262VA673

SUPREME COURT OF VIRGINIA
RECEIVED
MAY 23 2001
RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND

Record No. 003042

VAUGHN, INC.,

Appellant,

– v. –

HOWARD J. BECK, JR. et al.,

Appellees.

JOINT APPENDIX

Monica L. Taylor
GENTRY, LOCKE, RAKES & MOORE
P.O. Box 40013
Roanoke, Virginia 24022-0013
(540) 983-9405

Counsel for Appellees

EDWARD A. NATT
OSTERHOUDT, PRILLAMAN, NATT, HELSCHER, YOST, MAXWELL & FERGUSON, PLC
1919 Electric Road, SW, Suite 1
Roanoke, Virginia 24018
(540) 989-0000

Counsel for Appellant

Lawyers Printing & Research 800-275-0668 Counsel Press LLC 888-277-3259

TABLE OF CONTENTS

Appendix Page

Motion for Judgment filed December 7, 1998 1

Motion to Dismiss and Response to Motion for Judgment filed February 22, 2000 4

Opinion of court entered July 17, 2000 8

Order entered July 21, 2000 with attachment 10

Order entered August 8, 2000 14

Motion for Reconsideration filed August 16, 2000 16

Court Opinion Denying Motion to Reconsider Deleted Because not Relevant to Proceedings 18

Trial Transcript before the Honorable J. Howe Brown, Jr. held September 15, 2000 19

Testimony of Lauren Beck
Direct 21
Cross 26

Testimony of Howard Beck
Direct 28
Cross 37

Final Judgment Order entered October 2, 2000 40

Notice of Appeal filed October 30, 2000 43

Assignment of Error 45

VIRGINIA:

IN THE CIRCUIT COURT OF ROANOKE COUNTY

HOWARD J. BECK, JR. and LAUREN S. BECK, Plaintiffs v. DAVID VAUGHN, DAVID VAUGHN, t/a Dominion Builders and VAUGHN, INC., Defendants	)	MOTION FOR JUDGMENT

Come now the plaintiffs, Howard J. Beck, Jr. and Lauren S. Beck, by counsel, and file this their Motion for Judgment against the defendants, on the following grounds:

1. By contract dated February 18, 1996, the plaintiffs agreed to purchase from the defendants certain land and all improvements thereupon, including a house and a water well, identified as Lot 20 of Autumn Park, on Autumn Park Drive, in Roanoke County, Virginia.

2. The defendants, in the contract, agreed to finish the home in a turn-key fashion, and warranted the improvements to the property against defects in materials and workmanship.

3. In addition to the warranties of the defendants set forth in the contract, the defendants are deemed in law, under § 55-70.1 of the Code of Virginia, to have made certain additional warranties, including that the dwelling and all of its fixtures is sufficiently free from structural defects so as to pass without

LAW OFFICES
NTRY LOOKE
KES & MOORE
ANOKE, VIRGINIA

5002\360\528334.1

Filed in the Clerks Office 7th day Dec 1998
Writ tax $ 5.00
L.L. 4.00
Clerk 50.00
Acct (123) 2.00
TTF (106) 3.00
Acct (206)
Total Pd. $ 64.00

Teste: Steven A. McGraw, Clerk
D.C.

objection in the trade; that the dwelling and all of its fixtures has been constructed in a workmanlike manner so as to pass without objection in the trade; and that the property is fit for habitation.

4. Because of the inadequate rate of flow of water from the well in question on the plaintiff's lot, which inadequacy has existed from the date the plaintiffs took possession of the property, and which resulted from the failure of the defendants, or others for whom they are liable, to drill, construct and prepare such well in a good and workmanlike manner, free from structural defects, the property is now unfit for habitation and will not pass without objection in the trade. Accordingly, the defendants have breached both their contractual obligations under the contract of February 18, 1996, and their statutory warranty obligations under § 55-70.1 of the Code of Virginia.

5. As a proximate cause of such breach of contractual and statutory warranty obligations by the defendants, the plaintiffs have incurred the expense of putting in a new well, in the approximate amount of $12,000.00, and related expenses for repair and replacement of areas of the yard and driveway damaged as a result of the installation of the new well, in the approximate amount of $3,000.00.

6. Accordingly, the plaintiffs move the Court for judgment against the defendants for $15,000.00 plus their costs and expenses incurred in prosecuting this action.

7. December 9, 1996 was the date of both the closing on the sale and possession of the property by the plaintiffs, and this action is brought within two years of that date.

8. The plaintiffs demand a trial by jury.

HOWARD J. BECK, JR. and
LAUREN S. BECK

By: _____
Of Counsel

J. Rudy Austin (VSB No. 3312)
GENTRY LOCKE RAKES & MOORE
800 Crestar Plaza
P.O. Box 40013
Roanoke, Virginia 24038-0013
(540) 983-9300

Counsel for Plaintiffs

VIRGINIA:

IN THE CIRCUIT COURT OF ROANOKE COUNTY

RECEIVED & FILED
2000 FEB 22 AM 8:00
CLERK - CIRCUIT COURT
ROANOKE COUNTY, VA

HOWARD J. BECK, JR. and LAUREN S. BECK Plaintiffs v. DAVID VAUGHN, DAVID VAUGHN, t/a Dominion Builders and VAUGHN, INC. Defendants	))))))))))))	**RESPONSE TO MOTION FOR JUDGMENT**

298-468

COME NOW your Defendants, David Vaughn, David Vaughn, t/a Dominion Builders and Vaughn, Inc., and would respond to the Motion for Judgment heretofore filed against them as follows:

MOTION TO DISMISS

1. Your Defendants, David Vaughn and David Vaughn, t/a Dominion Builders, by counsel, respectfully move the Court to be dismissed as parties to this proceeding as they are not the true parties in interest. The real estate was acquired from Vaughn, Inc. and Vaughn, Inc. was the owner of the property and performed the construction of the home. Dominion Builders is the trade name of Vaughn, Inc. Therefore, Vaughn, Inc. is the appropriate party Defendant.

