8-18-2017

Petrus Fam. Trust Dated May 1, 1991 v. Kirk Appellant's Brief Dckt. 44784

IN THE SUPREME COURT OF THE STATE OF IDAHO

PETRUS FAMILY TRUST DATED MAY 1, 1991 and EDMOND A. PETRUS, JR., individually and as Co-Trustee of the Petrus Family Trust dated May 1, 1991, Plaintiffs / Appellants v. CHRIS KIRK d/b/a KIRK ENTERPRISES, Defendant / Respondent	SUPREME COURT DOCKET NO. 0044784-2017 Valley County District Court Case No. 2014-71-C

APPELLANTS' OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District for Valley County
Honorable Judge Jason D. Scott, Presiding

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Plaintiffs and Appellants, PETRUS FAMILY TRUST DATED MAY 1, 1991, and EDMOND A. PETRUS, JR., individually and as Co-Trustee of the Petrus Family Trust dated May 1, 1991 (together, "Petrus"), submit this Opening Brief on appeal from the summary judgment entered against them in their construction defect lawsuit against Defendant and Respondent, CHRIS KIRK d/b/a/ KIRK ENTERPRISES ("Kirk").

I.

NATURE OF THE CASE

Kirk built a home under contract to Nancy Gentry-Boyd ("Gentry-Boyd"), completing construction in about August of 2005. Petrus bought that home almost seven years later, in April of 2012. A year and a half after that, in October of 2013, a contractor hired by Petrus to address a seemingly simple problem with a set of French doors, discovered latent defects in the property caused by poor construction.

Petrus sued Kirk, asserting a cause of action for breach of the implied warranty of habitability. However, the district court (Judge Jason D. Scott presiding) ruled that Petrus's claim was "a contract action, not a tort action," and was therefore governed by Idaho Code section 5-241(b) (accrual of contract claims), and section 5-217 (the four-year statute of limitations on contract actions). Applying that analysis, the district court deemed Petrus's claim to be untimely, and granted summary judgment in favor of Kirk.

In this appeal, Petrus presents an issue of first impression for this Court, namely, whether a cause of action for breach of the implied warranty of habitability sounds in contract or in tort. Petrus submits that the only logical answer is that it sounds in tort. That conclusion, Petrus explains below, is compelled by important public policies (like protecting homeowners from catastrophic damages caused by large-scale builders) and by evolving case law from this Court on the subject (particularly *Salmon Rivers Sportsman Camps v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975) ("*Salmon Rivers*") (holding that any claim that does not require privity of contract *must* sound in tort), and *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987) ("*Tusch*") (holding that a remote purchaser of a home can sue the builder for breach of the implied warranty, even absent privity of contract)).

Thus understood as a tort, Petrus asserts that his claim against Kirk was governed by Idaho Code section 5-241(a) (a six-year accrual statute of limitations for tort actions relating to real estate investment), and section 5-224 (a four-year statute of limitation where, like here, the plaintiff reasonably does not discover the latent defect before expiration of the six-year period), and should not have been dismissed. Accordingly, the order granting summary judgment should be reversed, and the case remanded to the district court for further proceedings on the merits.

II.

STATEMENT OF FACTS

The single legal issue presented by this case is framed by very few facts (as summarized above). They were presented thoroughly and fairly in the district court's Memorandum Decision and Order granting summary judgment, are undisputed, and are reprised here, very simply, as follows.[1]

Kirk built the home at issue under an oral contract with Gentry-Boyd. R. Vol. 1, p. 562. Construction began in June of 2004, and was completed in August of 2005. R. Vol. 1, p. 562.

Almost seven years later, in April of 2012, Petrus purchased the home from Gentry-Boyd. R. Vol. 1, p. 826. Petrus moved into the home in May or June of 2012. R. Vol. 1, p. 826. Soon thereafter, Petrus discovered that the French doors in the home were swollen with water, could not open or close properly, and could not be locked. R. Vol. 1, pp. 285-86, L. 116:1-119:4; 826.

A little more than a year after *that*, in October of 2013, a remediation contractor hired by Petrus to address the doors discovered extensive dry rot resulting from years of water intrusion facilitated by construction defects, and causing tens of thousands of dollars of damages. R. Vol. 1, p. 777.

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[1] The district court's order regarding Kirk also resolved issues concerning Gentry-Boyd (the builder), and Kevin Batchelor (Petrus's real estate agent). Neither Gentry-Boyd nor Batchelor are parties to this appeal, so this brief does not discuss any of the facts or law relevant to them.

III.

PROCEDURAL HISTORY

The procedural history of this case as it relates to Kirk is also relatively simple. As summarized below, it involved: (A) Petrus's complaint, (B) Kirk's motion for summary judgment, (C) the district court's order granting summary judgment; and (D) the district court's order denying reconsideration.

A. The Pleadings.

Petrus filed his original complaint in March of 2014, asserting multiple claims against Gentry-Boyd (not relevant here). R. Vol. 1, p. 15.

In September of 2014, Petrus filed a first amended complaint, adding Kirk as a party, and asserting claims against him for breach of the implied warranty of habitability and conspiracy to defraud. R. Vol. 1, p. 28. In September of 2015, Petrus filed a second amended complaint—the operative complaint for purposes of this appeal—again asserting two claims against Kirk for breach of the implied warranty of habitability and conspiracy to defraud. R. Vol. 1, p. 71.

