

IN THE SUPREME COURT OF OHIO

10-1826

Paul Jones, et al.,	:	On Appeal from the Franklin
	:	County Court of Appeals
Plaintiffs-Appellants.	:	Tenth Appellate District
vs.	:	Court of Appeals
	:	Case No. 09 AP-1032
	:	
Centex Homes	:	
	:	
Defendant-Appellee.	:	
	:	
Eric Estep, et al.,	:	On Appeal from the Franklin
	:	County Court of Appeals,
Plaintiffs-Appellants,	:	Tenth Appellate District
vs.	:	Court of Appeals
	:	Case No. 09AP-1033
	:	
Centex Homes	:	
	:	
Defendant-Appellee.	:	

---

**MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFFS-  
APPELLANTS PAUL JONES, LATOSHA SANDERS, ERIC ESTEP, AND  
GINGER ESTEP**

---

Steve J. Edwards (0000398)  
4030 Broadway  
Grove City, Ohio 43123  
614) 875-6661

Counsel for Appellants

Michael G. Long  
Vorys, Sater, Seymour & Pease, LLP  
52 East Gay Street  
Columbus, Ohio 43215  
(614) 464-6297

Counsel for Appellee

<p><b>FILED</b></p> <p>OCT 25 2010</p> <p>CLERK OF COURT SUPREME COURT OF OHIO</p>
--

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST .....	1
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	8
<b><u>Proposition of Law No. 1:</u> The implied duty to construct a home in a workmanlike manner cannot be waived by the purchaser of a house.....</b>	<b>8</b>
<b><u>Proposition of Law No. 2:</u> Language in documents not shown to, nor seen by, the buyer may not be considered in determining whether a waiver of the implied duty to construct in a workmanlike manner is clear, conspicuous, and unambiguous...</b>	<b>9</b>
<b><u>Proposition of Law No. 3:</u> The doctrine of a warranty failing to meet its essential purpose should be adopted in Ohio if the implied duty to construct in a workmanlike manner can be waived.....</b>	<b>12</b>
CONCLUSION.....	13
PROOF OF SERVICE.....	14
 APPENDIX	
Opinion of the Franklin County Court of Appeals (September 9, 2010)	
Judgment Entry of the Franklin County Court of Appeals (September 9, 2010)	

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST**

This case presents four (4) issues of first impression in Ohio. These issues involve the protection given to a buyer in the purchase of a newly constructed home. Given the importance of these issues, the nature of the decision of the Court of Appeals, and the widespread effect this decision could have on the general population, this Court should exercise its discretion to hear this case.

Plaintiffs' new homes were built by Centex with steel joists and the steel became magnetized during construction. If the Court of Appeals' decision is upheld then plaintiffs will be required to live in a magnet and they will have no remedy.

A home is the single largest investment of a large percentage of the population. A home not only provides a safe environment to live and raise a family but provides a means, through the build-up of equity, to accumulate wealth. Any decision that affects this ability to accumulate wealth, potentially impacts a large percentage of the population.

For over forty (40) years Ohio has explicitly recognized that the builder of a new home had a duty to construct it with the ordinary care of a prudent person. *Mitchem v. Johnson* (1966), 7 Ohio St. 2 66. This duty was extended to all subsequent vendees, *McMillan v. Brune-Harpenau-Torbeck Builders, Inc.* 8 Ohio St. 3d 3, and has been affirmed again. *Velotta v. Leo Petronzio Landscaping* (1982), 69 Ohio St. 3d 376. This duty has never been weakened until the Court of Appeals decision herein. Below, the Court of Appeals decided four (4) issues of first impression in Ohio involving this implied duty to construct in a workmanlike manner. This decision below weakens the

protection Ohio consumers have in the purchase of a new home and has resulted in Plaintiffs living in a magnet with no remedy. These four (4) issues of first impression are:

1. Can the implied duty to construct in a workmanlike manner be waived?
2. If the implied duty to construct in a workmanlike manner can be waived, must the waiver be clear, unambiguous, and conspicuous?
3. In determining if a waiver is clear, unambiguous, and conspicuous, may documents be considered that were never shown to, nor seen by, the buyer until after the signing of the purchase contract?
4. Does the doctrine of a “warranty failing to meet its essential purpose” have application to a purchase of real estate?

Issue No. 1, the implied duty to construct in a workmanlike manner, is a negligence standard. *Mitchem* at 72. Allowing a party to disclaim its own negligence has never been favored under Ohio law. The consequences of such a decision could be far-reaching. A seller could disclaim the implied warranty of good workmanship and give no warranty or an inadequate warranty in its place. Without some inquiry into the adequacy of what is given, there is nothing to protect a purchaser from an unscrupulous builder. If this Court would conduct such an inquiry to determine the adequacy of what was given in return for the waiving of the implied warranty, then this Court is opening up a whole area of inquiry to judicial inspection for which it may not be suited. This Court created the implied duty to construct in a workmanlike manner and therefore this Court should make the decision as to whether that duty can be waived. New homes are constantly being

built in Ohio and prospective purchasers have a right to know what assurances of quality attach to their homes.

Issue No. 2, the standard against which a waiver of the implied warranty of good workmanship must be measured, must be given consideration if the law in Ohio becomes that the implied warranty can be waived.