RESPONSE

1. As to the allegations set forth in Paragraph 1 of the Motion for Judgment, the Defendants would admit that a Contract dated February 18, 1996, was signed by the

ERNDUDT, FERGUSON,
TT, AHERON & AGEE
ATTORNEYS-AT-LAW
ROANOKE, VIRGINIA
24018-1699

Plaintiffs and Dominion Builders by David Vaughn. The Contract was signed by David Vaughn on behalf of Dominion Builders, the trade name for Vaughn, Inc.

2. As to the allegations set forth in Paragraph 2 of the Motion for Judgment, the Defendants admit that the home is required by statutory warranty to be finished in a turn-key fashion and that the improvements were warranted against defects in materials and workmanship but deny that the Contract contains such language. The warranties given are the statutory warranties.

3. As to the allegations set forth in Paragraph 3 of the Motion for Judgment, the Defendants would admit that the warranty set forth in Section 55.70.1 applied to the construction of the home but deny that said warranty applies to the claim made by Plaintiffs in this case. Your Defendants would state that the language of Section 55.70.1 speaks for itself and is controlling as to the remaining allegations set forth in Paragraph 3.

4. As to the allegations set forth in Paragraph 4 of the Motion for Judgment, these Defendants are not advised as to the rate of flow of water from the well on the Plaintiffs' lot other than as is set forth in the tests conducted on the well in order to obtain the Certificate of Occupancy for the premises. Your Defendants deny that the rate of flow was inadequate at any point. Your Defendants deny that they failed to drill, construct and prepare the well in a good and workmanlike manner free from structural defects and further deny that the property is now unfit for habitation and will not pass without objection in the trade. Your Defendants further deny that they have breached any contractual obligations under the Contract of February 18, 1996, and further deny that there exists any statutory warranty obligations for the items set forth in the Motion for Judgment under Section 55.70.1 of the Code of Virginia.

TERHOUDT, FERGUSON,
ATT, AHERON & AGEE
ATTORNEYS-AT-LAW
ROANOKE, VIRGINIA
24018-1699

5. Your Defendants deny the allegations set forth in Paragraph 5 relating to the breach of contractual and statutory warranty obligations of the Defendants. The Defendants are not advised as to any expenses incurred by the Plaintiffs and call for strict proof of the same.

6. The allegations set forth in Paragraph 6 amount to a prayer for relief and, thus, the Defendants are not called to answer the same.

7. The allegations set forth in Paragraph 7 are admitted.

8. The allegations set forth in Paragraph 8 are not factual but are a request for a jury trial. Therefore, the Defendants are not required to answer the same.

9. All allegations not specifically admitted are denied.

AFFIRMATIVE DEFENSES

Your Defendants would raise the following affirmative defenses:

1. That the action brought herein is barred by the applicable statute of limitations.

2. That the claim of the Plaintiffs for breach of warranty for the well is not covered by the applicable warranty provisions of Section 55-70.1.

3. That your Plaintiffs failed to comply with the provisions of Section 55-70.1 within one year of occupancy of the premises or conveyance of title. None of the notices provided to Defendants within the one-year statutory period advised your Defendants of any alleged defects regarding the well.

WHEREFORE, your Defendants pray that this matter be dismissed together with their costs herein expended.

STERNHOUDT, FERGUSON, HATT, AHERON & AGEE
ATTORNEYS-AT-LAW
ROANOKE, VIRGINIA
24018-1699

DAVID VAUGHN,
DAVID VAUGHN, t/a Dominion Builders
and
VAUGHN, INC.

BY _____
Counsel

Edward A. Natt, Esq.
OSTERHOUDT, FERGUSON, NATT,
AHERON & AGEE, P.C.
1919 Electric Road, SW, Suite 1
Roanoke, VA 24018
Phone: (540) 774-1197
Fax: (540) 774-0961
VSB #1104
Counsel for Defendants

CERTIFICATE OF MAILING

The undersigned does hereby certify that a true and correct copy of the foregoing was mailed to J. Rudy Austin, Esquire, at Gentry, Locke, Rakes & Moore, 800 Crestar Plaza, P. O. Box 40013, Roanoke, Virginia 24038, this 18 day of February, 2000.

_____

carol\pleading\Vaughn Beck RESPONSE

STERHOUDT, FERGUSON,
NATT, AHERON & AGEE
ATTORNEYS-AT-LAW
ROANOKE, VIRGINIA
24018-1699

JUDGE J. HOWE BROWN, JR.
10404 Stratford Avenue
Fairfax, VA 22030

July 17, 2000

J. Rudy Austin, Esq.
Gentry Locke Rakes & Moore
P. O. Box 40012
Roanoke, VA 24022-0013

Edward A. Natt, Esq.
Osterhoudt, Ferguson, Natt, Agee & Kidd
P. O. Box 20068
Roanoke, VA 24018-0007

Re: Beck v. Vaughn, et al.
Roanoke County Circuit Court CL98-468

Dear Counsel:

Before the court for decision is the question of whether a homeowner must give notice to a builder of a breach of the statutory implied warranty under *Va. Code* § 55-70.01 as a condition to bringing an action for breach against the builder. I find no such requirement in the statute and decline to impose one.

Absent statute, in Virginia there is no implied warranty of workmanship or structural integrity in the sale of a new dwelling. In fact, *Va. Code* § 55-70.1 was enacted to provide such a warranty that the Supreme Court had declined to imply in *Bruce Farms v. Coupe*, 219 Va. 287, 247 S.E.2d 400 (1978). In accordance with rules of statutory construction, the Court looks to the plain meaning of the language of the statute. The statute does not require notice to the builder or vendor. In other statutes the legislature has required notice. See, e.g., *Va. Code* § 8.2-607(3). In other cases the express warranty requires notice by the buyer. See, e.g., *Bender-Miller Company, Inc. v. Thomwood Farms, Inc.*, 211 Va. 585, 179 S.E.2d 636 (1971); *Monroe v. Cowne*, 133 Va. 181, 112 S.E. 848 (1922). If notice of breach by the buyer is required in every case, there would be no reason for the legislature or the contractor to specify a notice provision in certain cases.