Kirk filed a general-denial answer to that complaint, which included the affirmative defense that Petrus's claims were "barred by the applicable statute of limitations under 5-216, 5-218, 5-219, and 5-241, and other governing laws of the state of Idaho." R. Vol. 1, pp. 91, 96.

B. Kirk's Motion for Summary Judgment.

Discovery ensued and, in May of 2016, Kirk filed a motion for summary judgment. R. Vol. 1, pp. 532 (motion); 535 (supporting memorandum); 561 (Kirk declaration); 112 (attorney declaration). In sum, as it relates to this appeal, Kirk argued that the cause of action against him for breach of the implied warranty of habitability was a *contract* claim, governed by the four-year statute of limitations set forth in Idaho Code section 5-217, and was therefore time barred. R. Vol. 1, pp. 551-53.

Petrus opposed Kirk's motion. R. Vol. 1, pp. 571 (opposition memorandum); 823 (Petrus declaration); 598 (attorney declaration); 769 (expert declaration, attesting to damage at Petrus's home); 775 (contractor declaration, attesting to discovery of the damage at Petrus's home). In sum, Petrus argued that his claim for breach of the implied warranty of habitability sounded in *tort*, that his claim did not accrue until he discovered the defects (in October of 2013), and, therefore, that his claim was timely under Idaho Code section 5-241(a) (the six-year accrual statute for torts) and section 5-224 (adding four more years for latent defects). R. Vol. 1, pp. 584-89.

Kirk filed reply papers, reiterating his central argument that Petrus's claim sounded in contract and was governed—and barred—by the four-year statute of limitations. R. Vol. 1, p. 907.

C. The District Court Order Granting Summary Judgment.

The district court heard oral argument on Kirk's motion on June 20, 2016. At that hearing, Petrus's counsel conceded that judgment should be entered in favor of Kirk on the conspiracy to commit fraud claim Tr. Vol. 1, pp. 7-8, the parties made their respective (and conflicting) arguments concerning the statutes of limitations applicable to Petrus's implied warranty claim (Tr. Vol. 1, pp. 71-75 (Petrus); 105-08 (Kirk)), and the district court ultimately took the matter "under advisement." Tr. Vol. 1, p. 112.

On July 7, 2016, the district court filed its Memorandum Decision and Order, reciting the relevant facts (as related above), and turning first to what it called Kirk's "frontline argument" regarding the statute of limitations. R. Vol. 1, pp. 967, 975. The district court fairly set forth the positions of both sides—turning fundamentally on whether the claim for breach of the implied warranty of habitability sounded in tort or in contract—and opined that "Kirk has the better half of the argument." R. Vol. 1, pp. 975-77.

Specifically, the district court concluded—based on "inferences" it drew from *Tusch*, "the 1987 case in which the Idaho Supreme Court extended to subsequent home purchasers the right to sue builders for breach of the implied warranty of habitability"—that: "Petrus's claim for breach of the implied warranty of habitability is a contract action, not a tort action." R. Vol. 1, p. 977. On that basis, the district court ruled: "Hence, Petrus's claim is subject to section 5-241(b)'s completion-of-construction accrual rule, and to

section 5-217's four-year limitations period. Under those statutes, the claim is time-barred. Kirk therefore is entitled to summary judgment . . . ." R. Vol. 1, p. 979.

On November 15, 2016, judgment was entered in favor of Kirk consistent with the order granting summary judgment. R. Vol. 1, p. 1003.

D. Petrus's Motion for Reconsideration.

On November 28, 2016, Petrus filed a motion for reconsideration, explaining that the district court's order conflicted with *Tusch*, and arguing that "the cause of action for breach of warranty cannot possibly accrue before the latent defect manifests itself." R. Vol. 1, pp. 1006 (motion); 1009 (supporting memorandum).

On December 5, 2016, the district court filed its Order Denying Motion for Reconsideration. R. Vol. 1, p. 1069. Again, the district court fairly framed the issue, but disagreed with Petrus, insisting that its approach to this unsettled question was "in keeping with *Tusch*." R. Vol. 1, p. 1071.

Petrus then filed a timely Notice of Appeal from the judgment in favor of Kirk (R. Vol. 1, p. 1092), and the "unsettled" legal issue framed in the district court regarding the fundamental nature of the claim for breach of the implied warranty of habitability is now squarely presented for de novo review by this Court.

IV.

STATEMENT OF APPEALABILITY

Petrus's appeal is from a final judgment of a district court in a civil action and is appealable pursuant to Idaho Appellate Rule 11 ("Appealable Judgments and Orders").

V.

ISSUES PRESENTED ON APPEAL

1. Whether, in the context of a lawsuit brought by a remote homebuyer against a home builder, a claim for breach of the implied warranty of habitability arises in tort or in contract.

2. Whether that claim for breach of the implied warranty of habitability is governed by statutes of limitations governing torts or governing contracts.

VI.