Issue No. 3, what documents can be considered in determining if a waiver meets the standard for waiving the implied duty to construct in a workmanlike manner, has consequences that reach far outside this case. Herein, the purchase contract mentioned a limited warranty document. The limited warranty document was never shown to, nor seen by, the buyers prior to signing the purchase contract. This fact was never mentioned by the Court of Appeals in its decision. The Court of Appeals decision then relies on the language of the limited warranty document in its determination that there was sufficiently clear, unambiguous and conspicuous language to waive the implied duty to construct in a workmanlike manner. Such a decision has the ability to undo all of the protections of any consumer legislation ever enacted. Any purchase contract could contain unclear, ambiguous, or inconspicuous language that both: 1.) waives a warranty or implied duty and 2.) also references another document or documents. Any deficiency caused by the waiver in unclear, ambiguous, or inconspicuous language of the purchase contract could be cured by considering the language in the other documents even though these other documents were never shown to, nor seen by, the buyers prior to signing a purchase contract. This would return us to the legal system to where it was years ago when there were incomprehensible purchase contracts in extremely small type. The legal analysis of the Court of Appeals decision provides that as long as that purchase contract referenced

another document that did meet the requirements of a certain standard, then the waiver would be effective despite the fact that the buyer never saw the referenced document and that purchase contract by itself did not meet the standard to waive the protection.

This is an unwarranted extension of the law without any discussion or citation by the Court of Appeals. This issue is deserving of this Court's attention because of the potential erosion of consumers' rights.

Issue No. 4, does a warranty failing to meet its essential purpose, have application to the purchase of real property. If this Court concludes that the implied duty to construct in a workmanlike manner can be waived then this doctrine is needed in Ohio law. There must be some protection for a buyer if a builder is able to waive or disclaim his own negligence. If a buyer is given no limited warranty or a poor limited warranty then there must be some protection for a homeowner, when the limited warranty fails to provide a remedy.

#### **STATEMENT OF THE CASE**

This matter arose out of Centex constructing new homes for Paul Jones and LaTosha Sanders and Eric and Ginger Estep. The homes contain metal joists and during the construction process the joists became magnetized creating a magnetic field inside each of Plaintiffs' homes. Plaintiffs' complaint sets forth the following claims: breach of contract, breach of express warranty, breach of implied warranty of workmanship, negligence and failure to perform in a workmanlike manner.

On October 20, 2009, the Trial Court granted Defendant's Motion for Summary Judgment and dismissed all of Plaintiffs' claims. Plaintiffs filed a timely Notice of Appeal to the Franklin County Court of Appeals, Tenth Appellate District. After briefing

and oral arguments the Court of Appeals affirmed the trial court's granting of summary judgment to Centex on September 9, 2010. The Court of Appeals held that the implied duty to construct a home in a workmanlike manner could be waived. This was a case of first impression on this issue in Ohio. The Court of Appeals went on to hold that any such waiver has to be clear, unambiguous, and conspicuous in order to be effective. In making its determination that the waiver in this case was clear, unambiguous, and conspicuous, the Court of Appeals considered a written limited warranty that was never shown to, nor seen by, Plaintiffs-Appellants prior to their signing the purchase contracts but was merely mentioned in the purchase contract. Again, this was an issue of first impression in Ohio and the Court of Appeals cited no support for such a huge extension of the law. In response to Plaintiffs argument that the limited warranty failed its essential purpose because it left plaintiffs living in a magnet with no remedy, the Court of Appeals held that the doctrine of a warranty failing its essential purpose was limited to Uniform Commercial Code claims and not applicable to the sale of real estate for a personal use. Finally, the Court of Appeals found that the waiver was not unconscionable and did not violate public policy. The Court of Appeals also upheld the trial court's finding that Plaintiff-Appellants did not have a claim under the limited warranty issued by Centex because the limited warranty did not cover magnetization of steel joists.

Plaintiffs-Appellants therefore did not have a claim under the limited warranty because it did not cover magnetization and they had waived all of their other claims, including the implied duty to construct in a workmanlike manner. Plaintiffs-Appellants now live in a magnet with no remedy.

## STATEMENT OF THE FACTS

Plaintiffs Eric and Ginger Estep entered into a contract to purchase a new home from Centex on August 25, 2004. Plaintiffs moved into their home and immediately began to experience problems with their new home. These problems consisted of the inability to use cordless phones while in their home, distortion of cathode ray televisions, and corruption of the hard drives of their computer. In addition to these problems there is the potential for health problems and the loss in value of the home with this magnetic field. After an investigation was undertaken it was determined that the steel joists of Plaintiffs' homes had become magnetized and it was this magnetic field that was causing the problems plaintiffs were experiencing.

Plaintiffs Paul Jones and Latosha Sanders entered into a contract to purchase a new home from Defendant on October 30, 2004. They have experienced problems similar to the Esteps.

All Plaintiffs signed purchase contracts with Centex that purport to waive all implied warranties, waive all claims and give Plaintiffs a limited warranty. All parties are in agreement, and the trial court so held, that the limited warranty provided by Centex to Plaintiffs does not cover magnetized joists, which is the defect claimed by Plaintiffs.