Defendant here relies on language in *Davis v. Tazewell Place Associates*, 254 Va. 257, 492, S.E.2d 162 (1997). That case did not raise a question whether notice had to be given; in fact, there was notice under those facts. The Court was dealing there with a question of when the two-year statute of limitations began to run. That is a separate issue. Defendant's reliance on cases from other jurisdictions is not well taken because here we are dealing with particular language in a Virginia statute.

Mr. Austin should prepare an order consistent with this ruling and consistent with the oral rulings previously made and submit it to Mr. Natt for approval as to form and then to the Court.

Very truly yours,

J. Howe Brown, Jr.
Judge Designate

TOTAL P.03

VIRGINIA:

IN THE CIRCUIT COURT OF ROANOKE COUNTY

HOWARD J. BECK, JR. and LAUREN S. BECK, Plaintiffs	)	Case No. CL98-468
v.	)	**ORDER**
DAVID VAUGHN, DAVID VAUGHN, t/a Dominion Builders and VAUGHN, INC., Defendants	)	

This day came the plaintiffs and the defendants, by counsel, for a pre-trial conference and for argument on the outstanding motions. As a result, it is ORDERED as follows:

1cc Austin Nott file 7-31-02

1. The motion of the plaintiffs to increase the *ad damnum* from $15,000 to $35,000 is granted. No further answer by the defendants will be necessary because of the increase in the *ad damnum* to $35,000.

2. The defendants' motion to dismiss some of the parties defendant is deferred to a later time because of the absence of evidence presently in the record in regard thereto.

3. The defendants' plea of the statute of limitations is overruled in view of the defendants' admission in their responsive pleading that plaintiffs' action was instituted within two years of the date of both the closing on the sale and the possession of the property by the plaintiffs.

4. The Court defers any ruling on the defendants' defense that a water well is not covered by the warranty provisions of § 55-70.1 of the Code of Virginia. Counsel for the parties are to exchange citations of the cases referred to by counsel during the hearing before the Court.

5. With regard to defendants' position that notice of any alleged breach of warranty under § 55-70.1 of the Code of Virginia is required by such Code Section to have been made

{W:\lin\5002\360\00710129.DOC}

within one year of occupancy of the premises or conveyance of title is taken under advisement by the Court, and the parties are to provide memoranda of authorities to the Court on or before July 17, 2000, by mailing such memoranda to The Honorable James Howe Brown, Jr., P.O. Box 11002, Blacksburg, Virginia 24062. In this regard, the plaintiffs concede that they gave no specific notice of the alleged breach of warranty regarding the water well to the defendants within one year of occupancy of the premises and conveyance of title.

Enter this 21 day of July, 2000.

Judge Designate

SEEN:

GENTRY LOCKE RAKES & MOORE

By: _____
J. Rudy Austin (VSB No. 3312)
P.O. Box 40013
Roanoke, Virginia 24022-0013
Of Counsel for the Plaintiffs
Tel. No: 540/983-9300
Fax No: 540/983-9400

OSTERHOUDT, FERGUSON, NATT & AGEE

By: _____
Edward A. Natt (VSB No. 1104)
1919 Electric Road, S.W., Suite 1
Roanoke, Virginia 24018
Of Counsel for Defendants
Tel. No: 540/774-1197
Fax No: 540/774-0961

{W:\li\5002\360\00710129.DOC}

JUDGE J. HOWE BROWN, JR.
10404 Stratford Avenue
Fairfax, VA 22030

July 17, 2000

J. Rudy Austin, Esq.
Gentry Locke Rakes & Moore
P. O. Box 40012
Roanoke, VA 24022-0013

Edward A. Natt, Esq.
Osterhoudt, Ferguson, Natt, Agee & Kidd
P. O. Box 20068
Roanoke, VA 24018-0007

Re: Beck v. Vaughn, et al.
Roanoke County Circuit Court CL98-468

Dear Counsel:

Before the court for decision is the question of whether a homeowner must give notice to a builder of a breach of the statutory implied warranty under *Va. Code* § 55-70.01 as a condition to bringing an action for breach against the builder. I find no such requirement in the statute and decline to impose one.

Absent statute, in Virginia there is no implied warranty of workmanship or structural integrity in the sale of a new dwelling. In fact, *Va. Code* § 55-70.1 was enacted to provide such a warranty that the Supreme Court had declined to imply in *Bruce Farms v. Coupe*, 219 Va. 287, 247 S.E.2d 400 (1978). In accordance with rules of statutory construction, the Court looks to the plain meaning of the language of the statute. The statute does not require notice to the builder or vendor. In other statutes the legislature has required notice. See, e.g., *Va. Code* § 8.2-607(3). In other cases the express warranty requires notice by the buyer. See, e.g., *Bender-Miller Company, Inc. v. Thomwood Farms, Inc.*, 211 Va. 585, 179 S.E.2d 636 (1971); *Monroe v. Cowne*, 133 Va. 181, 112 S.E. 848 (1922). If notice of breach by the buyer is required in every case, there would be no reason for the legislature or the contractor to specify a notice provision in certain cases.

Defendant here relies on language in *Davis v. Tazewell Place Associates*, 254 Va. 257, 492, S.E.2d 162 (1997). That case did not raise a question whether notice had to be given; in fact, there was notice under those facts. The Court was dealing there with a question of when the two-year statute of limitations began to run. That is a separate issue. Defendant's reliance on cases from other jurisdictions is not well taken because here we are dealing with particular language in a Virginia statute.

Attachment

Mr. Austin should prepare an order consistent with this ruling and consistent with the oral rulings previously made and submit it to Mr. Natt for approval as to form and then to the Court.