STANDARD OF REVIEW

In granting summary judgment in favor of Kirk based on its interpretation of the proper statute of limitations to apply to Petrus's claim, the district court was ruling as a matter of law. Accordingly, the district court's ruling should be reviewed *de novo*. *Hummer v. Evans*, 129 Idaho 274, 279, 923 P.2d 981, 986 (1996).

VII.

DISCUSSION

Here, Petrus first provides background confirming that claims for breach of the implied warranties were historically considered *tort* claims. Next, Petrus traces the Idaho case law that leads to the inescapable conclusion that breach of the implied warranty of habitability must logically be regarded as a tort claim.

Third, Petrus examines persuasive authority from other jurisdictions that expressly holds that such claims are governed by tort statutes of limitations. Finally, Petrus explains why summary judgment cannot be affirmed on the alternative basis (suggested by the district court) of the economic loss rule.

A. The History of Implied Warranties.

The historical origins of the claim for breach of the implied warranties does not control the present issue, but it is important background and helps inform the question of whether the claim is more akin to one sounding in tort or in contract.

As explained by Dean William L. Prosser, to whom this Court has frequently looked for clarity in this area (*see, e.g.*, *Salmon Rivers*, 97 Idaho at 311-12), "[t]he action for breach of warranty was originally on the case, sounding in tort and closely allied to deceit . . . ." Prosser, *The Assault on the*

Citadel, 69 Yale L.J. 1099, 1126 (1960) ("Prosser").

Prosser's deep analysis also confirms as "undisputed" the fact that "the original tort form of action . . . still survives to the present day, and may everywhere be maintained." *Id.* According to Prosser, this is not a "mere technical matter of procedure," as there are "many decisions which have held that the tort aspects of warranty permit the application of a tort rather than a contract rule, in such matters as the survival of actions, the statute of limitation, the measure of damages, or recovery for wrongful death." *Id.* (extensive citations omitted).

While warranties originally arose as a tort concept, Prosser explains that the theory was later grafted into the law of contracts, almost as an addendum to the express warranties that accompany the sale of many goods. *Id.* at 1100. That, in turn, led to the recognition of *implied* warranties—first of *title*, and later of *quality* and *habitability*—which provided the foundation for Justice Cardoza's seminal decision in *MacPherson v. Buick*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916), giving birth to the law of strict liability in tort. As Prosser explains it, "the old tort character has continued to color the substantive law of warranty itself," and "there are a great many cases . . . in which to say that the warranty is a term of the contract is 'to speak the language of pure fiction.'" Prosser, 69 Yale L.J. at 1127 (citation omitted). Prosser explains the point further like this:

> [O]nce the contract action was established, it came into such universal and almost exclusive use that, in the minds of nearly all courts and lawyers, warranty, whether express or implied, became definitely identified with the contract, and regarded as an integral and inseparable part of it. This attitude persists to such an extent that the theory of warranty, far from being an aid to the recognition of strict liability to the consumer, has proved in many jurisdictions to be an actual deterrent; and in all probability this has considerably delayed any change in the law. *Id.* at 1128.

Ultimately, Prosser observes that this hybrid concept of implied warranties has caused special confusion with respect to the *defenses* that ought to apply to any action upon those warranties. Specifically he mentions *contributory* negligence, but the same thoughts apply equally to the *statute of limitations* defense at the center of this case. Prosser asserts that "the confusion is merely part of the general murk which surrounds 'warranty,' and is another indication that that unhappy word is a source of trouble in this connection," that it "appears probable that ordinary rules applicable to the tort action will be carried over," and that "the assault upon the citadel of privity is proceeding in these days apace." *Id.* at 1147-48.

Prosser spoke to this issue almost 70 years ago. The revolution he predicted has been slow, and has advanced at different speeds in different jurisdictions; but it has been decided, with an ever-increasing number of jurisdictions now permitting claims for breach of the implied warranties by remote purchasers, even absent privity of contract. Consistent with that trend,

this case now presents this Court with the perfect opportunity to revisit an issue it last teased 30 years ago in *Tusch*, and to validate the compelling public policies that favor holding builders accountable to remote but hapless homeowners, for whom a poorly constructed home can mean financial ruin. In the end, Petrus asks this Court to rule expressly that a claim for breach of the implied warranty of habitability arises in tort, and is therefore governed by the applicable statutes of limitations governing tort actions.

B. Idaho Case Law Supports Petrus's Position.

1. *Tomita v. Johnson.*

Case law relevant to the issue presented in this appeal traces back to at least 1930 and the case of *Tomita v. Johnson*, 49 Idaho 643, 200 P. 395 (1930) ("*Tomita*"). In that case, an experienced tenant farmer purchased potato seeds from his landlord, knowing they were partly spoiled and mostly diseased. A poor crop resulted, and the tenants sued the seller, asserting a claim based on allegedly defective seeds. The district court entered judgment for the seller, and the tenant appealed.

This Court affirmed, finding that the tenant "was in no wise misled at the time of planting," and ruling that "under these facts he cannot recover crop damage resulting from planting the diseased seed in question." *Tomita*, 290 P. at 396. The Court explained that "[t]he substantive law applicable [to this case] is the law of warranty," that "there arises [in this situation] an implied

warranty that the seed is suitable for the purposes intended," and (of greatest importance here) that "the right of action in damages for breach of such warranty accrues at the time it is ascertained by the purchaser that the seed is not as represented." *Id.*

Precisely so, submits Petrus, just as his cause of action for breach of the implied warranty of habitability should not have accrued until it was ascertained by him, the subsequent purchaser, that the home was not fit for habitation.

