

HOME INSPECTOR LIABILITY

By Stephanie M. Wilson
STOOPS, DENIOUS, WILSON & MURRAY P.L.C.

A typical residential real estate purchase involves several parties, one of which is a home inspector. Many, if not most, buyers hire a home inspector to conduct an inspection of the property prior to close of escrow, and most buyers rely on the report generated by the home inspector for the condition of the property and ultimately whether they will proceed with the purchase of the property in its current condition. However, often after a buyer takes possession of the property, the buyer discovers problems with the physical condition of the property which were not disclosed by either the seller or by the home inspector in the home inspector's report. The question then becomes whether the home inspector is liable for any of the buyer's resulting damages based on the report prepared by the home inspector which did not disclose the physical defects.

In 2003, a new law was passed requiring home inspectors to be licensed. Although there have been no reported cases since that time regarding the effect of the new statute on home inspectors, this issue is currently being raised by many buyers and will likely be in Arizona courts in the near future. Recent cases in other states may shed some light on the direction Arizona courts will take on this issue.

I. EARLIER CASES.

One of the earlier cases addressing home inspector liability was Redding v. Tanner, 231 Ga. App. 250, 498 S.E. 2d 156 (1998). In that case, a homeowner sued a home inspector for negligence in the home inspector's report based on the allegation that the inspector missed cracks in the roof. The trial court granted summary judgment in favor of the home inspector based on the existence of a waiver of liability clause in the home inspector's report. The report stated in

pertinent part that the inspection and report “does not cover all aspects, even of structural conditions. Neither TLC Home Inspections nor the inspector shall be liable for mistakes, omissions, or errors in judgment.” The facts were that the buyers were present during the inspection and were aware that the inspector did not climb on the roof to inspect the roof but indicated to the buyers that he had binoculars and would use those to inspect the roof. The evidence established that the written report containing the waiver of liability clause was prepared after the inspection and after an oral report was given to the buyers regarding the inspection. The Court of Appeals found the inspector liable for negligence, stating that the buyers hired the inspector because of his expertise in inspecting homes and the buyers were entitled to rely upon the inspector to do that which was necessary to properly inspect the property.

In a more recent case, Herner v. Housemaster of America, Inc., 349 N.J. Super. 89, 793 A.2d 55 (2002), first time home buyers sued a home inspection company for violations of the consumer fraud statute. Although the legal question was whether the home inspection company violated the consumer fraud act, the facts dealt with the report provided to the buyers by the home inspection company. The evidence demonstrated that the home inspection company’s policy was to stress both positive and negative aspects of the property so a buyer would have little basis for canceling a sale or renegotiating a price. The Court found that the home inspection company failed to deliver what it represented to the buyers and what the buyers had a right to expect they would receive. The Court went on to hold that what buyers would want and generally and reasonably expect is an inspection and report which discloses the physical conditions of the property which could reasonably affect the health, safety and welfare of the owners and the report should reveal conditions which may be presently, or in the reasonably foreseeable future, cause the buyer substantial inconvenience or require costly maintenance expense.

These two cases have set some initial standards regarding inspector liability. The more

recent case, Carroll v. Bergen, 57 P.3d 1209 (Wyo. 2002) provides further guidance.

II. CARROLL v. BERGEN.

Case Facts. Thomas Bergen retained a real estate agent to help him find a home to purchase. Mr. Bergen made an offer on the home and the offer gave him the right to perform a home inspection of the property. After the offer was accepted, Mr. Bergen asked his real estate agent to arrange for the inspection. The real estate agent contacted and arranged for the inspection directly with Dale Carroll and agreed that Mr. Carroll would receive reimbursement for his fee and for mileage. The real estate agent was present for the inspection. After the inspection, Mr. Carroll provided a report advising Mr. Bergen of a cracked window and a leaky bathtub. Mr. Carroll wrote in his report that he found “the home to be structurally sound. . . . Roof supports strong, 12" log construction, caulked where necessary.” The real estate agent contacted Mr. Carroll to advise him that the roof was actually constructed out of insulated panels with log facing and Mr. Carroll thereafter amended his report so it was consistent with the real estate agent’s information. Mr. Carroll submitted the report to Mr. Bergen along with the bill for his services, which bill was never paid.

Mr. Bergen never spoke with Mr. Carroll prior to the inspection and did not provide him with any instructions. Mr. Bergen received the report, completed the purchase and moved into the house. Shortly after taking possession he began to notice problems with the property which were not reflected in Mr. Carroll’s report. Mr. Bergen contacted a builder to look at the property and the builder noted numerous problems with the property and estimated that the total costs of all repairs would not exceed \$15,000.00. Mr. Bergen brought a lawsuit against Mr. Carroll for breach of contract and the trial court awarded Mr. Bergen \$14,954.00, and Mr. Carroll appealed.

Inspector’s Arguments. Mr. Carroll first argued that no contract existed with the buyer because the buyer’s real estate agent made all of the arrangements for the inspection. The Supreme Court found that the real estate agent had the authority necessary to retain Mr. Carroll

on behalf of Mr. Bergen and the evidence demonstrated that Mr. Bergen did not dispute that he had given the real estate agent the authority to retain Mr. Carroll.

Mr. Carroll also argued that there was no consideration to support the contract with Mr. Bergen because Mr. Bergen never paid for the inspection. The Court discussed the necessary elements for a contract formation and held that Mr. Bergen's promise to pay Mr. Carroll's fees constituted sufficient consideration to support a contract between the parties. The Court also held that the language in Mr. Carroll's report demonstrated that he understood that he was retained to evaluate the structural soundness of the home.

Mr. Carroll's last argument was that Mr. Bergen failed to produce expert testimony in support of his damages. During the trial, Mr. Bergen called the builder who had looked at the home and estimated the total costs for repairs to testify as a lay witness about the costs of repairs. The builder, in addition to testifying about the costs of repairs, provided the only testimony relating to an industry standard for home inspections and construction.

Mr. Carroll objected to the testimony of the builder on the grounds that it constituted expert testimony and the builder's testimony had not been properly identified as expert testimony. The Court agreed and ruled his testimony inadmissible. Accordingly, with the builder's testimony inadmissible, since Mr. Bergen had submitted no other evidence of his damages, the Court reversed the trial court and sent the case back to the trial court for a new trial.

III. CONCLUSION.

What does this mean for a home inspector? It appears from these cases that if a buyer obtains an expert to testify as to the standards in the industry for home inspections and construction and the cost of any repairs, that a buyer may proceed with an action against a home inspector for repairs to a property for defects discovered after an inspector provides a report which does not disclose those problems with the property. In addition, a home inspector may face liability even if their report contains a disclaimer. Therefore, home inspectors need to be aware of this potential for liability when inspecting properties.