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The Myth Behind North Carolina's Mandatory Construction Warranty

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The first time a general contractor client mentioned, matter-of-fact, that North Carolina law required general contractors to provide a one-year construction warranty on their work, I was worried. As a construction lawyer who frequently negotiates and drafts construction contracts and warranty clauses for a living, I should know that. How could I have missed it?

Anxious of what I might find, I did some research, but nothing came up. I asked other attorneys in our office to do the same, and they, too, found nothing. I moved on, as confident as one can be proving a negative. But then, I heard it again from another general contractor, and another. The seeds of doubt were sprouting again when, just the other day, I heard it again: "...right, but North Carolina requires me to give a one-year warranty." I was in a meeting with a client and, as nonchalantly as possible, I asked where she'd heard this. She said all contractors are taught it and that it's common knowledge. I said I was sure no such requirement exists and when she glared back



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skeptically, I did the only honorable thing one can do under the circumstances: I bet her a dollar I was right. Our client politely declined and suggested I write this article instead.

North Carolina law does not require general contractors to provide a one-year construction warranty for their work. The belief that it does appears to be a common yet understandable misconception. This confusion likely arises because of the implied warranty of workmanlike construction and industry

standards. Under North Carolina law, the implied warranty of workmanlike construction as articulated in *Hartley v. Ballou* exists by operation of law (i.e., is implied) and is not dependent on the existence of a written contract between the parties. That is, the implied warranty can exist whether there is a written agreement in place between the parties or not. But to say that the implied warranty is the same as requiring a warranty or even a one-year warranty is incorrect and contravenes a funda-

mental principle under North Carolina law that grants parties the freedom to allocate, by contract, risk in a construction project.

Not only is there no one-year warranty requirement, but under North Carolina law, parties to a construction contract are free to eliminate the implied warranty of workmanlike construction altogether. That is, the parties can negotiate and bargain for no warranties whatsoever or craft whatever warranty they choose, which can vary in both scope and duration. For example, in the wake of Hurricane Helene or other disasters, contractors wanting to donate their services or provide them at below-market rates would find this flexibility helpful.

I now think I understand why general contractors assume they must provide a construction warranty, and the confusion is well-founded. The law of contracts, which includes the law of express and implied warranties, is a confusing area of the law to begin with and legal precedent and statutory requirements have established standards that can make it even more confusing. Cases like *Leggett v. Pittman* and *Allen v. Roberts Constr. Co., Inc.* illustrate that building contractor's warranties often include provisions that any defects arising within a period of one year will be repaired or replaced by the builder at no cost to the owner and re-

quire the owner to notify the builder of any nonconformities within one year.

Similarly, *Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison* notes that in actions for breach of a construction contract, there is an implied warranty that the contractor or builder will use customary standards of skill and care based on the particular industry, location, and timeframe in which construction occurs. Without distinguishing between the type of warranty, I imagine most contractors would say that a one-year construction warranty is the industry standard, perhaps reinforcing the belief among general contractors that they must provide it. And, while that may be true of express warranties, it is certainly not the case for implied warranties, which extend for three years (N.C. Gen. Stat. § 1-52) and possibly beyond. See N.C. Gen. Stat. § 1-50(5)(a).

These cases and standards might make it seem to the general contractor that a construction warranty is required when, in reality, it's not. Instead, it's far better to think of it this way: under NC law, a warranty will be implied by law and industry standards in the absence of a written warranty excluding it.

I'll bet you a dollar I'm right!

Whether you are a builder or owner, it is important to understand how to negotiate

and craft agreements that protect your interests and allocate risk suitable to the needs of your project. If you are embarking on a construction project and want to learn more about managing risk, it is advisable to consult with an attorney. ■

Paul Capua is an AV-Preeminent® rated civil trial lawyer and is recognized by Chambers & Partners in construction law. His 30 years of practice and trials have focused on US and international construction law and business law disputes in state and federal courts as well as international and domestic arbitrations. A former shareholder of the international litigation firm Astigarraga Davis Mullins & Grossman, P.A., Capua has enjoyed a career prosecuting, defending, and trying significant claims involving international and domestic engineering, construction, and business disputes including construction disputes involving offshore floating production, storage, and offloading units (FPSOs); oil refinery turnarounds (TARs); maritime refit and mega yacht conversions; and US commercial & residential construction projects. Capua is also the founder of Capua Law, a full-service law firm that focuses on construction and business law.

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Judge No Longer Available (cont.)

Fearns held that Rule 63 does not apply in a criminal case to authorize entry of an order by a substitute judge. *Id.* at ___, 914 S.E.2d at 6.

G.S. 15A-1224 does apply to criminal proceedings but has more limited application than Rule 63 as it applies only to criminal trials. See G.S. 15A-1224(b) (allowing another judge to perform duties when the judge “before whom the defendant *is being or has been tried*,” is unable to do so) (emphasis added); see also *Bartlett*, 368 N.C. at 313 (“By its plain terms, subsection 15A-1224(b) applies only to criminal trials, not suppression hearings.”); *Fearns*, ___ N.C. App. at ___, 914 S.E.2d at 7 (holding that G.S. 15A-1224(b) did not authorize second judge to enter order on motion to dismiss on behalf of the judge who held the hearing, announced his ruling, and subsequently retired).

Might Judge B enter judgment pursuant to his inherent authority to ensure that the court's records accurately reflect its actions? Cf. *State v. Cannon*, 244 N.C. 399, 403 (1956) (“It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record....”); *State Tr. Co. v. Toms*, 244 N.C. 645, 650 (1956) (“It is well settled that in any case where a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk, the court has power to order that the judgment be entered up *nunc pro tunc*, provided the fact of its rendition is satisfactorily established and no intervening rights are prejudiced.” (internal quotations omitted)); see generally *Michael Crowell, Inherent Authority*, Administration of Justice Bulletin No. 2015/02 (UNC School of Government November

2015). Our appellate courts have not considered whether the later entry of a judgment by a substitute judge is a proper exercise of judicial authority; that act is akin to but extends beyond the judge's actions in *Cannon*, which involved the judge entering findings in the minutes about what transpired at a trial conducted before another judge, and in *State Trust Co.*, where the judge ordered the clerk to correct the minute docket to conform to the facts. Given the lack of clarity, the safer course of action may be for Judge B to rehear the matter, assuming that the defendant's term of probation has not yet expired. ■

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