2. *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft.*

Forty-five years later, in *Salmon Rivers*, this Court confronted squarely the anomalies inherent in implied warranties, this time in the context of a products liability action. In that case, the remote buyer of a Cessna airplane sued the manufacturer of the plane on an implied warranty theory to recover damages for only economic loss (cost of repair and loss of use) allegedly caused when the plane had mechanical failure and crashed. The district court granted summary judgment in favor of the defendants on the basis of lack of privity, the buyer appealed, and this Court ultimately *affirmed.*

The analysis began with the observation that "[t]he role of privity in products liability actions remains an unsettled legal issue," and that the "action varies in fortune depending upon the type of recovery sought, the legal basis upon which the desired recovery is grounded, and the applicable statute of limitations." *Salmon Rivers*, 544 P.2d at 309. That said, this Court made

clear that the only issue before it presently was "whether a plaintiff may maintain an action against a manufacturer, with which it is not in privity of contract, to recover economic loss on the ground of breach of implied warranty within the contract statute of limitations [Idaho Code section 5-217]." *Id.* at 310.

To answer that question, the Court alluded again to "the dual character of an action for breach of implied warranty as it has developed in American jurisprudence," and quoted Prosser for his observation that "consideration of an action grounded in breach of implied warranty can become complicated 'by the peculiar and uncertain nature and character of warranty, a *freak hybrid born of the illicit intercourse of tort and contract.*'" *Id.* at 311 (citing Prosser, 69 Yale L.J. at 1124-36). The Court cited further to Prosser for the propositions that "[j]udicial utilization of the contract concept of warranty should not camouflage the fact that the courts employed the concept to permit a recovery in tort," and that "a plaintiff generally may base an action for breach of warranty on either tort or contract." *Id.* at 311 (quoting Prosser, 69 Yale L.J. at 1126-27).

Still, having noted the ambiguity, the Court then switched perspectives and looked to "courts and commentators" (in particular back to Prosser) for the conclusion that privity of contract "is required in a contract action to recover economic loss for breach of implied warranty." *Id.* at 312. According to the Court: "This conclusion primarily is founded upon a commercial nature

of such an action and upon the legal principle that a contract, even including its implied terms only arises from an agreement between two or more parties." *Id.* That conclusion also found support in "previous decisions of this Court in products liability actions to recover economic loss." *Id.* (citations omitted).

In the process, however—and of particular importance to understanding the evolution of this issue and the essence of Petrus's present appeal—the Court quoted Prosser again for the proposition that, where there *is* no privity, "liability to the consumer *must be in tort and not in contract.*" *Id.* (emphasis added). And, although the Court made clear that "this case is not appropriate for deciding whether the statute of limitations . . . begins to run at the date of sale or at the date of discovery of the defect," it recognized its own previous ruling on that subject in *Tomita*, which, it said, "suggests a conclusion contrary to that for which the respondents argue" (that is, that the statute should not accrue until the particular defect is discovered).

3. *Tusch Enterprises v. Coffin*: The Majority Opinion

A dozen years after it decided *Salmon Rivers,* the Court returned to this implied warranty puzzle in *Tusch*, a case with facts that closely parallel Petrus's case.

In *Tusch*, the plaintiff (Tusch) purchased several residential duplexes, and later discovered they suffered from "major structural infirmities." *Id.* at 1023. Tusch sued the seller and the builder for negligence, misrepresentation,

breach of express warranty, and breach of implied warranty, in each instance claiming only economic loss in the form of lost rental income and property damage. The district court granted summary judgment on all claims (*id.* at 1025); Tusch appealed; and this Court affirmed in part (as to the negligence and express warranty claims), and reversed in part (as to the misrepresentation and breach of implied warranty claims).

With respect to Tusch's breach of implied warranty claim, the Court first considered the relevance of *disclaimers* and observed that "[b]ecause the implied warranty of habitability is a creature of public policy, public policy indicates that it be waived only with difficulty." *Id.* at 1031. Since the implied warranties were *not* adequately waived, the Court turned to Tusch's implied warranty claim against the seller, and cited its decision in *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966), which confirmed that "when builder-vendors sell newly constructed buildings there is an implied warranty that the building will be habitable." *Id.* at 1032.

Most importantly for present purposes, the Court wrote at length about its own rejection of the doctrine of *caveat emptor*—a *contract* concept—"as applied to the sale of new houses." *Id.* Observing that its view was "consistent with the vast weight of authority," the Court stated that the "trend away from the doctrine of *caveat emptor* in transactions of this nature is rooted in considerations of public policy." Quoting from a Wyoming case on the subject, the Court commented as follows:

> The mores of the day have changed and the ordinary home buyer is not in a position to discover hidden defects in a structure. A home buyer should be able to place reliance on the builder or developer who sells him a new home, the purchase of which in so many instances, is the largest single purchase a family makes in a lifetime. Courts will judicially protect the victims of shoddy workmanship. Consumer protection demands that those who buy homes are entitled to rely on the skill of the builder and that the house is constructed so as to be reasonably fit for its intended use. The average purchaser is without adequate knowledge or opportunity to make a meaningful inspection of the component parts of residential structure. *Id.* at 1032 (quoting *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735 (Wyo. 1979)).

