

ORIGINAL

IN THE SUPREME COURT OF OHIO

PAUL JONES, et al., :  
 :  
 Plaintiffs - Appellants, :  
 :  
 vs. : Case No. 2010-1826  
 :  
 CENTEX HOMES : On Appeal from the  
 : Franklin County Court of  
 Defendant – Appellee. : Appeals, Tenth Appellate  
 : District

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**MERIT BRIEF OF APPELLANTS PAUL JONES, LATOSHA SANDERS, ERIC ESTEP, AND GINGER ESTEP**

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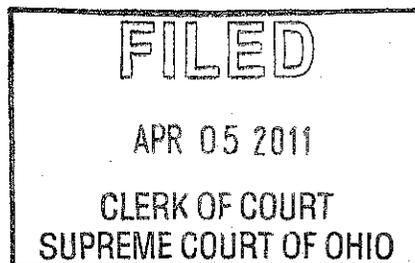


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## STATEMENT OF THE FACTS

Plaintiffs purchased new homes which were built by defendant with steel joists. The steel joists became magnetized during construction thereby creating a magnetic field which reduced property values, created potential health problems, and disrupted operation of: cordless phones, cathode ray televisions, and computer hard drives. If plaintiffs have waived their rights then they have no alternative but to live in a giant magnet.

Plaintiffs Eric and Ginger Estep entered into a contract to purchase a new home from Defendant on August 25, 2004. (Supplement to the Briefs, p.17, Affidavits attached to Plaintiffs' Memorandum Contra to Defendant's Motion for Summary Judgment). Plaintiffs moved in and 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. After an investigation was undertaken it was determined the steel joists in Plaintiffs' homes had become magnetized and it was this magnetic field that was causing the problems plaintiffs were experiencing. In addition to these problems there is the potential for unknown health problems and the loss in value of the home from this magnetic field.

Plaintiffs Paul Jones and Latosha Sanders entered into a contract to purchase a new home from Defendant on October 30, 2004. (Supplement to the Briefs, p.9, Affidavits attached to Plaintiffs' Memorandum Contra to Defendant's Motion for Summary Judgment). They have experienced problems similar to the Esteps.

All Plaintiffs signed purchase contracts with Defendant that purport to waive all implied warranties and claims and give Plaintiffs a limited warranty. (Supplement at 10-12, 18-20). The relevant portions of those sales contracts are:

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.

Plaintiffs' complaints 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. (Supplement at 70, 77, Plaintiffs' Complaints).

In the trial court, defendant filed for summary judgment and after briefing, the court granted defendant's motion for summary judgment and dismissed all of Plaintiffs' claims. The court held that the implied duty of good workmanship could be waived and that the waiver in the limited warranty was sufficient to waive that duty. The trial court also held that the waivers were not unconscionable or against public policy and that the limited warranty did not fail its essential purpose. The trial court held that plaintiffs' only claim was under the limited warranty that defendant had given to plaintiffs in lieu of all claims but that the limited warranty did not cover magnetized joists and therefore plaintiffs were without a remedy. (Appendix to Brief, A-24).

Plaintiffs filed a timely Notice of Appeal to the Franklin County Court of Appeals. On September 9, 2010 the Franklin County Court of Appeals affirmed the judgment of the common pleas court. (A-10). The court of appeals ruled that the implied duty to construct a new home in a workmanlike manner could be waived under Ohio law

and for such a waiver to be effective it must be clear, unambiguous and conspicuous. The court of appeals further ruled that while the sales contract in this case did not meet that standard, another document, not seen by plaintiffs, but incorporated by reference, did meet that standard and that was sufficient. The court of appeals held that such a waiver did not offend any public policy of Ohio and that it was not unconscionable. Finally, the court of appeals held that the doctrine of the limited warranty failing its essential purpose should be limited to the sale of goods and not extended to the sale of real estate. A timely motion to reconsider was denied by the court of appeals. (A-3).

