

IN THE SUPREME COURT OF OHIO

Paul Jones, et al.,	:	
	:	No. 10-1826
Plaintiffs-Appellants,	:	
	:	On Appeal from the Franklin
vs.	:	County Court of Appeals, Tenth
	:	Appellate District,
Centex Homes,	:	Case No. 09 AP-1032
	:	
Defendant-Appellee.	:	

Eric Estep, et al.,	:	
	:	No. 10-1826
Plaintiffs-Appellants,	:	
	:	On Appeal from the Franklin
vs.	:	County Court of Appeals, Tenth
	:	Appellate District,
Centex Homes,	:	Case No. 09 AP-1033
	:	
Defendant-Appellee.	:	

MEMORANDUM IN OPPOSITION TO JURISDICTION OF DEFENDANT-APPELLEE CENTEX HOMES

Steve J. Edwards
4030 Broadway
Grove City, Ohio 43123

Attorney for Plaintiffs-Appellants

Michael G. Long (0011079)
(Counsel of Record)
Jonathan P. Corwin (0075056)
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 East Gay Street
Columbus, Ohio 43215
Phone: (614) 464-6297
Facsimile: (614) 719-4829
Email: mglong@vorys.com
jpcorwin@vorys.com

*Attorneys for Defendant- Appellee Centex
Homes*

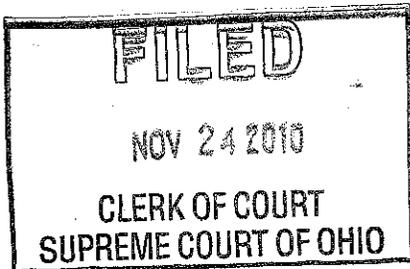


TABLE OF CONTENTS

	<u>Page</u>
I. This Is Not A Case Of Public Or Great General Interest.....	1
II. Statement Of The Case And Fac.....	4
III. Argument Concerning Appellants' Propositions Of Law.....	7
A. Response To Proposition No. 1: Ohio Law Permits The Waiver Of Implied Warranties, Including The Implied Warranty Of Good Workmanship.....	7
B. Response To Proposition No. 2: The Contracts Entered Into By Appellants Clearly, Conspicuously, And Unambiguously Waived The Implied Warranty Of Workmanlike Construction.....	10
C. Response To Proposition No. 3: The Doctrine Of A Warranty Failing Its Essential Purpose Has No Application In This Case And, In Any Event, The Limited Home Warranty Provided To Appellants Did Not Fail Its Essential Purpose.....	11
IV. Conclusion	14
CERTIFICATE OF SERVICE	

I. This Is Not A Case Of Public Or Great General Interest

This case does not involve issues of public or great general interest. Instead, it is nothing more than a case, like most cases, where well-established Ohio law regarding the right to freedom of contract, the waiver of implied warranties, and the doctrine of failure of essential purpose has been correctly applied to the particular facts. Although Appellants exaggerate their propositions of law in conclusory statements of general applicability, it is clear from the litigation history of this case, as well as a careful reading of Appellants' Memorandum in Support of Jurisdiction, that the issues presented for review are highly fact-specific and have been resolved via application of long-established principles of Ohio contract law. Appellants' contention that this case "presents four (4) issues of first impression in Ohio" is both erroneous and vastly overstated. In fact, none of these alleged "issues of first impression" warrant acceptance of this case for review.

On Appellants' first issue, waiver of the implied warranty of good workmanship, well-established Ohio law, and the law in every other jurisdiction to specifically address the issue, holds that this implied warranty can be waived, just like other implied warranties. This is nothing new. As long ago as 1989, this Court clearly held that "[c]ontracting parties are free to determine which warranties shall accompany their transaction." *Chemtrol Adhesives, Inc. v. American Manufacturers Mutual Insurance Co.* (1989), 42 Ohio St.3d 40, 55, 537 N.E.2d 624. Lower courts in Ohio have followed this principle, e.g., absent vague and ambiguous terms, limiting or exculpatory provisions in a contract will be upheld. See *Collins v. Click Camera & Video* (1993), 86 Ohio App.3d 826, 832, 621 N.E.2d 1294. Moreover, Ohio courts have in fact suggested that the implied warranty of good workmanship can be waived. See *Barton v. Ellis* (1986), 34

Ohio App.3d 251, 253, 518 N.E.2d 18. Other jurisdictions addressing this issue have come to the same conclusion and have consistently permitted the waiver of the implied warranty of good workmanship.