The Court also looked to Richard Posner (the eminent University of Chicago law and economics professor, now Judge on the Seventh Circuit Court of Appeals) to make the point that "economic policy considerations come into play as well." *Id.* Thus, the Court expressed agreement with the propositions that builder-vendors have "superior knowledge, skill, and experience in the construction of houses," are "generally better-positioned than the purchaser to know whether a house is suitable for habitation," are "better-positioned to evaluate and guard against the financial risk" posed by latent defects, and are better able "to absorb and spread across the market of home purchasers the loss therefrom." *Id.* at 1033 (quoting R. Posner, *Economic Analysis of Law* (2d ed. 1977)).

The Court then noted the "growing trend among other jurisdictions" to "extend the implied warranty of habitability to subsequent purchasers." *Id.*

Citing to consistent authority from Wyoming, New Jersey, Indiana, Arkansas, Oklahoma, Mississippi, and Texas, the Court quoted at length from yet another case, this one from the Arizona Supreme Court:

> The same policy considerations that lead to [our adoption of the implied warranty of habitability for sales of new homes]—that house-building is frequently undertaken on a large scale, that builders hold themselves out as skilled in the profession, that modern construction is complex and regulated by many governmental codes, and that homebuyers are generally not skilled or knowledgeable in construction, plumbing, or electrical requirements and practices—are equally applicable to subsequent homebuyers.
>
> Also, we note that the character of our society is such that people and families are increasingly mobile. Home builders should anticipate that the houses they construct will eventually, and perhaps frequently, change ownership. The effect of latent defects will be just as catastrophic on a subsequent owner as on an original buyer and the builder will be just as unable to justify improper or substandard work.
>
> Because the builder-vendor is in a better position than a subsequent owner to prevent occurrence of major problems, the cost of poor workmanship should be his to bear. *Id.* at 1034 (quoting *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 678 P.2d 427 (1984)) (paragraphing added).

Based on that logic, the Court "adopted the reasoning of these courts," with the single proviso that this "extension of liability" is "limited to latent defects, not discoverable by a subsequent purchaser's responsible inspection, manifesting themselves after the purchase." *Id.* at 1035 (quoting *Barnes v. Mac Brown & Co.*, 264 Ind. 277, 342 N.E.2d 619 (1976)). And thus, the

Court held, "subsequent purchasers of residential dwellings, who suffer purely economic losses from latent defects . . . may maintain an action against the builder . . . of the dwelling based upon the implied warranty of habitability despite the fact that no privity of contract exists between the two." *Id.* at 1035-36.

The Court concluded that any other holding would "lead to an absurd result," explaining as follows:

> For example, suppose an unscrupulous builder constructed a home of inferior quality and sold it to another. Suppose further, that for whatever reason, the buyer after three months sold the home to a second purchaser. And one month later the foundation of the house split apart rendering the home valueless. Should the common law deny the subsequent purchaser a remedy against the builder merely because there is no privity of contract and because the damages happen to be purely economic, when it was the conduct of the builder which created the latent defect in the first place? *Id.* at 1036.

With that, the Court held it was error to grant summary judgment in favor of the builder on Tusch's implied warranty of merchantability claim and remanded the case for further proceedings, exactly as Petrus is asking the Court to do in his case.

4. *Tusch:* The Additional Opinions on Point.

In addition to the majority opinion in *Tusch* (by Justice Donaldson), Justice Bistline, for himself and Justice Huntley, wrote a separate concurring opinion to note that *Salmon Rivers* had actually been overruled previously in

State v. Mitchell Construction Co., 108 Idaho 335, 699 P.2d 1349 (1984). But putting aside the "anomalies" Justice Bistline alluded to regarding the reporting of the *Mitchell* case, the important point here is that, even before *Tusch*, this Court was already moving in the direction of providing more protection for consumers who suffer economic loss like those incurred by Petrus.

Justice Bakes also wrote a separate opinion in *Tusch*, concurring in part and dissenting in part, calling it a "sheer contradiction" for the Court "to hold that a subsequent buyer has a cause of action against a builder 'upon the implied warranty of habitability' and then state that no privity of contract need exist between the two." *Id.* at 52. In the view of Justice Bakes, "the Court's action today is not based upon the well established and understood cause of action in contract for breach of implied warranty, but has created a new cause of action in tort." *Id.* And that, Justice Bakes warned, "will result in a great deal of uncertainty" because:

> The Court's opinion does not define what is required to establish a *prima facie* case under its new cause of action, or what the applicable burden of proof should be. The opinion is silent as to whether tort or contract statutes of limitations will apply in fact suggesting that may be neither would be applicable, but that some other "reasonable time" period might be. A limitations period which commences only upon the appearance of "latent defenses manifesting themselves within a reasonable time" will prove to be the most elusive part of the Court's opinion today. *Id.*

Justice Shepherd also wrote a dissenting opinion in *Tusch*, rebuking the Court for "continu[ing] its recent trend in creating new causes of action where none had previously existed," and stating he would "decline to extend the doctrine of implied warranty of habitability to the circumstances of the instant case." *Id.* at 54.