Very truly yours,

J. Howe Brown, Jr.
Judge Designate

TOTAL P.03

VIRGINIA:

IN THE CIRCUIT COURT OF ROANOKE COUNTY

HOWARD J. BECK, JR. and LAUREN S. BECK,	)	
Plaintiffs	)	Case No. CL98-468
v.	)	ORDER
DAVID VAUGHN, DAVID VAUGHN, t/a Dominion Builders and VAUGHN, INC.,	)	
Defendants	)	

The Court, having recently taken under advisement the question submitted to the Court by the parties for decision, as to whether a homeowner must give notice to a builder of a breach of the statutory implied warranty under Virginia Code § 55-70.1 as a condition to maintaining an action for breach against the builder, pending submission of memoranda of authorities by counsel for the plaintiffs and the defendants, respectively, has found no such requirement in the statute and declines to impose one.

cc: Justin Naft file 3/22/00

The Court's decision is set forth in the Court's July 17, 2000 letter to counsel, a copy of which is attached hereto and made a part hereof by reference.

Accordingly, it is ORDERED that the plaintiffs are not required to have given notice to the defendants of the alleged breach of the statutory implied warranty under Virginia Code § 55-70.1 as a condition to maintaining the present action. The defendants, by counsel, have duly objected to the Court's ruling herein.

The Clerk will forward a certified copy of this Order to each counsel of record.

{W:\lit\5002\360\00713290.DOC}

Enter this 8 day of August, 2000.

Judge Designate

We have seen and request the entry
of this Order:

GENTRY LOCKE RAKES & MOORE

By: _____
J. Rudy Austin (VSB No. 3312)
P.O. Box 40013
Roanoke, Virginia 24022-0013
Of Counsel for the Plaintiffs
Tel. No: 540/983-9300
Fax No: 540/983-9400

We have seen this Order and object
to its entry:

OSTERHOUDT, FERGUSON, NATT, AGEE & KIDD

By: _____
Edward A. Natt (VSB No. 1104)
1919 Electric Road, S.W., Suite 1
Roanoke, Virginia 24018
Of Counsel for the Defendants
Tel. No: 540/774-1197
Fax No: 540/774-0961

[W:\lit\5002\360\00713290.DOC]

VIRGINIA:

IN THE CIRCUIT COURT OF ROANOKE COUNTY

RECEIVED & FILED
2000 AUG 17 AM 10:53
CLERK, CIRCUIT COURT
ROANOKE COUNTY, VA

HOWARD J. BECK, JR. and LAUREN S. BECK Plaintiffs v. DAVID VAUGHN, DAVID VAUGHN, t/a Dominion Builders and VAUGHN, INC. Defendants	)	**MOTION FOR RECONSIDERATION**

COME NOW your Defendants, David Vaughn, David Vaughn, t/a Dominion Builders and Vaughn, Inc., and respectfully request the Court to reconsider its earlier decision set forth in an opinion dated July 17, 2000, in this matter.

DAVID VAUGHN,
DAVID VAUGHN, t/a Dominion Builders
and
VAUGHN, INC.

BY _____
Counsel

Edward A. Natt, Esq.
OSTERHOUDT, FERGUSON, NATT,
AGEE & KIDD, P.C.
1919 Electric Road, SW, Suite 1
Roanoke, VA 24018
Phone: (540) 774-1197 540 989 0000
Fax: (540) 774-0961
VSB #1104
Counsel for Defendants

OSTERHOUDT, FERGUSON,
NATT, AGEE & KIDD
ATTORNEYS-AT-LAW
ROANOKE, VIRGINIA
24018-1699

CERTIFICATE OF MAILING

The undersigned does hereby certify that a true and correct copy of the foregoing was mailed to J. Rudy Austin, Esquire, at Gentry, Locke, Rakes & Moore, 800 Crestar Plaza, P. O. Box 40013, Roanoke, Virginia 24038, this 16th day of August, 2000.

Edward A. Natt

ISTERHOUDT, FERGUSON,
NATT, AGEE & KIDD
ATTORNEYS-AT-LAW
ROANOKE, VIRGINIA
24018-1699

Court Opinion Denying Motion to Reconsider
Deleted Because Not Relevant to Proceedings

003042

VIRGINIA:

IN THE CIRCUIT COURT OF THE

COUNTY OF ROANOKE

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JAN 03 2001
RICHMOND, VIRGINIA

HOWARD J. BECK, JR. and LAUREN S. BECK, Plaintiffs vs DAVID VAUGHN, DAVID VAUGHN, t/a DOMINION BUILDERS and VAUGHN, INC. Defendant	CASE NO: CL98-468

ORIGINAL

SEPTEMBER 15, 2000
9:00 A.M.

HEARD BEFORE:

J. HOWE BROWN, JR.

CENTRAL VIRGINIA REPORTERS
P. O. BOX 12628
ROANOKE, VA 24027
(540) 380-5017

APPEARANCES:

GENTRY, LOCKE, RAKES & MOORE, ESQS.
Roanoke, Virginia
BY: J. RUDY AUSTIN, ESQ.

Counsel for the Plaintiff

OSTERHOUDT, FERGUSON, NATT, AHERON & AGEE, ESQS.
Roanoke, Virginia
BY: EDWARD A. NATT, ESQ.

Counsel for the Defendant.