Appellants' hyperbole on this point, suggesting that sellers could convey an inadequate warranty, and "[w]ithout some inquiry into the adequacy of what is given, there is nothing to protect a purchaser from an unscrupulous builder," ignores established Ohio law. Appellants would have this Court disregard the fundamental right to freedom of contract and require that Ohio courts weigh the adequacy of consideration given by the parties. However, this Court and other Ohio courts have routinely rejected invitations to second-guess the adequacy of consideration provided in contractual agreements. See e.g., *Rogers v. Runfola & Associates, Inc.* (1991), 57 Ohio St.3d 5, 6, 565 N.E.2d 540; *Mooney v. Green* (1982), 4 Ohio App. 3d 175, 177, 446 N.E.2d 1135.

While Appellants also suggest that allowing waiver of the implied warranty of good workmanship will prevent prospective purchasers from knowing what assurances of quality attach to their homes, they offer no basis for this contention, and ignore the fact that such a contention is supported neither by Ohio law nor by the facts of this case. The contracts entered into by Appellants clearly identified the Limited Home Warranty that was being provided, and clearly indicated that the Limited Home Warranty booklet was available for Appellants' review. Moreover, the Limited Home Warranty booklet was 24 pages long and provided extensive detail as to various items that were covered (including over 90 defects that were covered for a one year period, and another 16 defects that were covered for ten years).

The second issue identified by Appellants, whether the waiver must be clear, conspicuous, and unambiguous, is actually a non-issue. Ohio law clearly allows a waiver of an implied warranty when the language used is clear, conspicuous and unambiguous, and the courts below simply applied this law to the facts of this case and held the waivers were clear, conspicuous and unambiguous.

Appellants' third issue, whether the buyers had an opportunity to read the limitation of warranties, also is a non-issue because it turns completely on the facts of this case, not any new proposition of law. Once again, Ohio law on this issue is firmly established. Contracting parties are not excused from their obligations by claiming they did not actually read the contract. See *Hadden Co., L.P.A. v. Del Spina*, 10th Dist. No. 03AP-37, 2003-Ohio-4507, ¶¶ 13-15 (citing *McAdams v. McAdams* (1909), 80 Ohio St. 232, 241, 88 N.E. 542). Otherwise, "contracts would not be worth the paper on which they are written." *McAdams*, 80 Ohio St. at 241 (internal quotation and citation omitted). The issue is not whether one party can subsequently and unilaterally modify a contract – an issue not presented by the facts of this case – but is instead whether a party can be bound by contract language they could have read. Appellants were given an opportunity to read and review both the contract and warranty booklet. The fact that they chose not to do so is not a basis for expanding the scope of the bargained-for agreement. Again, this is consistent with well-established Ohio law.

Finally, Appellants' fourth issue, whether the doctrine of failure of essential purpose has application in the context of a purchase of real estate, also flies in the face of established Ohio law. First, the failure of essential purpose doctrine is a creature of the Uniform Commercial Code, and should not apply to the sale of a completed home. See

Ruschau v. Monogram Properties 12th Dist. No. CA2004-10-121, 2005-Ohio-6560, ¶ 25 (refusing to apply UCC provision to realty). Second, even if the doctrine did apply here, it would not provide Appellants any relief, because the failure of essential purpose doctrine is designed to ensure that sellers abide by warranty promises they make, not warranty promises that they did not make. See *Goddard v. General Motors* (1979), 60 Ohio St.2d 41, 44, 396 N.E. 2d 761. In other words, the doctrine is not designed to expand upon promises made by a seller in order to provide protection not actually bargained for. Appellants do not claim that Centex Homes failed to provide what was promised in the Limited Home Warranty. To the contrary, Appellants seek to expand the provisions of the Limited Home Warranty beyond the parties' bargained-for agreement. Quite simply, there is no factual or legal basis for this request.