In sum, it has been 30 years since this Court broke new ground and definitively ruled—based primarily on reasons of public policy—that a remote purchaser of a home can maintain a cause of action against the builder based on the implied warranty of habitability, even without privity of contract. This case now presents the Court with the opportunity to make express what logic and the law both compel, that this "new" cause of action is one that arises in tort, and one that must, therefore, be governed by tort statutes of limitations.[2]

5. Post-*Tusch* Case Law Confirms Its Central Ruling.

Since deciding *Tusch* in 1987, this Court has returned periodically to the unique issues raised by implied warranty claims (particularly whether they arise in tort or contract, and whether they are governed by the economic loss

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[2] In this respect, the Court is referred to *Bishop v. Owens* 152 Idaho 616, 272 P.3d 1247 (2012), which includes an informative discussion concerning the hybrid character of a claim for professional malpractice, depending on the context of the exact claim asserted. Of particular interest here, note that the Court observed that "professional malpractice actions traditionally have been characterized as tort actions in the context of the statute of limitations."

rule. *See, e.g., Ramerth v. Hart*, 133 Idaho 194, 983 P.2d 848 (1999) ("*Ramerth*"); *Employers Mutual Casualty Company v. Donnelly*, 154 Idaho 499, 300 P.3d 31 (2013) ("*Employers Mutual*"); *American West Enterprises, Inc. v. CNH, LLC*, 155 Idaho 746, 316 P.3d 662 (2013) ("*American West*").

The upshot of those cases is that the Court has *not* overruled the general rule established by *Salmon River*, and that privity of contract is still required in most implied warranty contexts (dealing with ordinary product defects, commercial transactions, and "services" cases). But the cases also all show fidelity to the holding in *Tusch*, and acknowledge implicitly that the same rules do *not* apply the context of homeowners and the implied warranty of habitability. For instance, in *Ramerth,* the Court validated the *Salmon Rivers* holding; but it also cited favorably to *Tusch*, recognized that *Tusch* was "not a goods case," and expressly acknowledged that "there may be cases where the plaintiff may be unfairly prejudiced by the operation of the economic loss rule in combination with the privity requirement articulated in *Salmon Rivers*. Given such a case, further relaxation of *Salmon Rivers* may be justified." *Id.* at 198.

In *Employers Mutual*, the Court confronted whether damages awarded by a jury on a breach of the implied warranty of workmanship claim arising out of a construction contract were more in the nature of contract damages or tort damages (important for insurance purposes). The Court stated that the "key determination" is whether the duty is based upon a contractual promise

or if the duty can be maintained without the contract. *Employers Mutual*, 154 Idaho at 505. The Court observed that the jury found that the breach "occurred with regard to [the contractor's] performance under the remodeling contract," and noted that that there was "no duty beyond the contractual promise between [the contractor and the plaintiff]." Accordingly the court found the damages to be *contract* damages (and hence not covered by the insurance policy at issue). Here, Petrus's case—for breach of the implied warranty of habitability—did *not* arise by contract.

In *American West*, the Court revisited this string of cases (including *Salmon Rivers*, *Tusch*, and *Ramerth*) in the context of an ordinary commercial case to recover the cost of a tractor engine. The trial court dismissed the plaintiff's claim based on the implied warranty of merchantability because there was no privity between the buyer and the defendant, and this Court affirmed on that claim. In the process, the Court reprised again its own ruling in *Salmon Rivers*, noted that that case "narrowly considered the type of action involved [a products case]," and "limited its ruling" to cases involving "an action against a manufacturer." However, the Court alluded again to the "complicated nature of warranty cases as a hybrid creature of contract and tort," and noted that the outcome in *Salmon Rivers* "was based primarily on the commercial nature of the action and on the principle that the implied terms of a warranty can only arise from an agreement between two or more parties." *Id.* at 750. The Court also noted expressly that "privity of contract is required

in a contract action to recover economic loss for breach of implied warranty, potentially unless the application of this rule would have the effect of unfairly prejudicing the plaintiff." *Id.*

Petrus's points here are simple. Privity of contract may still be required to recover economic loss in most breach of implied warranty cases; but the implied warranty of habitability is unique, and exists between a buyer and even a remote seller *as a matter of law*, apart from contract, as a matter of compelling public policies. In sum, this is "that case"—anticipated more than 40 years ago in *Salmon Rivers,* but alluded to again as recently as 2013 in *American West*—where a plaintiff has been "unfairly prejudiced by the operation of the economic loss rule in combination with the privity requirement," or where "application of [the privity rule] would have the effect of unfairly prejudicing the plaintiff." This, then, is the case where this Court should revisit this important area of law, and should rule expressly not just that a claim for breach of the implied warranty of habitability arises in *tort*, but that it logically then is governed by tort statutes of limitations.

C. Persuasive Authority from Other Jurisdictions Supports Petrus.

In each of the cases discussed above, this Court has considered persuasive authority from other jurisdictions to inform its own analysis in this evolving area of the law. In that spirit, Petrus examines several cases from other jurisdictions that have ruled—consistent with his theory of this case—

not only that the implied warranty of habitability is a tort, but also that it is governed by tort statutes of limitations.