I N D E X

FOR THE PLAINTIFF:

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Lauren Beck	4	22		
Howard Beck	33	51	61	
Larry W. Catron	62	76		
Michael Houchins	78	85		
Tye Davidson	86			
Robert Higgins	89	92		
Camillus Brennus Huggins V	93	116		180

Rests Page 126
Rebuttal Page 174

FOR THE DEFENDANT:

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
David Vaughn	130	137		
James McFadden	139	142		
Michael Vaught	143	164	173	182

Rests Page 172

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
Plaintiff's 1	House Contract	4
Plaintiff's 2	Invoice, Second Well	39
Plaintiff's 3	Invoice, Huggins' Firm	40
Plaintiff's 4	Invoice, Huggins' Firm	41
Plaintiff's 5	B & L Invoice	42
Plaintiff's 6	B & L Invoice	43
Plaintiff's 7	Invoice, Landscaping	44
Plaintiff's 8	Summary of Expenses	45
Defendant's 2	Punch List Letter	60

* * * * *

1 A To the side of our house we have a
2 very steep driveway going down; and right as you come
3 down the very steep part of the driveway, the well was
4 to the right up there, near the top of the hill,
5 fairly close to the street.
6 Q I know we are skipping ahead, but
7 where was the second well put in?
8 A The second well is way down at the
9 back of our property, down the entire hill at the
10 bottom of the swell. Right near the end of our lot at
11 the bottom.
12 Q Tell the Jury, if you will, when you
13 first experienced any problem with water, what kind of
14 problem you experienced and when that was.
15 A We experienced the first problem
16 within the first three weeks because the house had not
17 been power washed, the brick had not been power washed
18 after construction, and the power washing company came
19 out to do that. It was a Saturday, and while they
20 were doing that, we ran out of water; they ran out of
21 water to do that.
22 It was December 15th, I remember,
23 because it was my husband's birthday and we were
24 supposed to be having a party. We did not have any

1 water to shower with or cook with.
2 Q That was December 15, 1996?
3 A Yes.
4 Q Obviously, within the one of year
5 warranty?
6 A Yes.
7 Q Without going into each individual
8 instance, just tell the Jury what kinds of water
9 problems you had, if any.
10 A In our kitchen sink, for instance,
11 when you were washing dishes, we noticed very soon
12 that the water would very quickly trickle down to just
13 a very tiny trickle of water, not even enough to rinse
14 your plates very well. You really had to scrub and
15 kind of hold them there. So we started only doing a
16 few dishes at a time.
17 The same would happen when you
18 showered. You would try to shower very, very quickly
19 because you would get to a very small trickle of water
20 and it was very hard to rinse. Or we found if we got
21 wet and soaped up and then turned the water off and
22 you did the rest of your soaping, whatever you had to
23 do or shave, and then we would turn the water on to
24 try to rinse. You would try to do that so you could

1 get through the shower.
2 We had the incidence where we actually
3 did run out of water when I was showering. I was
4 getting ready for work, as Mr. Austin talked about in
5 his opening statement, and I was all soaped up and
6 ready, and I ran out of water and there was nothing to
7 rinse with. So I called my neighbors at six in the
8 morning and went over and showered in their house. I
9 since have gotten a key from one of my neighbors, so I
10 have showered there about half a dozen times since we
11 have lived in this house, when we absolutely just lost
12 all water.
13 The first summer we were there --
14 Q This would have been the summer of
15 1997; still within the twelve-month warranty period?
16 A Yes. We had just put in all this new
17 landscaping because none of it was there when we moved
18 in. We, of course, had been told to water every other
19 day, and when we tried to water with the sprinkler,
20 immediately the sprinkler just went "Shoosh," and went
21 all the way down. So we tried to water with a hose,
22 but then we would lose so much pressure. So we have
23 lost our landscaping every year, until finally this
24 past year when we had a lot of rain this summer. So

1 some of it has lived. So every year we have replaced
2 our landscaping and our grass and our azalea bushes
3 and those types of things because we are unable to
4 water at all, our lawn.
5 In terms of washing clothes, we have
6 washed clothes about every four to five days, only one
7 load. You can never do two loads in one day. You
8 have to really spread it out. And if you wash
9 clothes, you can't run a dishwasher on the same day
10 because you run out of water. So we have to be very
11 careful on when you are going to run the dishwasher
12 and when you are going to wash clothes.
13 When we have had company, my nephew
14 came for Thanksgiving with my brother's family, and he
15 ran out of water in the tub when he was trying to take
16 a tub. So we had to kind of just sponge off with
17 bottled water at that time for him. So we have had
18 different situations like that throughout the time we
19 have been there.
20 Q How many of those problems that you
21 have enumerated, doing laundry, taking baths, washing
22 dishes, or watering the landscaping, all the problems
23 that you have just gone through, how many of those
24 occurred during the first twelve months after you took

1 occupancy in December of 1996?
2 A By far the majority of them. I would
3 say ninety to ninety-five percent. It has gotten
4 better since we dug the second well. It is still in
5 no way the amount or flow of water that we had when we
6 lived in the city. And we have gone occasionally down
7 to insufficient water, even with the second well. But
8 it is much better than it was.
9 We still conserve a lot. We still
10 spread out our laundry. I never do two loads on one
11 day; and spread it out to every three or four days and
12 don't run the dish washer and washing machine the same
13 day. I think I am a little paranoid about it, but we
14 still have to do that.
15 Q When you realized that you were having
16 water problems, what did you do?
17 A The first time we talked to the window
18 washers about it, about why this had happened, and
19 they seemed to indicate it was just typical --
20 MR. NATT: I object, Your Honor. That
21 is hearsay.
22
23 BY MR. AUSTIN:
24 Q That is. I don't think that is fact

1 months. * * *

2 Q But now you just testified that you

3 had already come to the realization that there was a

4 problem with the water, right?

5 A Yes.

6 Q And that Mr. Vaughn was responsible,

7 right?

8 A In terms of the house being there,

9 yes.

10 Q And yet, even when you went ahead and

11 drilled the second well you did not bother to call him

12 at that time and say, "We've got a problem"?

13 A We did not want to use the same well

14 builder again because it had not worked the first

15 time.

16 Q Let me ask you just one or two more

17 questions. Right after you moved in, you said you had

18 had some problems and you called representatives of

19 Mr. Vaughn or Vaughn, Inc., to come out, and I think

20 you said that he had his people come out and do those

21 things?

22 A Not with the water.

23 Q Not with the water, I agree, because

24 you never called him about that?