In sum, this appeal is nothing more than an attempt by Appellants to rewrite Ohio contract law, curtailing one of the most basic and fundamental rights, i.e., freedom of contract. Ignoring the clear, conspicuous, and unambiguous language of the contracts they entered into with Centex Homes, Appellants attempt to expand the scope of the bargained-for express warranty that they received in connection with the purchase of their homes. In essence, Appellants seek to have this Court second-guess the consideration given by the parties, provide them a benefit that was never bargained for, and thereby erode the long-recognized concept of freedom of contract.

II. Statement Of The Case And Facts

In 2004, Appellants entered into Real Estate Sales Agreements ("Contracts") with Centex Homes for the sale of previously constructed homes located in Canal Winchester,

Ohio. In signing the Contracts, Appellants agreed to pay the stated purchase price and also explicitly agreed to the following provisions:

8. LIMITED HOME WARRANTY. Seller shall provide its standard Limited Home Warranty covering defects in materials and workmanship as described in the Limited Home Warranty documents. Copies of the Warranty are available for Purchasers to 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 express 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.

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 relating to any of the following:

* * *

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

Additionally, Appellants acknowledged that Centex Homes was "entitled to rely upon this waiver as a complete bar and defense against any claim" they asserted.

In exchange, Centex Homes agreed to sell Appellants the homes and provide them with its standard Limited Home Warranty that covered "defects in materials and workmanship as described in the Limited Home Warranty documents." The Limited Home Warranty covered only items specifically designated therein, and further provided detailed descriptions of those warranted items. Additionally, the front page of the

Warranty booklet that Appellants received clearly reiterated, in bold italicized print, that Centex Homes:

makes no housing merchant implied warranty or 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.

After Appellants moved into their respective homes, they began to experience minor interference with their cathode-ray tube television monitors and cordless phones. It was determined that the problems they were experiencing stemmed from the slight magnetization of the steel floor joists in the homes – a common occurrence in steel frame construction. However, the Limited Home Warranty that Centex Homes provided to the Appellants does not provide coverage for magnetized steel framing.

Appellants brought suit alleging that the magnetization constituted a defect in construction and asserted claims for breach of contract, breach of express and implied warranties, negligence, failure to perform in a workmanlike manner, and fraud.¹ Granting Centex Homes' motion for summary judgment, the trial court properly concluded that Appellants had "agreed to waive any claims for property damage other than claims covered under the Limited Home Warranty." Decision and Entry (Oct. 20, 2009), at p. 8.

On September 9, 2010, the Court of Appeals for the Tenth Appellate District affirmed the trial court's decision. Specifically, the court of appeals held that Ohio law

¹ The trial court dismissed the claims asserted by Ginger Estep, concluding that, because she did not sign the contract, she lacked standing to assert claims. Decision and Entry (Oct. 20, 2009), at p. 7. Further, the fraud claim asserted by Paul Jones and Latosha Sanders was dismissed, as they could not establish the necessary elements of that claim. Id., at p. 8. Those decision were not appealed.

does not preclude a builder-vendor from offering an express limited home warranty while disclaiming other warranties implied by law, including the duty to construct a home in a workmanlike manner. Decision (Sept. 9, 2010), 2010-Ohio-4268, ¶ 17. The court of appeals also held that disclaimer of the duty to construct a home in a workmanlike manner was not against public policy, was not unconscionable, and would be enforced because the waiver language was clear, unambiguous and conspicuous. *Id.*, ¶¶ 20-21, 26, 30. Finally, the court of appeals rejected Appellants' contention that the Limited Warranty failed of its essential purpose, finding the doctrine inapplicable to the facts of the case. *Id.*, at ¶ 34.