The language relied upon by Centex and the Court of Appeals that was contained in the purchase contracts signed by the Plaintiffs is:

8. LIMITED HOME WARRANTY. Seller shall provide its Standard Limited Warranty covering defects in materials and workmanship as described in the Limited Home Warrant documents. Copies of the Warranty are available for purchasers review in the sales office and will be provided to purchasers upon request.

9. WAIVER OF IMPLIED WARRANTIES. Purchasers agree that there are no other warranties either expressed or implied and hereby waive and relinquish any and all implied warranties of habitability and fitness and agree to rely solely on sellers Limited Home Warranty. Purchasers acknowledge and agree that seller is relying on this waiver and would not sell the property to purchasers without this waiver.

\* \* \*

33. WAIVER OF FUTURE CLAIMS. Purchasers hereby waive and relinquish all claims against seller for damages to property or personal injury arising after the date of this contract and relating to any of the following:

A. Environmental or ecological conditions or events such as weather conditions, atmospheric conditions, acts of God or other natural or man made conditions or occurrences beyond reasonable control of seller;

B. The presence or existence of cancer causing or radioactive substances or materials, or substances causing or suspected of causing illnesses unless seller (i) has actual knowledge of the presence of such substances or material and the illness causing potential of such substances and (ii) seller fails to advise purchasers of the presence of the substance prior to closing;

C. Consequential damages or expenses resulting from the termination of this contract or delays in closing, such as lodging, storage, moving, meals, or travel expenses.

D. Any claims for repairs or modifications to the property except as specifically covered by the sellers Limited Home Warranty.

E. All claims for personal injury or damage to property unless directly resulting from acts or omissions of seller for which acts or omissions of seller bears direct legal responsibility.

This waiver shall be binding upon Purchasers' and their heirs, successors, assignees, guests and invitees.

Purchasers acknowledge that the seller shall be entitled to rely upon this waiver as a complete bar and defense against any claim asserted by purchasers or anyone claiming through purchasers. The deed conveying the property to purchasers may contain a reference to this waiver.

This limited warranty provided no relief to Plaintiffs-Appellants because the trial court and Court of Appeals held that it did not cover the particular defect claimed herein, magnetized steel joists.

## ARGUMENT

### **I. The implied duty to construct a home in a workmanlike manner cannot be waived by the purchaser of a house.**

Ohio recognizes a duty implied by law to construct a home in a workmanlike manner using ordinary care.

The duty implied in the sale between the builder-vendor and the immediate vendee is the duty imposed by law on all persons to exercise ordinary care. In an action by a vendee to construct in a workmanlike manner using ordinary care, the essential allegation is, *viz.*, the builder-vendor's negligence proximately caused the vendee's damages. The action, therefore, arises *ex delicto*, and the four-year statute of limitations set forth in R.C. 2305.09 (D) applies. The obligation to perform in a workmanlike manner using ordinary care may arise from or out of a contract, *i.e.*, from the purchase agreement, but the cause of action is not based on contract; rather it is based on a duty imposed by law.

*Velotta v. Landscaping, Inc.*, *supra* at 378-79.

This duty was first recognized forty-four (44) years ago by this Court in *Mitchem v. Johnson, supra*. There, this Court in finding an implied duty of reasonable care on the builder, held:

The trial court confused the operative effect of a warranty, even though implied by law, with the duty historically posed by law on all persons that they measure their conduct by that of the ordinarily prudent person under all the circumstances, which include the risk (if harm from the natural and probable consequences of that conduct. We do not understand that a builder of structures on real estate is relieved of that duty any more than any other person in whatever capacity he may act. \*\*\* On the other hand, we do concur in the statement that "it is an implied term of the sale that the builder will complete the house in such a way that \*\*\*the work [both before and after the sale] would be done in a workmanlike manner."

*Id.* at 72-73.

This holding in *Mitchem*, *supra*, was extended to all purchasers of a home in *McMillan v. Brune-Harpenau-Torbeck Builders, supra*.

There is no Ohio case holding that this duty implied in the law to construct a home in a workmanlike manner can be waived. The Court of Appeals as a matter of first impression in Ohio held that this implied duty can be waived.

The effect of this waiver is to exclude the consequences of one's own negligence. This ability is not favored under Ohio law. *Agricultural Ins. Co. v. Constatine* (1944), 144 Ohio St. 275, 283-284; *Railway Co. v. Spangler* (1886), 44 Ohio St. 471; *Speroff v. First Central Trust Co.* (1948), 149 Ohio St. 415. This duty, to act with reasonable care, is one that is demanded of all people. There is no good reason to allow builders of new homes to escape this duty. There is a need to be cautious in this area since if a waiver is allowed there is nothing in the law to verify that something is received to replace the implied duty to construct in a workmanlike manner.

II. **Language in documents not shown to, or seen by, the buyer may not be considered in determining whether a waiver of the implied duty to construct in a workmanlike manner is clear, conspicuous, and unambiguous**

The Court of Appeals held that for the implied duty to construct in a workmanlike manner to be waived the language of the waiver must "Accepting appellants' argument that waiver of an implied warranty must be clear, unambiguous, and conspicuous \*\*\*" *Jones et. al. v. Centex, supra*, at para. 21.