1 A Yes; these were things like to
2 continue to finish painting the house or to put up
3 woodwork that had not been finished.
4 Q And they did all those things that you
5 asked him to do?
6 A Yes.
7 Q And he responded to all of those
8 things?
9 A Yes.
10 MR. NATT: Thank you. That is all
11 that I have.
12 THE COURT: Anything on redirect?
13 MR. AUSTIN: No, Your Honor.
14 THE COURT: You may step down, thank
15 you. Let's take a ten-minute recess.
16
17 (A recess was taken. Following the
18 recess the parties returned to the room and
19 the Proceeding continued.)
20
21 THE COURT: Mr. Natt, you want to tell
22 me what Defendant's One is for?
23 MR. NATT: Your Honor, I intended and
24 I introduced this so maybe I could get it in

1 DIRECT EXAMINATION

2

3 BY MR. AUSTIN:

4 Q You are Howard Beck?

5 A Yes, I am.

6 Q And you are the husband of

7 Lauren Beck?

8 A Yes, I am.

9 Q You are one of the plaintiffs in this

10 case?

11 A I am.

12 Q I certainly do not intend at all to go

13 back over the testimony that your wife gave, but from

14 your perspective you heard what she testified about,

15 about the water problems. Were you around in the

16 house and so forth to observe these water problems?

17 A Oh, yes, and to observe the effect of

18 them on our living conditions.

19 Q Which was what?

20 A Lauren described that it created a

21 situation that neither one of us had encountered

22 before. This may be naive, but I had never had

23 experiences with the well, either, and I assumed that

24 adequate water would be available. When it began very

1 early that we could not do the routine things as
2 scheduled that you do in a household, then it became
3 very apparent to me that we had some problems.
4 Q When did those problems arise?
5 A Almost immediately. Again, as Lauren
6 described, when we had the brick pressure-cleaned,
7 that effort drew the water down to nothing, and we
8 were without water for two days. She said it was on
9 my birthday.
10 So within two weeks of when we moved
11 in, we experienced our first problem with lack of.
12 Q Let me ask you the same question that
13 I asked Lauren. Let me ask you another question
14 first. You are a lawyer. We have established that.
15 You work in my law firm. What kind of work do you do?
16 A I do bankruptcy work.
17 Q Do you do real estate work? That is
18 really what I mean.
19 A No, I don't; never really have.
20 Q Have you had experience with people
21 dealing with wells and that sort of thing
22 professionally?
23 A No, I have not.
24 Q Are you acquainted with Mr. Vaughn and

* * *

But, in discussing the resolution, the problem with Bren Huggins, and then with the folks that actually came out and drilled the second well, Bedford Well Drilling Service folks and B & L Pump Service folks, it was my decision that the only way we would get to a solution that would make the house livable and protect the investment we had in it was the solution we undertook.

If I could have done it for $1,500, which I was being told I could not do, I would have done it. I would not have spent $25,000 to fix the system.

MR. AUSTIN: Your Honor, I have documents that have been pre-marked as Plaintiff's Exhibits Two through Eight that I would like to take up with the witness at this point.

(The document entitled "Invoice, Second Well," dated 9-15-2000, pre-marked Plaintiff's Exhibit Number 2 and would be entered into the Proceeding.)

1 BY MR. AUSTIN:
2 Q Let me show you Exhibit Two and ask
3 you what this is or what it is a copy of.
4 A This a copy of the bill from Bedford
5 Well Drilling Services in the amount of $11,162.50.
6 Q That is a bill for doing what?
7 A For drilling the second well 1,050
8 feet down.
9 Q The first well was how deep?
10 A 620 feet.
11 Q The first well was 620 and the second
12 was 1,050?
13 A Right.
14
15 (The document entitled
16 "Invoice, Huggins' Firm," dated
17 11/30/1998 was pre-marked
18 Plaintiff's Exhibit Number 3 and would
19 be entered into the Proceeding.)
20
21 BY MR. AUSTIN:
22 Q Let me show you Plaintiff's Exhibit
23 Three. What is that?
24 A This is a bill from Bren Huggins' firm

1 for his assistance in diagnosing the problem in the
2 amount of $483.98.
3 Q What is the date of that bill that is
4 Exhibit Three?
5 A November 30th, 1998.
6
7 (The document entitled
8 "Invoice, Huggins' Firm," dated
9 3-28-1999 was pre-marked
10 Plaintiff's Exhibit Number 4 and
11 would be entered into the Proceeding.)
12
13 BY MR. AUSTIN:
14 Q Now let me show you Exhibit Four.
15 This also purports to be a bill from Mr. Huggins'
16 firm. What is the date on that bill?
17 A February 28th, 1999.
18 Q This Exhibit Four, and how much is
19 that amount?
20 A $475.20. Again, for additional work
21 on his firm's behalf.
22 Q Toward what end? What had you hired
23 to do?
24 A To tell me what the problem was and

1 how to fix it.
2 Q Now, Mr. Huggins is appearing here as
3 an expert witness today. Any expenses or fees he has
4 for that, are they included in this or is that
5 separate?
6 A Those for appearing today?
7 Q Yes.
8 A They are not included in this.
9 Q This report advising you on the water
10 problem?
11 A Right.
12
13 (The document entitled
14 "B & L Invoice," dated
15 3-10-1999 was pre-marked
16 Plaintiff's Exhibit Number 5 and
17 would be entered into the Proceeding.)
18
19 BY MR. AUSTIN:
20 Q Okay. Let me show you Exhibit Five,
21 which purports to be from B & L Water Specialists.
22 What is that for?
23 A That is, indeed, an invoice dated
24 March 10th, 1999 from B & L Water Specialists in the