III. Argument Concerning Appellants' Propositions Of Law

A. Response To Proposition No. 1: Ohio Law Permits The Waiver Of Implied Warranties, Including The Implied Warranty Of Good Workmanship.

Appellants contend that there is no Ohio case holding that the implied warranty of workmanlike construction can be waived. While true, Ohio courts have suggested that the implied warranty of workmanlike construction can be waived and, significantly, there is no Ohio case holding that this implied warranty cannot be waived. See *Hanna v. Groom*, 10th Dist. No. 07AP-502, 2008-Ohio-765, ¶ 20; *Barton*, 34 Ohio App.3d at 253. Instead, as the analysis of both the trial court and the court of appeals demonstrates, application of well-established principles of Ohio law leads to the inescapable conclusion that implied warranties, including the implied warranty of good workmanship, can be waived.

The concept of freedom of contract is fundamental to our society. See *Dorsey v. Contemporary Obstetrics & Gynecology, Inc.* (1996), 113 Ohio App.3d 75, 80, 680

N.E.2d 240. To that end, Ohio courts have held that, absent vague and ambiguous terms, limiting or exculpatory provisions in a contract will be upheld. See *Collins*, 86 Ohio App.3d at 832. In the context of this case, it is also a well settled aspect of Ohio law that “[c]ontracting parties are free to determine which warranties shall accompany their transaction.” *Chemtrol Adhesives, Inc.*, 42 Ohio St.3d at 55.

Ohio courts have recognized that a builder-vendor of a completed structure has a duty to perform in a workman like manner and, “***absent express or implied warranties as to the quality or fitness of work performed,***” the builder-vendor’s failure to exercise reasonable care sounds in tort. *Barton*, 34 Ohio App.3d at 253 (emphasis added). See also *Hanna*, 2008-Ohio-765, ¶ 20. This statement of Ohio law recognizes that parties will often desire to contractually address the quality or fitness of the work performed, and is therefore consistent with the Supreme Court of Ohio’s statement in *Chemtrol* that “[c]ontracting parties are free to determine which warranties shall accompany their transaction.” 42 Ohio St.3d at 55.

As the court of appeals noted, “it appears that a majority of jurisdictions ... have adopted the view that waiver of the implied warranty of good workmanship is permissible.” 2010-Ohio-4268, ¶ 16 (citing cases). See also *Turner v. Westhampton Court, LLC* (Ala. 2004), 903 So.2d 82, 93 (affirming summary judgment to new home vendor and concluding that the principle of freedom of contract permits a party to effectively limit warranty coverage); *Bass v. Pinnacle Custom Homes, Inc.* (N.C. Ct. App. 2004), 592 S.E.2d 606, 607 (finding that use of clear and unambiguous terms sufficient to disclaim implied warranties in connection with sale of home); *O’Mara v. Dykema* (1997), 328 Ark. 310, 319 (implied warranties may be excluded when the

circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is excluded).

For example, in *Turner*, the plaintiffs entered into a contract for the purchase of a new house. The contract provided a limited warranty and further explained – in clear and conspicuous language – that the warranty was “given in lieu of any and all other warranties, either expressed or implied, including any implied warranty of merchantability, fitness for a particular purpose, habitability and workmanship....” 903 So.2d at 86. Nevertheless, the plaintiffs brought an action against the vendor and various contractors alleging that the house was damaged by use of synthetic stucco finish and asserted claims for, inter alia, breach of implied warranties. In discussing the defendants' limited warranty and disclaimer of other warranties, the court, being “led by the principle of freedom of contract,” concluded that it was permissible to limit warranty coverage. *Id.*, at 91.

