in the 1975 case of Hinson v. Jefferson, 287 N.C. 422, 215 S.E. 2d 102 (1975) (recognizing implied warranty imposed by restrictive covenants limiting use to single-family residences). See also George v. Veach, 67 N.C. App. 674, 313 S.E.2d 920 (1984) (implied warranty extended to septic system); Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222 (1985) (buyer who was not original purchaser has cause of action against builder and general contractor); Gaito v. Auman, 313 N.C. 243, 327 S.E.2d 870 (1985) (implied warranty could extend to defective air conditioning); Lumsden v. Lawing, 107 N.C. App. 493, 421 S.E.2d 594 (1992) (implied warranty extends to defective septic tank rendering lot unusable for single family residence).

Despite these opinions expanding the implied warranty doctrine, the Court of Appeals recently refused a further expansion of the doctrine to “ordinary” sellers instead of “builder” sellers. Everts v. Parkinson, 147 N.C. App. 315, 555 S.E.2d 667 (2001).

In what would have been an unfortunate development for new home buyers, the Court of Appeals recently held that the implied warranty can be waived. See Brevorka v. Wolfe Construction, Inc., 155 N.C. App. 353, 573 S.E.2d 656 (2002). But before the ink was dry, the Supreme Court reversed and adopted the dissenting opinion of the Court of Appeals. 357 N.C. 566, 597 S.E.2d 671 (2003). In a subsequent flip flop, the Court of Appeals distinguished Brevorka and upheld an “unambiguous” waiver of the implied warranty of habitability. Bass v. Pinnacle Custom Homes, Inc., 163 N.C. App. 171, 592 S.E.2d 606 (2004).

B. Seller’s Duty To Disclose “Material” Facts

Despite the doctrine of caveat emptor, a duty to disclose material facts is imposed upon the seller:

A duty to disclose material facts arises “[w]here material facts are accessible to the vendor only, and he knows

them not to be within the reach of the diligent attention, observation and judgment of the purchaser.'

Everts v. Parkinson, 147 N.C. App. 315, 325, 555 S.E.2d 667, 674 (2001) (quoting Brooks v. Ervin Construction Co., 253 N.C. 214, 217, 116 S.E.2d 454, 457 (1960)). In Brooks, the seller failed to disclose the known fact that the residence was constructed over a hole filled with debris and covered, thereby preventing discovery by buyer in exercise of due diligence.

The duty is also imposed upon the seller's real estate agent:

A broker who makes fraudulent misrepresentations or who conceals a material fact when there is a duty to speak to a prospective purchaser in connection with the sale of the principal's property is personally liable to the purchaser notwithstanding that the broker was acting in the capacity of agent for the seller.

Johnson v. Beverly Hanks & Assoc., 328 N.C. 202, 210, 400 S.E.2d 38, 43 (1991) (quoting Webster's Real Estate Law in North Carolina). In Johnson, the court concluded a buyer is entitled to rely on realtor's selection of an "independent" inspector.

III. WHAT IS THE IMPACT ON THIRD PARTIES?

A. Lender Liability? Not!

In an interesting twist on liability, a homeowner brought a lawsuit against the lender on the construction loan for the lender's failure to inspect construction progress for the benefit of the homeowner. In this case, the Court of Appeals found no duty on the lender, saying:

[L]iability 'will be imposed on construction lenders only where contractual provisions or lender assurances justify purchaser reliance on inspections for purchaser's benefit.'

Lassiter v. Bank of North Carolina, 146 N.C. App. 264, 268, 551 S.E.2d 920, 924 (2001). See also Camp v. Leonard, 133 N.C. App. 554, 515 S.E.2d 909 (1999) (no duty of lender to monitor construction for borrower's benefit).

B. Attorney Liability In The Context Of Due Diligence

1. Title

Ives v. Real Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573 (1990), was a legal malpractice action in which the issue was whether the attorney was retained to conduct a title examination and acquire title insurance. The Court of Appeals held that issue was a question of fact for the jury.

2. Access

Gram v. Davis, 128 N.C. App. 484, 495 S.E.2d 384 (1998), was also a legal malpractice action. In that case, the former client sued because the attorney allegedly failed to inform the client (as buyer) that the lot he was buying was subject to restrictive covenants which prevented use of the lot for access to another subdivision.

3. Utilities

In Swaim v. Simpson, cited above, the buyer was left with access for ingress, egress, and regress to his otherwise landlocked tract, but without access for utility connections from the public road. The closing attorney was not a named defendant, but could easily have been.

4. Flood Zone

In Clouse v. Gordon, cited above, the closing attorney was not a named defendant. However, the court alluded to the duty of an attorney:

[The realtor] would have no reason to believe she needed to conduct an independent search of the flood hazard maps in light of the fact that plaintiffs were represented by an attorney at the closing, and an attorney representing the buyer at a closing is normally expected to have conducted a title search of the property, which search would presumably uncover the fact that the property was located in a flood plain.

Id. at 509, 445 S.E.2d at 433.

EXHIBIT A

DUE DILIGENCE CHECKLIST (Status of Property)

- ☐ obtain copies of any existing due diligence from seller (title policies, surveys, reports, etc.)
- ☐ title search (verify legal description correct)
 - ☐ copies of plats/exceptions
- ☐ title insurance/endorsements available
- ☐ UCC search (fixtures/personal property)
- ☐ access (for roads and for utilities)
 - ☐ necessary driveway permit
 - ☐ private access issues (easement; maintenance expenses)
- ☐ survey/surveyor's certificate (including verification of acreage)
- ☐ flood certificate
- ☐ governmental
 - ☐ zoning/conditional uses/parking
 - ☐ subdivision
 - ☐ watershed
 - ☐ historic district/other special district (e.g., airport issues)
 - ☐ other local ordinances/conditions (limited access, curb cuts)
 - ☐ permits required to operate for intended use (including building permit)
 - ☐ certificate of occupancy
- ☐ wetlands

- ☐ environmental (including asbestos)
- ☐ utilities
 - ☐ water (water availability; water test)
 - ☐ sewer/septic (“perk” test for soil suitability)
 - ☐ electric
 - ☐ gas
 - ☐ telephone
 - ☐ cable
- ☐ inspections
 - ☐ soil (suitability for building; fill)
 - ☐ structure/roof (including any ADA/engineering/architect inspections)
 - ☐ operating systems (HVAC)
 - ☐ termite
- ☐ condemnation (and planned road widenings)
- ☐ existence of cemeteries on acreage tracts
- ☐ water issues
 - ☐ riparian rights
 - ☐ drainage issues/erosion issues
 - ☐ stormwater runoff
- ☐ verify compliance with restrictive covenants/verify status of dues/assessments/ compliance with any property owners association
- ☐ possession/tenant rights
- ☐ appraisal (including verification of square footage)