### ARGUMENT

**Proposition of Law No. I:  
Any waiver of the duty to construct a new home in a workmanlike manner is against public policy and therefore void.**

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.* (1982), 69 Ohio St.2d 376, 378-79

This duty of ordinary care was first recognized in *Mitchem v. Johnson* (1966), 7 Ohio St. 2d 66. There, this Court discussed adopting an implied warranty but instead choose to

adopt an implied duty of ordinary care. “In *Mitchem*, we carefully distinguished between (1) an implied warranty of suitability for the purpose intended, which we declined to impose on the builder-vendor, and (2) the duty to construct in a workmanlike manner using ordinary care, which we held to be *a duty imposed by law* (emphasis in original) on the builder vendor.” *Velotta*, at 377-378. In *McMillan v. Brune-Torbeck Builders, Inc.* (1983), 8 Ohio St. 3d 3 this duty was extended to subsequent purchasers of the home.

Nothing in these cases suggests that this implied duty can be waived. To the contrary, language in these cases suggests that this duty cannot be waived. “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.” *Mitchem* at 72, “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.” *Velotta*, at 378. By drawing this comparison between new home builders and ordinary citizens of Ohio, with both being bound by the duty of ordinary care, this Court was demonstrating how widespread and ingrained this duty is in the law and there is no good reason to relieve one segment of society, home builders, from the duty that governs the remaining citizens of Ohio.

The Court of Appeals found no Ohio case law addressing this issue. This is an issue of first impression in Ohio. The Court of Appeals and defendant rely on the principle that the freedom to contract contains the right to waive this implied duty. However, the freedom to contract does have boundaries, “In certain circumstances, however, complete freedom of contract is not permitted for public policy reasons.” *Lake Ridge Academy v. Carney* (1993), 66 Ohio St. 3d 376, 381. See also *Mark-It Place Foods, Inc. v. New Plan* (4<sup>th</sup> Dist. 2004), 156 Ohio App.3d 65, 95-96; *Eagle v. Fred*

*Martin Motor Co.* (9<sup>th</sup> Dist. 2004), 157 Ohio App.3d 150, 175. In *The Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Kinney* (1916), 95 Ohio St. 64, 67-68 this Court answered what is public policy:

What is "public policy?" A correct definition, at once concise and comprehensive, of the words "public policy" has not yet been formulated by our courts. Indeed the term is as difficult to define with accuracy as the word "fraud" or the term "public welfare". In substance it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all the circumstances of each particular relation and situation.

Sometimes such public policy is declared by constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people - - in their clear consciousness and conviction of what is naturally and inherently just and right between man and man.

It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic.

When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be constitution, statute or decree of court.

It has frequently been said that such public policy is a composite of constitutional provisions, statutes, and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination.

When a contract is contrary to some provision of the constitution, we say it is prohibited by the constitution, not by public policy. When a contract is contrary to a statute, we say it is prohibited by a statute, not by a public policy. When a contract is contrary to a settled line of decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy.

Public policy is the cornerstone – the foundation – of all constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them. If this be not true, when came the first judicial decision on matter of public policy?

It is contrary to public policy to allow a home builder to exclude all claims and warranties for a new home in lieu of a limited warranty and then claim that the limited warranty provides no repair for the defect. This contravention of public policy would be greater if no limited warranty was offered in return for the waiver. Buyers assume that a new home will be in good working order and backed by the builder who will make good on any problems for a reasonable period of time. Allowing the builder to engage in conduct which contradicts this widely held belief is contrary to public policy. This especially true since the builder has the ability to eliminate the defects and the product (house), is an extremely expensive purchase.

This ability, to exclude the consequences of one's own negligence, is not favored under Ohio law. There are areas of the law where a party cannot contractually waive the consequences of his negligence. Some of those areas include bailments, *Agricultural Ins. Co. v. Constatine* (1944), 144 Ohio St. 275, 283-284; employer-employee, *Railway Co. v. Spangler* (1886), 44 Ohio St. 471; and a bank and its customers, *Speroff v. First Central Trust Co.* (1948), 149 Ohio St. 415.

**A. If waiver allowed.**

If this Court would allow a builder to waive the duty to construct in a workmanlike manner, along with all other claims a seller may have, then the consequences of such a decision must be examined.