In this case, Appellants contractually agreed that there were “no other warranties either express or implied” and agreed to “rely solely on Seller's Limited Home Warranty” for all alleged “defects in materials and workmanship.” Further, the Limited Home Warranty provided on its cover page that all warranties were excluded, except as explicitly provided in the Limited Home Warranty. Because these waivers are clear, conspicuous and unambiguous they should be given their proper effect.

B. Response To Proposition No. 2: The Contracts Entered Into By Appellants Clearly, Conspicuously, And Unambiguously Waived The Implied Warranty Of Workmanlike Construction.

Appellants contend that if parties are permitted to waive the implied warranty of good workmanship, then that waiver must be clear, conspicuous, and unambiguous. On this point, the parties are in agreement. Similarly, well-established law in Ohio is in accord. Appellants, however, take this a step further and contend that because they did not actually read the clear, conspicuous, and unambiguous waiver provided by Centex Homes, that waiver cannot be enforced.

The Limited Home Warranty was incorporated into and was part of the Contract. The Contracts entered into by Appellants clearly identified the Limited Home Warranty, clearly identified that the Limited Home Warranty was part of the Contracts, and clearly indicated that the Limited Home Warranty booklet was available for review. Appellants agreed to the terms of the Contracts, including the Limited Home Warranty, when they signed the respective Contracts in 2004. And, the Limited Home Warranty was not altered following execution of the Contracts.

Appellants' failure to actually read either the Contracts or the Limited Home Warranty booklets before signing the Contracts is, as a matter of law, neither an excuse nor a justification for expanding the scope of the bargain. Appellants do not allege that they were denied the opportunity to read and review, or have someone else read and review, the relevant documents prior to signing the Contracts. See *Hadden Co., L.P.A.*, 2003-Ohio-4507, ¶¶ 13-15 (finding that purchase contract for the sale of real estate was clear and unambiguous, and noting that "a party to [a] contract is presumed to have read what he signed and cannot defeat the contract by claiming he did not read it").

In this respect, Appellants' reliance on Eleventh District Court of Appeals decision in *Service Guide, Inc. v. Building Systems Division, Armco, Inc.* (1988), 11th Dist. No.3804, 1988 Ohio App. LEXIS 1500, is misplaced. The portion of the opinion cited by Appellants is distinguishable from the facts of this case. In *Service Guide*, the plaintiff brought an action seeking damages due to alleged defects in a commercial aluminized steel roof manufactured and installed by the defendant. On appeal, the defendant argued that the trial court erred in refusing to enforce a warranty exclusion. In fact, the trial court did not even consider the issue. Discussing warranty exclusions under R.C. 1302.29 (a Uniform Commercial Code provision), the court of appeals noted that the contract simply stated that "[t]he new roof will carry [the defendant's] 20 year guarantee against rupture, structural failure or perforation in normal atmospheric conditions." *Id.*, at *14-15. However, it was significant that the exclusionary language was in a separate document that was not mentioned in the contract, that was not offered to the plaintiff, and that was not provided to the plaintiff. *Id.*, at *13-15.

By contrast, in this case, the Contracts explicitly identified the Limited Home Warranty and provided Appellants with an opportunity to review the actual warranty booklet before signing the Contracts. The fact that Appellants chose not to read the warranty booklet does not elevate the issue to one of public or great general interest.

C. Response To Proposition No. 3: The Doctrine Of A Warranty Failing Its Essential Purpose Has No Application In This Case And, In Any Event, The Limited Home Warranty Provided To Appellants Did Not Fail Its Essential Purpose.

Finally, Appellants contend that if Ohio law permits waiver of the implied warranty of workmanlike construction, then the "failure of essential purpose doctrine" must be adopted and applied in the context of new home construction. As the court of

appeals correctly concluded, the failure of essential purpose doctrine has no application in this case. 2010-Ohio-4268, ¶¶ 32-34. And, even if it did apply, the Limited Home Warranty provided by Centex Homes does not fail of its essential purpose.