In determining whether the language involved herein met this standard, the Court of Appeals first considered the purchase contract herein and concluded “Appellants observe, and we agree, that the paragraphs in the sale agreement referencing disclaimer are not more conspicuous than the other paragraphs.” *Id.* at para. 23. That did not end the Court of Appeals analysis on this issue. It then considered the language contained in the limited warranty document, “We consider, however, the sale agreement in conjunction with the limited warranty.” *Ibid.* However that limited warranty document was never shown to, nor seen by, the Plaintiffs until sometime after they signed the purchase contract. The Court of Appeals goes on to find that the language contained in the limited warranty document does meet the standard of clear, unambiguous, and conspicuous and therefore the implied duty to construct in a workmanlike manner can be waived. *Id.*, at para. 26.

In this analysis the Court of Appeals greatly extends the law without any acknowledgment. The Court of Appeals is allowing documents not seen by, nor shown to, the purchaser of a house prior to signing a purchase contract, to disclaim warranties implied as a matter of law.

There is no discussion in the Court of Appeals’ decision on this legal doctrine. There is not one case in Ohio that stands for this proposition. Such a dramatic and extreme extension of Ohio law in the first instance requires some discussion. In *Service Guide, Inc. v. Building Systems Division, Armco, Inc.* (1988, 11<sup>th</sup> Dist.), 1988 Ohio App. LEXIS 1500, it was held:

Thus, defendant Armco’s assignment of error goes to whether the trial court erred or abused its discretion in refusing to determine whether the implied warranty that otherwise would be applicable had been excluded by agreement of the parties. We have some

difficulty in applying an exclusionary clause that the seller reveals to the buyer only after the purchase contract has been entered into and executed by performance by the seller. This is the apparent situation herein, although defendant suggests that plaintiff should have been aware of the warranty exclusion language from the proposal submitted the previous year and rejected. **It is difficult to conceive how the exclusionary language can meet the conspicuous requirement of R.C. 1302.29 unless it is physically included in the contract documents at the time the contract is entered into.** A reference to another paper, which may contain the conspicuous language, is insufficient to meet the conspicuous requirement unless such other paper is actually made physically a part of the contract at the time it is entered into. In other words, the conspicuous requirement is to call attention to the buyer of the existence of the warranty exclusion, which is not accomplished by incorporation by reference of a document which contains the warranty exclusion but is not given to the buyer nor physically included in the contract at the time the contract, is entered into.

*Id.* at p. 4 (emphasis added)

There is not one case cited in the Court of Appeals decision that allowed the any disclaimer to be accomplished by incorporating by reference other documents containing the disclaimer, not provided to the buyer until after the purchase contract had been signed.

In prior cases of this Court involving the sale of personal property, the language was always found in the purchase contract. In *Chemtrol Adhesives v. American Manufacturers* (1989), 42 Ohio St. 3d 40 the disclaiming language was found in the purchase contract. *Id.*, at 43 and in *Insurance Comp. of North America v. Automatic Sprinkler Corp.* (1981), 67 Ohio St. 2d 91 the disclaimer was contained in a proposal and purchase order signed by the parties.

If Ohio is going to allow such a drastic extension of the law, then Court should be the one to make such a decision.

**III. The doctrine of a warranty failing to meet its essential purpose should be adopted in Ohio if the implied duty to construct in a workmanlike manner can be waived.**

The Court of Appeals held that the doctrine of a limited warranty failing its essential purpose should be limited to the Uniform Commercial Code transactions and not extended to the construction of new homes. Again this is a matter of first impression in Ohio.

In *Goddard v. General Motors (1979)*, 60 Ohio St.2d 41 this Court held:

Although in most cases a limited remedy may be fair and reasonable, and satisfy the reasonable expectations of a new car purchaser, other courts and some commentators have generally recognized that when a seller is unable to fulfill its warranted obligation to effectively repair or replace defects in goods which are the subject matter of the sale, such as in the instant cause, the buyer is deprived of the benefits of the limited remedy and it therefore fails its essential purpose. (Citations omitted)

*Chemtrol Adhesives v. American Manufacturing, supra*, involved the sale of a product between sophisticated, commercial parties. In discussing “warranty”, and “liability limitation” provisions in a sales contract, the Court stated:

Lexington cites two decisions to support its argument that the limitation-of-liability provision causes the remedy to fail of its essential purpose: *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*, (1983), 5 Ohio St.3d 181, 5 OBR 398, 449 N.E.2d 1289, and *Goddard v. General Motors Corp. (1979)*, 60 Ohio St.2d 41, 14 O.O.3d 203, 396 N.E.2d 761. However, as Midland-Ross correctly notes, the plaintiffs therein attempted to avail themselves of the repair and/or replacement remedy and were completely frustrated. See *McCullough, supra*, at 181-182, 5 OBR at 399-400, 449 N.E.2d at 1291; *Goddard, supra*, at 42-43, 14 O.O.3d at 203-204, 396 N.E.2d at 762-763. “Repair or replacement” remedies are designed to give the seller an opportunity to make the goods conforming while limiting the risks to which he is subject by excluding direct and consequential damages that might otherwise arise.” *Beal v. General Motors Corp.* (D. Del. 1973), 354 F. Supp. 423, 426. **Such limited remedies generally fail only where the seller is unable or unwilling to make repairs within a reasonable time.**

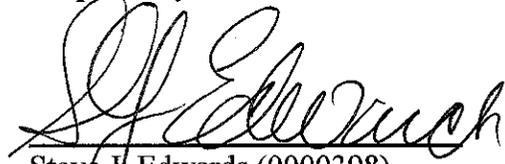
Id., at 41-48 (emphasis added)

These cases stand for the proposition that if a limited warranty fails its essential purposes then it is invalid. This doctrine is only needed if the seller is able to exclude protections guaranteed to the buyer, such as the implied duty to construct in a workmanlike manner. If there is no ability to exclude duties or warranties or limit damages then there is no place for the doctrine of “a warranty failing to meet its essential purpose”. If this Court allows the implied duty to construct in a workmanlike manner to be waived by a buyer, then there must be some assurance that the buyer is receiving something of value for that waiver in order that buyers receive the benefit of their bargain.