All home builders could start disclaiming all warranties or duties, providing no limited warranties and then walk away from defective homes. This practice would likely lead to lower sales prices due to the cheaper price of poor quality materials or poor quality workmanship which would result in the defect. The lower price would attract more buyers. How is this practice in accordance with the public good for the citizens of Ohio to have defective homes proliferating throughout Ohio? How is this practice in accord with the sense of justice of Ohio's citizens?

If this duty can be waived, what protection is left for a buyer? There is no guarantee that a limited warranty will be substituted for this duty. According to the court of appeals, the doctrine of unconscionability would provide the protection for a buyer. In Ohio, unconscionability is difficult to prove.

Assessing whether a contract provision is unconscionable requires an examination of the facts and circumstances surrounding the creation of the agreement. *Id.* In Ohio, a party claiming unconscionability must demonstrate (1) substantive unconscionability, i.e., unfair and unreasonable contract terms, and (2) procedural unconscionability, i.e., individualized circumstances surrounding parties to a contract such that no voluntary meeting of the minds was possible. (citations omitted).

*Khoury v. Denny Motors Assoc.*, 2007 Ohio 5791; 2007 Ohio App. LEXIS 5103 (Franklin County 2007) at P. 11. See also *Tomovich v. USA Waterproofing*, 2007 Ohio 6214, 2007 Ohio App. LEXIS 5460 (9<sup>th</sup> Dist. 2007) at P. 19.

Substantive unconscionability involves factors relating to the contract terms themselves and whether they are commercially reasonable. (citations omitted). When examining whether a particular limitations clause is substantively unconscionable, courts have considered the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability. (citations omitted).

*Khoury*, supra at para. 12.

\*\*\* procedural unconscionability involves factors bearing on the relative bargaining positions of the contracting parties, such as “age, education, intelligence, business acumen, and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alteration in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question.” (citations omitted).

*Khoury*, at Para.12

Leaving the buyers of new homes with only the doctrine of unconscionability as protection for their investment is poor public policy and contrary to the expectations of the citizens of Ohio. Proof of this is the court of appeals analysis below on unconscionability.

Another consequence of holding that this duty can be waived is that a subsequent buyer would likely not be bound by the waiver and therefore could sue the builder for breach of the implied duty under *McMillan*, supra. This would have the effect of putting a subsequent buyer in a superior legal position over the immediate buyer. There is no rational basis for discriminating between these two buyers in their ability to sue the builder for its negligence. Such a legal position could lead to sham sales with subsequent purchasers being able to sue the builder for the defects where the original purchaser could not because of a waiver.

Allowance of the waiver would return Ohio consumers to a position worse than having only caveat emptor as protection, since under caveat emptor one could sue for fraud, *Traverse v. Long* (1956), 165 Ohio St. 249, 252, but, depending on the language of the waiver, fraud claims could also be eliminated. This is contrary to modern jurisprudence.

The traditional justification for the caveat emptor doctrine was that, in the markets that existed during the eighteenth and nineteenth centuries, the buyer and the seller had relatively equal bargaining positions. During the twentieth century, however, especially during the period following World War II, the age of automation thrust the seller and manufacturer into new roles of responsibility.

With the enactment of the Uniform Commercial Code in most states, the caveat emptor doctrine has essentially been eliminated with respect to the sale of goods. Although the caveat emptor approach has not disappeared from many courts consideration of a new home purchaser's claim against the housing merchant, there is a growing acceptance of the view that the risk of loss from a defect in a new home is most appropriately placed on the person or entity most likely for the defect. As the Mississippi Supreme Court has noted:

The purchase of a home is quite frequently the most important and expensive investment that a family makes. Yet, most purchasers simply do not have the knowledge or expertise necessary to discover many defects. They must instead rely upon the honesty and expertise of the builder. Consequently, if the home is poorly constructed with latent defects, the purchaser may very well be subjected to a major financial catastrophe against which he has no practical means of protecting himself. *Keyes v. Guy Bailey Homes, Inc.* (Miss. 1983), 439 So. 2d 670, 671-72.