The “failure of essential purpose” doctrine generally applies when a seller – who has promised or agreed to provide a remedy with respect to a particular deficiency or problem – fails to provide the warranty or repair coverage promised, thereby resulting in the buyer being deprived of the benefit of the warranty coverage bargained for. This doctrine arises out of, and applies most frequently in, the context of the sale of goods under the Uniform Commercial Code. See R.C. 1302.93(B). In fact, Appellants have not cited a single Ohio case where the “failure of essential purpose” doctrine has been expanded to apply outside the context of the UCC to a non-UCC breach of warranty claim, such as to the sale of a completed home. See *Ruschau*, 2005-Ohio-6560, ¶ 25.

Nevertheless, the case law cited by Appellants demonstrates that the intent of the “failure of essential purpose” doctrine is to ensure that a seller abides by warranty promises that it actually makes; not that such promises be expanded upon in order to provide protection not bargained for. For example, in *Goddard*, 60 Ohio St.2d at 44, the Supreme Court of Ohio recognized that the doctrine of failure of essential purpose applies 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.” (emphasis added). See also *Jeffrey Mining Prods. v. Left Fork Mining Co.* (2001), 143 Ohio App.3d 708, 717, 758 N.E. 2d 1173 (noting that warranty and limitations of remedies clause “may fail of its essential purpose where the seller is **unable or unwilling** to make repairs within a reasonable time”) (emphasis added).

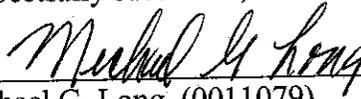
Quite simply, the “failure of essential purpose” doctrine is not to be used to add terms to a contractual provision, but instead is simply designed to ensure that a party reaps the benefits that were actually bargained for. For example, in *Vahalik v. Jeep Corp.* (Jan. 12, 1983), 7th Dist. No. 82 J 22, 1983 WL 6736, the defendant provided the plaintiff with a 12 month / 12,000 mile warranty. The plaintiff sought recovery for repair work performed after the vehicle had been driven in excess of 12,000 miles. *Id.*, at *2. The court explained that the express warranty did not fail of its essential purpose because its purpose was simply to provide a 12 month / 12,000 mile warranty. *Id.*, at *4.

Here, Appellants are improperly attempting to expand the coverage provided by the Limited Home Warranty by use of the “failure of essential purpose” doctrine. The Limited Home Warranty that the parties agreed would cover the homes – to the exclusion of all other express or implied warranties – did not provide coverage for magnetized floor joists. Simply, it was not the purpose of the Limited Home Warranty to provide coverage for magnetism. Therefore, the Limited Home Warranty has not failed of its essential purpose, and Appellants cannot use the failure of essential purpose doctrine to expand the coverage provided by that warranty.

IV. Conclusion

Appellants have failed to identify a public or great general interest justifying this Court's acceptance of jurisdiction. Because both the trial court and the court of appeals rendered well-reasoned decisions supported by the evidence and by established Ohio law, Centex Homes respectfully requests that this Court decline Appellants' invitation to accept jurisdiction in this case.

Respectfully submitted,



Michael G. Long (0011079)

(Counsel of Record)

Jonathan P. Corwin (0075056)

VORYS, SATER, SEYMOUR AND PEASE LLP

52 East Gay Street

Columbus, Ohio 43215

Phone: (614) 464-6297

Facsimile: (614) 719-4829

Email: mglong@vorys.com

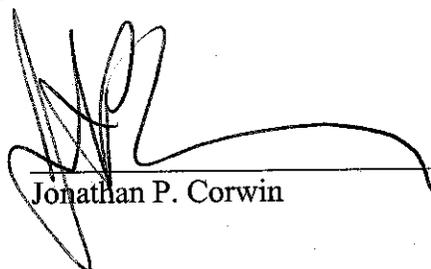
jpcorwin@vorys.com

Attorneys for Defendant-Appellee Centex Homes

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via U.S. Mail, postage prepaid, this 27th day of November, 2010, upon:

Steve J. Edwards
4030 Broadway
Grove City, Ohio 43123



Jonathan P. Corwin