**CONCLUSION**

For the reasons stated herein, this Court should exercise its discretionary power and accept this appeal.

Respectfully Submitted,



Steve J. Edwards (0000398)

4030 Broadway

Grove City, Ohio 43123

614) 875-6661

614) 875-2074 (Fax)

Atty4030@aol.com

*Attorney for Plaintiffs*

*Eric and Ginger Estep and*

*Paul Jones and Natasha Sanders*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served via  
regular U.S. Mail, postage paid on this 25th day of October 2010, upon:

Michael G. Long (0011079)  
Jonathan P. Corwin (0075056)  
VORYS, SATER, SEYMOUR & PEASE, LLP  
P.O. Box 1008 - 52 East Gay Street  
Columbus, Ohio 43216-1008

  
Steve J. Edwards

[Cite as *Jones v. Centex Homes*, 2010-Ohio-4268.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Paul Jones et al.,	:	
	:	
Plaintiffs-Appellants,	:	No. 09AP-1032
	:	(C.P.C. No. 07CVH02-2478)
v.	:	
	:	(REGULAR CALENDAR)
Centex Homes,	:	
	:	
Defendant-Appellee.	:	
	:	
Eric Estep et al.,	:	
	:	
Plaintiffs-Appellants,	:	No. 09AP-1033
	:	(C.P.C. No. 07CVH02-2479)
v.	:	
	:	(REGULAR CALENDAR)
Centex Homes,	:	
	:	
Defendant-Appellee.	:	
	:	

---

D E C I S I O N

Rendered on September 9, 2010

---

*Steve J. Edwards*, for appellants.

*Vorys, Sater, Seymour & Pease, LLP, Michael G. Long, and Jonathan P. Corwin*, for appellee.

---

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} In these consolidated appeals, plaintiffs-appellants, Paul Jones, Eric Estep, and Latosha Sanders (collectively "appellants"), appeal from a judgment of the Franklin County Court of Common Pleas, granting summary judgment in favor of defendant-appellee, Centex Homes ("Centex").

{¶2} On August 25, 2004, appellant Eric Estep entered into a "Real Estate Sale Agreement" with Centex, a builder, whereby Centex agreed to sell Estep a newly constructed single family home located at 7488 Hemrich Drive, Canal Winchester, Ohio. On October 30, 2004, appellants Paul Jones and Latosha Sanders entered into a similar agreement with Centex for a newly constructed single family home located at 7489 Hemrich Drive, Canal Winchester. Each of the agreements included a limited home warranty.

{¶3} On February 20, 2007, appellants filed complaints against Centex, alleging causes of action for breach of contract, breach of express and implied warranties, negligence, and failure to perform in a workmanlike manner. In both complaints, appellants alleged that "the metal floor members on the 2<sup>nd</sup> floor were magnetized," resulting in interference with televisions, telephones, and computers.

{¶4} On November 27, 2007, Centex filed motions for summary judgment against appellants. Appellants filed responses to the motions for summary judgment, and attached supporting affidavits. The cases were consolidated for determination pursuant to an order of the trial court filed on April 30, 2008.

{¶5} By entries filed October 20, 2009, the trial court granted summary judgment in favor of Centex on appellants' claims. More specifically, the court found that appellants "agreed to waive any claims for property damage other than claims covered under the

Limited Home Warranty," and therefore could "only proceed on a claim for breach of the Limited Home Warranty." Based upon a determination that "the Limited Home Warranty does not cover the magnetization of the steel framing," the court found that Centex was entitled to summary judgment as to all of appellants' claims.

{¶6} Appellants filed timely appeals, and this court sua sponte filed an entry consolidating the two appeals. On appeal, appellants set forth the following assignment of error for this court's review:

The trial court erred to the prejudice of Plaintiffs-Appellants in granting Defendant-Appellee[s] Motion for Summary Judgment.

{¶7} Appellants challenge the trial court's grant of summary judgment in favor of Centex, raising several issues with respect to warranty and waiver language contained in the agreements entered between the parties. Specifically, appellants assert: (1) the limited warranty fails its essential purpose; (2) a waiver of the implied duty to construct a home in a workmanlike manner is against public policy; (3) the language employed in the agreements is insufficient to waive appellants' limited warranties; and (4) the waiver of claims and limitations of remedies should not be enforced on grounds of unconscionability.

{¶8} This court reviews de novo a trial court's ruling on summary judgment. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶24, citing *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186. In accordance with Civ.R. 56(C), "summary judgment shall be granted when the filings in the action, including depositions and affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Bonacorsi* at ¶24.