The doctrine of caveat emptor has now been wholly or partially repudiated in most states in regard to new home sales, although there is no unanimity with respect to the standard to which the housing merchant should be held or the parties to whom the merchant should be held responsible.

14 Richard Powell, Powell on Real Property, ¶ 84A.03 [1] (rev. 2008).

We live in a time when houses are mass produced, just like toasters. Homes are both, important societal institutions for the raising of families and the passing on of values and investment vehicles for accumulating wealth. These are frequently once in a lifetime purchases where the consumer does not have the expertise to know that they

even need protection. They are faced with long preprinted contracts containing boiler plate terms which cannot be negotiated and a seller that has more expertise and bargaining power. These facts support that the citizens of Ohio keep a certain level of protection in the duty to build a new home in a workmanlike manner. Public policy should prevent the waiver of this duty.

**Proposition of Law No. II:**

**The duty to construct a new home in a workmanlike manner can only be waived by a writing that is clear, conspicuous, known to the buyer, bargained for, and mentions the duty to construct in a workmanlike manner, when the waiver is construed against the seller.**

If this Court allows the implied duty to build in a workmanlike manner to be waived, then what language is needed in order to successfully waive the duty? Plaintiffs would submit that the language of the waiver must be clear, conspicuous, known to the buyer, specifically bargained for, and disclose the consequences of such a waiver, when construed against the builder.

The court of appeals, below, held that "Accepting appellants' argument that waiver of an implied warranty must be clear, unambiguous and conspicuous, \*\*\*\*" Court of Appeals. at ¶ 21. This standard omits the requirements of being: known to the buyer, specifically bargained for and that the consequences of the waiver be explained. These requirements are necessary for any effective waiver. In *White Co. v. Canton Transportation Comp.* (1936), 131 Ohio St. 190 this Court stated "He who asserts a waiver must prove it. \*\*\* 'A waiver is a voluntary relinquishment of a known right \*\*\*\*'". See also *Glidden Co. v. Lumbermens Mutual* (2006), 112 Ohio St. 3d 470, 478.

These requirements are even more critical herein since the buyer is waiving possibly the only right of protection in the normally largest purchase of his or her life.

**A. The waivers do not meet the standard and therefore are not effective.**

The sales contracts herein consist of five (5) pages with thirty-four (34) numbered paragraphs. (Supplement at 9-13, 17-21). Each paragraph has a number followed by one to five words in small capital letters with the title of the paragraph. The remainder of each paragraph is in small letters stating the terms of the contract. There is nothing conspicuous that sets off paragraphs 8, 9, and 33 from the other thirty-one (31) paragraphs. There is no bold-faced type or other indicating that these paragraphs are more important than the other paragraphs. This is a boiler plate contract.

A voluntary relinquishment of a known right would require that the buyer be aware of the seller's duty to construct a new home in a workmanlike manner. Nowhere in the sale contract were plaintiffs told of this right. The waiver does not state specifically that Defendant is protecting itself from its own negligence. Further, paragraphs 8, 9, or 33 of the sales agreements do not mention the implied duty of good workmanship. As the court of appeals found, the language was not more conspicuous than the other language in the sale contract. The sales contract therefore does not the knowing requirement of a waiver under Ohio law.

For a waiver to be valid the relinquishment must also be voluntary. Paragraphs 8, 9, and 33 were not specifically bargained for. They were part of a pre-printed contract prepared by Defendant and Plaintiffs did not feel they could suggest changes. The language of the disclaimer indicated that it was non-negotiable and a deal breaker. ("9. \*\*\*: Purchasers acknowledge and agree that seller is relying on this waiver and would

not sell the property to purchasers without this waiver.”). When one party states that the waiver must be included or there is no deal, then the waiver is not voluntary.