1 amount of $10,002, which was for the installation of
2 the duel pump system with two control boxes and
3 cut-off switches and automatic things that have gone a
4 long way to make the situation more tolerable.
5
6 (The document entitled
7 "B & L Invoice," dated
8 3-15-1999 was pre-marked
9 Plaintiff's Exhibit Number 6 and
10 would be entered into the Proceeding.)
11
12 BY MR. AUSTIN:
13 Q Then Exhibit Six is also from B & L
14 Water Specialists. That is dated March 15, 1999.
15 That is a two-page bill.
16 A Yes; this was for some additional pump
17 work that was undertaken on the first well, the well
18 that was originally installed.
19 Q By B & L?
20 A By B & L.
21 Q How much is the amount?
22 A It is in the amount of $1,505.60.
23
24 (The document entitled

1 "Invoice, Landscaping," dated
2 9-15-1999 was pre-marked
3 Plaintiff's Exhibit Number 7 and
4 would be entered into the Proceeding.)
5
6 BY MR. AUSTIN:
7 Q And then, Exhibit Number Seven shows
8 photocopies of three checks. It has on there that
9 it's yours and Laurie's checks. It shows the front
10 and the back; and the total on that, of those checks,
11 is $1,872.10. What is that for?
12 A Calvin Hilton is a gentleman who had
13 been doing some yardwork for us, and I engaged him to
14 put the backyard back in some kind of shape after
15 Bedford Well Drilling Services tore it up. They had
16 to tear it up to get to the bottom of the back of the
17 house to drill the second well.
18 Q Laurie mentioned in her testimony that
19 you have lost landscaping every year. Is this
20 limited, however, to just what was torn up to put in
21 this second well?
22 A Yes. This does not have anything to
23 do having to replace things because we had inadequate
24 ability to water them. This is just for the fixing of

1 what was torn up when the second well was installed.
2 Q What has been marked as Plaintiff's
3 Exhibit Number Eight is a summary of Exhibits Two
4 through Seven; is that correct?
5 A Yes; and the total of what we have
6 just identified specifically is $25,501.38.
7 MR. AUSTIN: Your Honor, please, I
8 would move into evidence Plaintiff's Exhibits
9 Two through Eight, inclusive.
10 THE COURT: Any objections?
11 MR. NATT: No objections, Your Honor.
12 THE COURT: They are received and
13 marked on the back.
14
15 (The document entitled
16 "Summary of Expenses," dated
17 9-15-2000, was pre-marked
18 Exhibit Number 8 and was
19 entered into the Proceeding.)
20
21 BY MR. AUSTIN:
22 Q I am going to digress a moment. You
23 and Laurie lived on Sewell Lane before?
24 A Yes.

1 the pressure issue.

2 So Laurie and I, we just made that

3 assumption that it was a pressure problem and that

4 meant a pump problem, so we called Mr. Catron, because

5 his little tag on the tank said, "Call Mr. Catron."

6 Q And you said that you were not

7 thinking of any liability at that time. You wanted

8 him to just get the problem solved.

9 A I knew I had spent a lot of money on a

10 nice house, and the house is nice. But I was scared

11 to death that we had an irresolvable problem that

12 would maybe hurt my investment.

13 Q Well, it just concerns me. Why didn't

14 you call Mr. Vaughn. I mean, he built the house for

15 you.

16 A He built the house for me; he arranged

17 a subcontractor to install the well; I read the

18 contract. I guess, Mr. Natt, I thought I would go

19 directly to the source of what I thought the problem

20 was. It sounds overly simplified to say that I did

21 not focus on, I wasn't focusing on hanging liability

22 on anybody. I wanted it fixed and thought it was a

23 pump issue. So rather than go through David, we would

24 just call Mr. Catron himself, I assumed.

1 Q You assumed.
2 A I assumed; I did.
3 Q And maybe he would have, right? He
4 Probably have called Mr. Catron.
5 A Again, I assume that he probably would
6 have, yes.
7 Q You read the contract, and the
8 warranty is there that he has to, the seller, and that
9 was Mr. Vaughn, has to provide you with potable water;
10 I am summarizing that, but, right?
11 A Well, potable water doesn't --
12 Q Supply. We are getting into semantics
13 a little bit. You did not have enough water --
14 A Potable means drinkable.
15 Q And it also means it also mean the
16 well.
17 A I have not looked at it very recently,
18 but I think that the contract provided that he provide
19 a well. The warranty issue if associated with the
20 statutory warranty, as I understand it.
21 I mean, I can't answer it many other
22 ways other than to say we just did not call Mr. Vaughn
23 because we did not think he was the source of being
24 able to fix it.

1 Q He wasn't the source of being able to
2 fix it?
3 A No. We --
4 Q Or he would have had to call somebody
5 else?
6 A Well, we figured he would call
7 somebody else.
8 Q You did not think it prudent to call
9 him first?
10 A I did not consider whether it was
11 prudent or not prudent; I just didn't.
12 Q I think your testimony on direct was
13 that you did not associate the problem with anything
14 Mr. Vaughn was responsible for?
15 A At the time, that is right.
16 Q What changed your mind?
17 A Mr. Huggins.
18 Q When did you employ Mr. Huggins?
19 A In '98.
20 Q When in '98?
21 A I want to say, I think it was in the
22 summer of '98. That is about as accurate as I can
23 get.
24 Q So between August of '97, which is

VIRGINIA:

IN THE CIRCUIT COURT OF ROANOKE COUNTY

HOWARD J. BECK, JR. and LAUREN S. BECK,	)	
Plaintiffs	)	Case No. CL98-468
v.	)	JUDGMENT ORDER
DAVID VAUGHN, DAVID VAUGHN, t/a Dominion Builders and VAUGHN, INC.,	)	
Defendants	)	

This day came the parties to this action, by their attorneys, and both sides announced ready for trial upon the pleadings heretofore filed.

Prior to the commencement of the trial, the Court overruled the defendants' Motion for Reconsideration of the Court's earlier decision regarding the "notice" issue, as set forth in the Court's letter opinion dated July 17, 2000 and memorialized in the Court's Order entered August 8, 2000, upon the grounds and for the reasons stated by the Court on the record, to which action of the Court the defendants, by counsel, duly objected.