For instance, in *Richman v. Watel*, 565 S.W.2d 101 (Tex. 1978), plaintiff sued the builder of a new home for breach of the implied warranty o habitability when the floor in the front part of his home collapsed. The trial court granted summary judgment in favor of the builder on the basis of the four-year contract statute of limitations; but a Texas Court of Civil Appeals reversed, ruling that: "The breach of the implied warranty of fitness arising from the construction and sale of a new house is considered to be a tort rather than a contract concept," and ruling further that the limitation "commences on the breach of implied warranty when the buyer discovers or should discover the injury." *Id.* at 102 (citing *Humber v. Morton*, 426 S.W.2d 554 (1968)). In language that should apply equally to the dry rot and water intrusion that damaged Petrus's home, the Court explained:

> The failure of defendant to properly vent the foundation did not give rise to a cause of action at the time, thus plaintiffs' cause of action accrues and the statute of limitations begins to run when damages are sustained, here when the floor collapsed. *Id.* at 103.

In Texas, the law in this area is settled beyond dispute. For example, in *Gibson v. John D. Campbell and Co.*, 624 S.W.2d 728 (Tex. App. 1981), an owner brought an action against a builder for breach of the implied warranty of habitability, the trial court granted summary judgment in favor of the

builder, and the owner appealed. The issue on appeal was whether the evidence was sufficient to resolve *when* the owner should have realized the alleged defect, but the Court began its opinion by observing: "Both parties agree that the statute of limitations governing breach of implied warranty of habitability begins to run when the buyer discovers or would have discovered the injury." *Id.* at 731 (citing *Richman*, 565 S.W.2d at 102).

Similarly, in *Swaw v. Ortell*, 137 Ill.App.3d 60, 484 N.E.2d 780 (1984), the buyers of a house sued the builder, alleging the house was not habitable. The trial court dismissed the buyer's second amended complaint, but the appellate court reversed in part. With respect to the buyer's claim for breach of the implied warranty of habitability, the Court ruled:

> The applicable statute of limitations is the 5 years provided in section 15 of the Limitations Act for actions to recover damages for an injury done to property, real or personal. The accrual of a cause of action starts the limitations clock. Under the discovery rule, a cause of action does not accrue until a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused. The discovery rule applies to actions against contractors for failure to construct or design a building properly. *Id.* at 70 (citations omitted).

In sum, Petrus knows that Idaho is sovereign, that authority from out-of-state does not control, and that Idaho law must evolve at its own speed and in its own direction. Still, Petrus suggests that the logic of the four cases discussed above is compelling, and strongly supports his argument here. That

is, the claim for breach of implied warranty, at least as to a remote purchaser, cannot possibly be a *contract* claim because there is no privity between the buyer and the seller. Rather, the claim exists in the first place because it serves larger public policy goals, and it is, in that respect, a *tort*. And a tort, Petrus submits, must logically be governed by the statutes of limitations that govern torts.

D. The Economic Loss Rule Does Not Support Summary Judgment.

Kirk's motion for summary judgment was based primarily on the statute of limitations argument discussed above. R. Vol. 1, pp. 551-53. As explained, the district court agreed, ruling that "Petrus's claim is subject to section 5-241(b)'s completion-of-construction accrual and to section 5-217's four-year [contract] limitations period." R. Vol. 1, p. 979. However, the district court added a single-sentence, sua-sponte footnote after that, stating: "If that claim sounded in tort, it seemingly would be analogous to a claim for negligent construction," and "would be barred by the 'economic loss rule' in any event." R. Vol. 1, p. 979. *See also* R. Vol. 1, pp. 1073-74 (where the district court reiterated that conclusion in denying Petrus's motion for reconsideration). That off-hand statement, however, cannot possibly justify affirming the summary judgment in favor of Kirk at this stage of the proceedings.

First, the district court's comments conflict directly with *Tusch*, which held specifically that "subsequent purchasers of residential dwellings, who suffer purely economic losses from latent defects manifesting themselves within a reasonable time, may maintain an action against the builder . . . of the dwelling based upon the implied warranty of habitability despite the fact that no privity of contract exists between the two." *Tusch*, 113 Idaho at 50-51. The *Tusch* Court explained that conclusion with this rhetorical question (quoted previously, at p. 22): "Should the common law deny the subsequent purchaser a remedy against the builder merely because there is no privity of contract and because the damages happen to be purely economic, when it was the conduct of the builder which created the latent defect in the first place?" *Id.* at 51. The answer was *no* there, and it should be *no* here.

Even if *Tusch* were not so clear, Kirk never raised the economic loss rule in his motion for summary judgment below, and neither the facts nor the law on this theory were developed sufficiently to permit the district court to rule upon it. Specifically, there was no evidence before the trial court confirming exactly what the nature or scope of Petrus's damages were. And, as Petrus explained in his motion seeking reconsideration, the economic loss rule is not *absolute* in any event.