{¶9} As noted under the facts, appellants' complaint alleged that Centex breached its duty to perform in a workmanlike manner because the second floor metal joists had become magnetized, resulting in interference with electronic applications. In Ohio, "[t]he duty to perform in a workmanlike manner is imposed by common law upon builders and contractors." *Hanna v. Groom*, 10th Dist. No. 07AP-502, 2008-Ohio-765, ¶19, quoting *Barton v. Ellis* (1986), 34 Ohio App.3d 251, 252.

{¶10} At issue in this case are various provisions of the "Real Estate Sale Agreement" (hereafter "the sale agreement") and the "Limited Warranty" (hereafter "the limited warranty"). Paragraph 8 of the sale agreement states in part: "Seller shall provide its standard Limited Home Warranty covering defects in materials and workmanship as described in the Limited Home Warranty documents." Paragraph 9 of the sale agreement contains a "waiver of implied warranties" provision, stating as follows:

Purchasers agree that there are no other warranties either expressed or implied and hereby waive and relinquish any and all implied warranties of habitability and fitness and agree to rely solely on Seller's Limited Home Warranty. Purchasers acknowledge and agree that Seller is relying on this waiver and would not sell the property to Purchasers without this waiver.

{¶11} Paragraph 33(D) of the sale agreement states: "Purchasers hereby waive and relinquish all claims against Seller for damages to property or personal injury arising after the date of this contract and relating to \* \* \* [a]ny claims for repairs or modifications to the property except as specifically covered by the Sellers Limited Home Warranty."

{¶12} The limited warranty provides in part: "The Builder makes no housing merchant implied warranty or any other warranties, express or implied, in connection with the attached sales contract or the warranted Home, and all such warranties are excluded,

except as expressly provided in this Limited Warranty." Additionally, the limited warranty states "[t]here are no warranties which extend beyond the face of this Limited Warranty." The limited warranty sets forth one-year, two-year, and ten-year coverage periods for various warranted items, and the document details warranty standards under headings for "category" (i.e., foundations, framing, exterior, interior), "observation[s]" (i.e., cracks, warping, leaks), and "action required" by the builder to correct various warranted items.

{¶13} We first address appellants' contention that Ohio law does not allow for waiver of the implied duty to construct a home in a workmanlike manner. Appellants argue the trial court erred in proceeding under the assumption that this duty could be waived.

{¶14} In its decision, the trial court noted that appellants were provided express warranties, and that they agreed to waive any claims for property damage other than claims covered under the limited warranty. The trial court cited language from this court's decision in *Hanna*, in which we noted that a builder has a duty to exercise reasonable care to perform in a workmanlike manner " 'absent express or implied warranties as to the quality or fitness of work performed.' " *Id.* at ¶20, quoting *Barton*.

{¶15} Appellants acknowledge a lack of Ohio case law on the issue of whether the duty implied in law to construct a home in a workmanlike manner can be waived. While appellants contend this court should hold that the duty cannot be waived, appellants rely upon cases from other jurisdictions holding that such a waiver is valid if it is conspicuous, unambiguous, and fully disclosed. See, e.g., *Bd. of Mgrs. of the Village Ctr. v. Wilmete Partners* (2001), 198 Ill.2d 132, 138 (party raising disclaimer of implied warranty of habitability as a defense must show that disclaimer was a conspicuous

provision, fully disclosed, and that the disclaimer in fact was the agreement reached by the parties); *Heath v. Palmer* (2006), 181 Vt. 545 (exclusions or modifications of warranty of habitability and good workmanship must contain clear and unambiguous provision, agreed to by plaintiffs, waiving defendants' liability for defects).

{¶16} Based upon this court's own research, it appears that a majority of jurisdictions considering this issue have adopted the view that waiver of the implied warranty of good workmanship is permissible. See *Griffin v. Wheeler-Leonard & Co.* (1976), 290 N.C. 185, 202 ("[w]ithout question" a builder-vendor and purchaser could enter into a binding agreement that the implied warranty of workmanlike manner would not apply to particular transaction); *Belt v. Spencer* (1978), 41 Colo.App. 227, 230 (warranty that home be built in a workmanlike manner "may be limited by an express provision in the contract between the parties"); *Dixon v. Mountain City Constr. Co.* (Tenn.1982), 632 S.W.2d 538, 542 (adopting doctrine of implied warranty of workmanship, but noting that builder-vendors and purchasers are "free to contract in writing for a warranty upon different terms and conditions or to expressly disclaim any warranty"); *O'Mara v. Dykema* (1997), 328 Ark. 310, 319 (implied warranties of habitability, sound workmanship, and proper construction may be excluded); *Tyus v. Resta* (1984), 328 Pa.Super. 11 (builder-vender can limit or disclaim implied warranty of reasonable workmanship by clear and unambiguous language).

{¶17} Having considered the reasoning of the above authorities, and based upon a review of Ohio case law, we are not persuaded that the law of this state precludes a builder-vendor from offering an express limited home warranty while disclaiming other warranties implied by law. See *Barton* at 253 (trial court applied correct standard of law in

finding parties expected work to be performed in a good and workmanlike manner "unless otherwise agreed").

{¶18} Appellants alternatively contend that, even if waiver is permissible, this court should refuse to enforce such waiver because it is against public policy. Appellants argue that the trial court failed to address this argument in its decision.