Whereupon, came a jury panel of thirteen (13), from which each side struck three (3) and the remaining seven (7), against whom no objections were raised, composed the jury for the trial of this case, as follows: Larry T. Akers, Gary W. Doss, Christopher A. Hall, Suzanne S. LaPlace, Kathryn M. Lawson, Carla T. Leach, and Stacy S. Passeretti. Such jurors were sworn to well and truly try the issue between the plaintiffs and the defendants and a true verdict render according to the law and the evidence.

Thereafter, plaintiffs proceeded to introduce their evidence in chief, and after plaintiffs had rested their case in chief, the defendants moved the Court out of the presence of the jury to strike the plaintiffs' evidence and enter summary judgment for the defendants on the grounds

1cc: Justin Natt SLD file 10/11/00

OCT 13 2000 1:52

that the plaintiffs had failed to make out a *prima facie* case that the statutory implied warranty had been breached. The Court, being of the opinion that said motion should not be granted, accordingly overruled same, to which action the defendants duly objected on the grounds assigned in the record.

Whereupon, the defendants introduced evidence on their behalf and rested, after which the plaintiffs introduced evidence on rebuttal.

The jury, having heard all the evidence, received the instructions of the Court and heard the argument of counsel, thereafter retiring to their room to consider their verdict and, after some time, returned into the courtroom and rendered the following verdict:

"We the jury find our verdict in favor of the plaintiffs against the defendant Vaughn, Inc., and in favor of the defendants David Vaughn and David Vaughn, t/a Dominion Builders, and fix the plaintiffs' damages at $20,000.00.

/S/ Christopher A. Hall
Foreman"

Thereupon, the jury was discharged by the Court.

It is therefore ORDERED that the plaintiffs, Howard J. Beck, Jr. and Lauren S. Beck, have and recover of the defendant Vaughn, Inc. the sum of $20,000.00 and their costs in this behalf expended.

The Clerk shall send a certified copy of this Order to each counsel of record.

Enter this 2 day of October, 2000.

Judge Designate

{W:\lin\5002\360\00726675.DOC}

294.

We have seen and request the entry
of this Order:

GENTRY LOCKE RAKES & MOORE

By: _____

J. Rudy Austin (VSB No. 3312)
GENTRY LOCKE RAKES & MOORE
P.O. Box 40013
Roanoke, Virginia 24022-0013
Counsel of Record for the Plaintiffs
Tel. No: 540/983-9300
Fax No: 540/983-9400

We have seen this Order and object to its entry
as noted therein:

OSTERHOUDT, FERGUSON, NATT, AGEE & KIDD

By: _____

Edward A. Natt (VSB No. 1104)
1919 Electric Road, S.W., Suite 1
Roanoke, Virginia 24018
Counsel of Record for the Defendants
Tel. No: 540/774-1197
Fax No: 540/774-0961

{W:\lit\5002\360\00726675.DOC}

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF ROANOKE

HOWARD J. BECK, JR. and LAUREN S. BECK Plaintiffs v. DAVID VAUGHN, DAVID VAUGHN, t/a Dominion Builders and VAUGHN, INC. Defendants	))))))))))))	**NOTICE OF APPEAL** Case No. CL98-468

The Defendant, Vaughn, Inc., hereby gives notice of appeal to the Supreme Court of Virginia from the Judgment Order of this Court entered on the 2nd day of October, 2000, and further give notice that a transcript of the testimony at trial and all incidents of the case will be filed with the Court at the appropriate time.

VAUGHN, INC.

BY Edward A. Natt
Of Counsel

Edward A. Natt, Esquire
OSTERHOUDT, FERGUSON, NATT,
AGEE & KIDD, P.C.
1919 Electric Road, S.W., Suite 1
Roanoke, Virginia 24018
Phone: (540) 774-1197
Fax: (540) 774-0961
VSB #1104
Counsel for Defendants

OSTERHOUDT, FERGUSON,
NATT, AGEE & KIDD
ATTORNEYS-AT-LAW
ROANOKE, VIRGINIA
24018-1699

CERTIFICATE

I, Edward A. Natt, counsel of record for Vaughn, Inc., hereby certifies that:

1. The names and addresses of the Appellants are:

   David A. Vaughn
   Vaughn, Inc.
   P. O. Box 21309
   Roanoke, VA 24018

2. The name, address, and telephone number of counsel for Appellant is:

   Edward A. Natt, Esq.
   1919 Electric Road, S.W., Suite 1
   P. O. Box 20068
   Roanoke, VA 24018
   (540) 774-1197

3. The names and addresses of Appellees are:

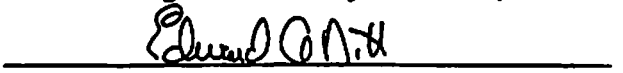
   Howard J. Beck, Jr. and
   Lauren S. Beck
   7705 Autumn Park Drive
   Roanoke, VA 24018

4. The name, address, and telephone number of counsel for Appellees is:

   J. Rudy Austin, Esq.
   Gentry Locke Rakes & Moore
   P. O. Box 40013
   Roanoke, VA 24022-0013

5. Counsel for the Appellant has ordered from the Court Reporter who reported the case, the transcript for filing as required by Rules of the Supreme Court of Virginia.

6. A copy of this Notice of Appeal has been mailed or delivered to all opposing counsel and to the Clerk of the Supreme Court of Virginia this 26th day of October, 2000.



Of Counsel

:TERHOUDT, FERGUSON,
NATT, AGEE & KIDD
ATTORNEYS-AT-LAW
ROANOKE, VIRGINIA
24018-1699

ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED IN HOLDING THAT, UNDER VA CODE 55-70.1, THE HOMEOWNER IS NOT REQUIRED TO GIVE PRIOR NOTICE TO THE BUILDER OF THE DEFECT AS A CONDITION PRECEDENT TO LATER MAINTAINING AN ACTION AGAINST THE BUILDER FOR BREACH OF IMPLIED WARRANTY.