Applying the standard to the sales contracts in this case, the court of appeals held, “Appellants observe and we agree, that the paragraphs in the sale agreement referencing disclaimer of warranties are not more conspicuous than the other paragraphs”. Court of Appeals at ¶ 23. Given that legal conclusion, it would seem to follow that the court of appeals would have ruled in Appellants’ favor. However that was not the case because the court of appeals went on to consider whether the language of the limited warranty itself met the standard needed to waive the implied duty to perform in a workmanlike manner, “We consider, however, the sale agreement in conjunction with the limited warranty.” *Id.* at ¶ 23.

**Proposition of Law No. III:**

**Language in a document incorporated by reference cannot waive the duty to construct a new home in a workmanlike manner unless both of the following are met: (1) both the language incorporating the waiver and the language of the waiver meet the appropriate standard and (2) the buyer sees the language set forth in (1) a reasonable period of time prior to becoming legally obligated to purchase.**

The timing when the buyer sees the waiver is crucial to a resolution of the issues. The limited warranty and the language contained therein and relied upon by the court of appeals, was not given to plaintiffs until sometime **after** Plaintiffs signed the sales contracts and became legally bound to purchase the houses. This fact that plaintiffs were

not given the limited warranty until after they signed the sales agreement was established by plaintiffs' affidavits, "... Centex did give us a booklet about our limited warranty at some point after we signed the contract". (See paragraph 5 of the affidavits of Plaintiffs Eric Estep, Ginger Estep, Paul Jones and Latosha Sanders, which can be found both at pages 1,3,5,7 of the Supplement). This fact was the basis of Plaintiffs' Motion to Reconsider that was denied by the court of appeals.

The Sales Contract herein does provide that copies of the Limited Warranty are available for review in the sales office and will be provided upon request. That language is not sufficient. If the seller is going to rely on a document incorporated by reference to establish a waiver then the burden is on the seller to establish that the waiver was seen and understood by the buyer **prior** to entering into the purchase contract. The context of this procedure must be remembered when deciding the responsibilities of the parties. Waiver is an affirmative defense. Rule 8(C) of the Ohio Rules of Civil Procedure. As an affirmative defense, the seller would have the burden of proof. That burden is not met by merely offering to provide the document that constitutes the waiver. There can not be a voluntary relinquishment of a known right unless the buyer is made aware of his right prior to becoming legally bound by signing the purchase contract.

The right to have their new home constructed in a workmanlike manner is an important consumer right. It was established more than 40 years ago by this Court. As a matter of policy and procedure, any waiver of that right must be given to the buyer a reasonable period of time prior to the buyer becoming contractually bound. The reason that waivers must be clear, conspicuous and unambiguous is because they must provide notice and warning to the purchasers that they are giving up something of value. That

purpose cannot be achieved if the language waiving the duty is given after the sales agreement is signed.

The court of appeals decision allows incorporation by reference of a waiver into a purchase contract and then allowing the language in the incorporated waiver to waive the duty to construct in a workmanlike manner without the buyers ever seeing the language in the incorporated document prior to signing the purchase contract. There is not one case in Ohio that stands for this proposition making the court of appeals decision a dramatic and extreme extension of Ohio law. In *Service Guide, Inc. v. Building Systems Division, Armco, Inc.* (1988, 11<sup>th</sup> Dist.), 1988 Ohio App. LEXIS 1500, (see Appendix) 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

A second issue is the language in the sales contracts that incorporates the waiver. Failure to require that language to meet the same standard as the language in the waiver will lead to abuse and eventually the destruction of the buyer's right to this duty. If the incorporation by reference language does not have to meet the same standard as the waiver, of being clear, conspicuous, known to the buyer, and bargained for then this language could be hidden anywhere in the purchase contract, in any type size and written in obscure and impenetrable language. It would then be impossible for a consumer to locate and understand that another, unseen document, is part of the purchase contract and could be waiving important rights. The only manner to prevent this outcome is to require that any language that incorporates a waiver of the duty to construct in a workmanlike manner must meet the same standard as is required of the waiver itself. Anything less would lead to the destruction of this consumers' right.