{¶19} In general, "parties have complete freedom to enter into a contract." *Brandon/Wiant Co. v. Teamor* (1998), 125 Ohio App.3d 442, 448. Thus, in the absence of an "overwhelming public policy concern, the concept of freedom to contract is considered to be fundamental to our society." *Id.* at 449, citing *Royal Indemn. Co. v. Baker Protective Servs., Inc.* (1986), 33 Ohio App.3d 184. See also *Stickovich v. Cleveland*, 143 Ohio App.3d 13, 25, 2001-Ohio-4117 ("freedom of contract is the general rule; public-policy limits are the exception"). Further, "[j]udges must apply the doctrine of public policy with caution so as not to infringe on the parties' rights to make contracts that are not clearly opposed to some principle or policy of law." *Teamor* at 448-49, citing *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 185.

{¶20} Upon review, we decline to hold that a valid disclaimer is violative of Ohio public policy. We have noted above that a majority of states permit a disclaimer of the implied duty to construct in a workmanlike manner as long as such disclaimer is clear and unambiguous, and appellants have offered no Ohio authority for the proposition that a clearly disclosed disclaimer of the implied warranty is against the public policy of this state. We further note that case law cited by appellants from outside Ohio supports the view that a knowing waiver is not contrary to public policy. See *Wilmete Partners* at 980 (knowing disclaimer of implied warranty of habitability not against public policy).

{¶21} Accepting appellants' argument that waiver of an implied warranty must be clear, unambiguous, and conspicuous, we next consider the language of the agreements at issue in addressing appellants' argument that the language was insufficient to waive the warranties. The sale agreement is five pages in length and contains 34 paragraphs. Three of the paragraphs address disclaimer of warranties, and paragraphs 8, 9, and 33 specifically reference the "Limited Home Warranty."

{¶22} Paragraph 8 informs the buyer that "Seller shall provide its standard Limited Home Warranty" to purchasers, and that copies of the limited warranty are "available for Purchasers[] review in the Sales office and will be provided to Purchasers upon request." Paragraph 9 of the sale agreement states in part that purchasers agree there are "no other warranties either expressed or implied," and that purchasers "waive and relinquish any and all implied warranties" and agree to "rely solely on Seller's Limited Home Warranty." That paragraph further provides that purchasers acknowledge the seller is "relying on this waiver and would not sell the property to Purchasers without this waiver." Additionally, paragraph 33 states in part: "Purchasers acknowledge that the Seller shall be entitled to rely upon this waiver as a complete bar and defense against any claim asserted by Purchasers."

{¶23} Appellants observe, and we agree, that the paragraphs in the sale agreement referencing disclaimer of warranties are not more conspicuous than the other paragraphs. We consider, however, the sale agreement in conjunction with the limited warranty.

{¶24} The cover of the limited warranty provides in part:

***The Builder makes no housing merchant implied warranty or any other warranties, express or implied, in***

***connection with the attached sales contract or the warranted Home, and all such warranties are excluded, except as expressly provided in this Limited Warranty. There are no warranties which extend beyond the face of this Limited Warranty.***

(Emphasis sic.)

{¶25} In general, "courts presume that the intent of the parties can be found in the written terms of their contract." *Foley v. Empire Die Casting Co.*, 9th Dist. No. 24558, 2009-Ohio-5539, ¶12. The terms of a contract are ambiguous "if their meanings cannot be determined from reading the entire contract, or if they are reasonably susceptible to multiple interpretations." *Id.*

{¶26} Here, the language set forth above in the limited warranty is clear and unambiguous, and not susceptible to differing interpretations. See, e.g., *Brevorka v. Wolfe Constr., Inc.* (2002), 155 N.C.App. 353, 358 ("[t]he words 'there are no other warranties express or implied' are sufficient to exclude the implied warranty of habitability or workmanlike construction from the parties' transaction"); *Flex Homes, Inc. v. Ritz-Craft Corp.* (N.D. Ohio, Mar. 18, 2008), No. 07cv1005 ("phrase 'THERE ARE NO OTHER WARRANTIES, EXPRESS OR IMPLIED' clearly disclaims all implied warranties," including implied warranty of workmanship). Further, the disclaimer provision in the instant case, located on the cover of the limited warranty in bold print and italics, was sufficiently conspicuous, and we therefore find unpersuasive appellants' contention that the wording in the agreements was insufficient to constitute a valid disclaimer.

{¶27} Appellants further contend that the waiver of claims and limitations of remedies provisions should not be enforced because they are unconscionable. The Supreme Court of Ohio has observed that " '[u]nconscionability has generally been

recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' " *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 383, quoting *Williams v. Walker-Thomas Furniture Co.* (C.A.D.C.1965), 350 F.2d 445, 449. Unconscionability "embodies two separate concepts: (1) unfair and unreasonable contract terms, *i.e.*, 'substantive unconscionability,' and (2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, *i.e.*, 'procedural unconscionability.' " *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834. The party asserting unconscionability of a contract bears the burden of proving that such agreement is both procedurally and substantively unconscionable. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶33.

{¶28} The primary grounds appellants assert for procedural unconscionability involve the age of the buyers, their relative inexperience in home purchases, and the fact they did not have an attorney review the documents. Appellants also contend they felt some pressure to move into the area, *i.e.*, enrolling children in school and living close to a relative.