For instance, case law recognizes that the economic loss rule does not apply where there is a "special relationship" between the parties. *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300, 108 P.3d 996, 1000 (2005)

("*Blahd*"). As explained in *Blahd*, that term "refers to those situations where the relationship . . . is such that it would be equitable to impose such a duty . . . ." *Id.* at 301. And, while that exception has been interpreted narrowly in the past, it should be now deemed to apply here, particularly in light of *Tusch* (which was based entirely on the equities, and which found the duties inherent in the implied warranties to run from a home builder directly to a subsequent purchaser). The exception precisely fits the pattern of the case law identified in *Blahd*, given that builders (like Kirk) are "professionals or quasi-professionals," and "hold themselves out to the public as having expertise regarding a specialized function." *Id.*

The Court in *Blahd* also recognized an exception for "unique circumstances requiring a different allocation of risk." *Id.* at 302 (citing *Just's Inc. v. Arrington Construction Co.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978)). And in *Brian & Christie, Inc. v. Leishman Electric, Inc.*, 150 Idaho 22, 28, 244 P.3d 166, 172 (2010), the Court identified an exception for torts arising where economic loss exists but is parasitic to property damage or personal injury (issues that Petrus never had the opportunity to present facts on or to brief in the district court, given that Kirk's motion did not raise this issue at all).

Ultimately, in this appeal, Petrus asks the Court to reexamine a large body of case law dealing with the devastating issues confronting buyers who conduct responsible home inspections, but later face financial ruin due to the

negligent conduct of mass builders who cut corners and construct homes with latent defects, certain to manifest down the road. That, Petrus submits, creates a "special relationship," and illustrates the sort of "unique circumstances requiring a different allocation of risk" that should render the economic loss rule inapplicable here. In the end, it would be utterly inconsistent for *Tusch* to expressly permit a remote homeowner to maintain a claim for breach of the implied warranty of habitability—necessarily in tort, because there is not privity with the builder—but then to dismiss the claim because the buyer has only economic loss.

E. Public Policy Supports Petrus's Right to Recover.

Decades before it decided *Tusch*, this Court recognized the particular public policies that come to bear in the context of home buyers and home builders. For instance, in *Bethlahmy*, the Court recognized the "trend in judicial opinions to invoke the doctrine of implied warranty of fitness in cases involving sales of new houses by the builder." *Id.* at 67. According to the Court:

> 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 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.

In *Tusch*, the Court referred favorably to *Bethlahmy*, and quoted extensively from *Moxley*, 600 P.2d at 735, to make these points:

> The mores of the day have changed and the ordinary home buyer is not in a position to discover hidden defects in a structure. A home buyer should be able to place reliance on the builder or developer who sells him a new home, the purchase of which in so many instances, is the largest single purchase a family makes in a lifetime. Courts will judicially protect the victims of shoddy workmanship. Consumer protection demands that those who buy homes are entitled to rely on the skill of the builder and that the house is constructed so as to be reasonably fit for its intended use. The average purchaser is without adequate knowledge or opportunity to make a meaningful inspection of the component parts of a residential structure. *Id.* at 735, footnote omitted.

The opinion in *Tusch* also noted that, in this context, "economic policy considerations come into play as well." *Tusch*, 113 Idaho at 47-48. Looking again to Prosser, the Court considered that home builders have "superior knowledge, skill, and experience in the construction of houses," that they are "generally better positioned than the purchaser to know whether a house is suitable for habitation," and that they are "better positioned to evaluate and guard against the financial risk posed by [latent defects], and to absorb and spread across the market of home purchasers the loss therefrom." *Id.* at 48.

In the end, this case illustrates perfectly the concern raised by this Court in *Tusch* when it posed the rhetorical question of whether the common law should deny the subsequent purchaser (here, Petrus) a remedy against the builder (Kirk) "merely because there is no privity of contract and because the

damages happen to be purely economic, when it was the conduct of the builder which created the latent defect in the first place." *Tusch*, 113 Idaho at 51. The answer is, it should *not*. Home builders owe purchasers *and* subsequent purchasers an implied duty that the homes they build are habitable. Public policy then demands that any claim for *breach* of that duty cannot possibly begin to run until the breach manifests itself and is either known or should reasonably be known to the home buyer.

Here, the effect of the district court's ruling is that the statute of limitations on Petrus's claim against Kirk had already expired before Petrus even bought the house. That makes no sense at all, and the result does not serve the indicated public policies of protecting homeowners and holding builders accountable. The district court's ruling on summary judgment does not withstand scrutiny, and cannot be allowed to stand.

VIII.

CONCLUSION

Petrus, of course, had no contract with Kirk; he was not in privity with Kirk; and his action against Kirk should not be misconstrued to be based on contract. It is not. It is based on a warranty, implied by law, and enforced by courts as a matter of public policy. It is intellectually inaccurate, then, to treat the claim as one arising in *contract*, or to restrict it by any defenses—statutes of limitations included—intended to apply to contract actions.

For those and all the reasons stated, above, Petrus respectfully submits that the district court erred as a matter of law in ruling that his claim for breach of the implied warranty of habitability was governed by the statute that controls actions on a contract, rather than those that control actions on a tort. The ruling of the district court should be reversed, and the matter remanded for further proceedings on the merits.

Dated: August 18, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August, 2017, I served true and correct copies of the foregoing **APPELLANTS' OPENING BRIEF** upon each of the following individuals in the manner indicated below:

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