{¶29} According to their affidavits, appellants ranged in age from the mid-30s to early 40s at the time they signed the agreements. Although courts may consider whether a party had legal representation, we note there was no showing appellants were somehow precluded from consulting with counsel prior to signing the agreements. See *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, ¶10 ("while appellees were not represented by counsel, it was by their own choice, and lack of representation is not dispositive"). Further, "a party is presumed to have read what he

signed and cannot defeat the contract by claiming he did not read it." *Hadden Co., L.P.A. v. Del Spina*, 10th Dist. No. 03AP-37, 2003-Ohio-4507, ¶15. While appellants averred they had not previously purchased homes, the evidence does not suggest the builder exerted undue pressure on them to sign the agreements; nor do general claims of pressure to live in a particular area establish that appellants were limited in purchasing a home from a particular builder.

{¶30} With respect to the issue of substantive unconscionability, we find no error with the trial court's determination that both the sale agreement and the limited warranty adequately explained in "numerous places that the Limited Home Warranty covers all defects in materials and workmanship and that there are no other warranties either expressed or implied." As noted above, the limited warranty disclaimer was clearly worded and conspicuous, and the limited warranty was made in conjunction with specific promises by Centex warranting repairs for over 100 items, including some items which carried a ten-year limited warranty period (in contrast to four-year limitations period under Ohio law).<sup>1</sup> Upon review, we agree with the trial court that the limitations of warranties contained in the agreements were not unconscionable.

{¶31} Appellants also assert that the limited warranty failed in its essential purpose by not providing for the repair of the magnetized joists in their homes. We find this argument unpersuasive. The doctrine relied upon by appellants is drawn from the Uniform Commercial Code ("UCC"). See UCC. § 2-719(2) (providing certain remedies

---

<sup>1</sup> See *Velotta v. Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 378 (duty implied in the sale between builder-vendor and vendee to construct residence in a workmanlike manner using ordinary care subject to four-year statute of limitations under R.C. 2305.09(D)).

under the UCC "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose"); see also R.C. 1302.93(B) (codifying UCC § 2-719).

{¶32} Centex notes that appellants have cited no cases where this doctrine has been applied to the sale of a home. Courts have noted in general that "the failure-of-the-essential-purpose doctrine \* \* \* is grounded in the Uniform Commercial Code \* \* \* and its associated case law and thus, applicable only to contracts for the sale of goods." *Darby Anesthesia Assoc., Inc. v. Anesthesia Business Consultants* (E.D.Pa.July 23, 2008), No. 06-1565. See also *Ruschau v. Monogram Properties*, 12th Dist. No. CA2004-10-121, 2005-Ohio-6560, ¶25 (R.C. 1302.02 limits the scope of Ohio's UCC provisions to transactions in goods, and R.C. Sections 1302.01 to 1302.98 "are inapplicable to realty").

{¶33} Courts in other jurisdictions have declined to apply UCC provisions to "a non-UCC breach of warranty claim." *Plymouth Pointe Condominium Assoc. v. Delcor Homes-Plymouth Pointe, Ltd.* (Mich.App.Oct. 28, 2003), No. 233847 (declining to apply by analogy UCC doctrine of "failure of essential purpose" in analyzing limited warranty agreement involving condominium builder); *Southcenter View Condominium Owners' Assoc. v. Condominium Builders, Inc.* (1986), 47 Wash.App. 767, 770 (UCC not applicable to sales of real estate).

{¶34} Rather, these courts have held "there is no need to adopt by analogy a UCC concept in analyzing the limited warranty" because the common-law mechanism of unconscionability "is still a viable mechanism for determining the enforceability of a contract in non-UCC cases." *Plymouth Pointe*. See also *Pichey v. Ameritech Interactive Media Servs., Inc.* (W.D.Mich.2006), 421 F. Supp.2d 1038 (court finds no basis to extend failure-of-the-essential-purpose doctrine to cases "outside the application of Article 2 [of

the UCC]. Instead, the doctrine of unconscionability more properly provides the vehicle for determining whether the terms of a services contract are sufficiently one-sided as to undermine the purpose of the agreement"). We agree, and find the doctrine is inapplicable to the instant action.

{¶35} Based upon the foregoing, we find that the trial court properly granted summary judgment in favor of Centex. Accordingly, appellants' single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

TYACK, P.J., and McGRATH, J., concur.

---

10X

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
2009 SEP -9 PM 3:21  
CLERK OF COURTS

Paul Jones et al.,	:	
	:	
Plaintiffs-Appellants,	:	No. 09AP-1032
	:	(C.P.C. No. 07CVH02-2478)
v.	:	
	:	(REGULAR CALENDAR)
Centex Homes,	:	
	:	
Defendant-Appellee.	:	
	:	
Eric Estep et al ,	:	
	:	
Plaintiffs-Appellants,	:	No. 09AP-1033
	:	(C.P.C. No. 07CVH02-2479)
v.	:	
	:	(REGULAR CALENDAR)
Centex Homes,	:	
	:	
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on September 9, 2010, appellants' sole assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellants.

BROWN, J., TYACK, P.J., & McGRATH, J.  
  
\_\_\_\_\_  
Judge Susan Brown