**Proposition of Law No. IV:**

**A limited warranty given by a seller to a buyer as consideration for the buyer waiving the seller's duty to construct a new home in a workmanlike manner fails its essential purpose and is ineffective if it does not repair the defect.**

These waivers of damages and waivers of warranties clauses present herein are invalid because they fail their essential purpose by not providing for the repair of the magnetic field in Plaintiffs' homes. The court of appeals in discussing this issue held that the doctrine of failure of the essential purpose should be limited to the sale of goods in Article 2 of the Uniform Commercial Code, and not extended to the sale of real estate. The court of appeals went on to hold that unconscionability was the only remedy for the

plaintiffs. As pointed out, supra, unconscionability has such a difficult proof as to make it unlikely in most instances.

In *Goddard v. General Motors*, 60 Ohio St.2d 41 (1979), the 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*, 42 Ohio St.3d 40 (1989), 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.**

\* \* \*

We note that the determination of whether a warranty has failed to fulfill its essential purpose is ordinarily a question of fact for the jury.

*Id.*, at 41-48 (emphasis added)

This view from *Goddard*, that regardless of whether a limited warranty may be fair and reasonable when viewed in general, if a particular buyer cannot use the limited

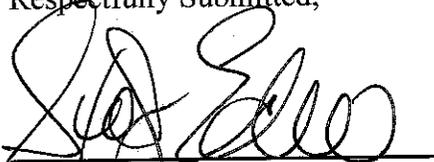
remedy to repair the defect of that particular buyer, then the limited remedy fails its essential purpose. If this holding is applied to plaintiffs then the limited warranty fails its essential purpose since defendant has conceded that the limited warranty provides no remedy for the magnetic field in plaintiffs' home.

If this Court is going to allow the waiver of the duty to construct a new home in a workmanlike manner then the buyer must have some protection given the significance of this transaction. Unconscionability is of little assistance and could be swept away by the language of the waiver. Waiver cannot be permitted unless a limited warranty is provided. If a limited warranty is provided then this Court must adopt the doctrine of failure of its essential purpose. If this doctrine is not adopted then worthless limited warranties could be provided in order to accomplish waiver of the duty to construct in a workmanlike manner. There must be some mechanism or standard by which the value of a limited warranty is measured. The only meaningful standard is whether limited warranty will remedy a particular defect claimed by a buyer. If the limited warranty does not remedy a defect then a buyer can claim that the limited warranty fails its essential purpose, avoid the waiver, and sue based upon the duty to construct in a workmanlike manner. This is the only workable solution if waiver is permitted.

**CONCLUSION**

For the reasons stated herein, the court of appeals' decision affirming the trial court's granting of summary judgment should be reversed and this case remanded for trial.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Steve J. Edwards", written over a horizontal line.

Steve J. Edwards (0000398)

4030 Broadway

Grove City, Ohio 43123

614) 875-6661

614) 875-2074 (Fax)

Atty4030@aol.com

*Attorney for Plaintiffs*

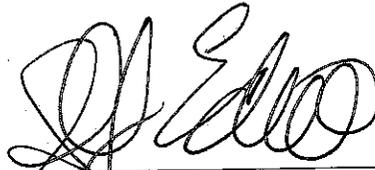
*Eric and Ginger Estep and*

*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 5th day of April 2011, upon:

Michael G. Long  
VORYS, SATER, SEYMOUR & PEASE, LLP  
P.O. Box 1008 - 52 East Gay Street  
Columbus, Ohio 43216-1008



---

Steve J. Edwards

IN THE SUPREME COURT OF OHIO

10-1826

Paul Jones, et al.,

Plaintiffs-Appellants.

vs.

Centex Homes

Defendant-Appellee.

Eric Estep, et al.,

Plaintiffs-Appellants,

vs.

Centex Homes

Defendant-Appellee.

On Appeal from the Franklin  
County Court of Appeals  
Tenth Appellate District  
Court of Appeals  
Case Nos. 09 AP-1032

On Appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District  
Court of Appeals  
Case No. 09AP-1033

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**NOTICE OF APPEAL OF APPELLANTS PAUL JONES, LATOSHA SANDERS,  
ERIC ESTEP, AND GINGER ESTEP**

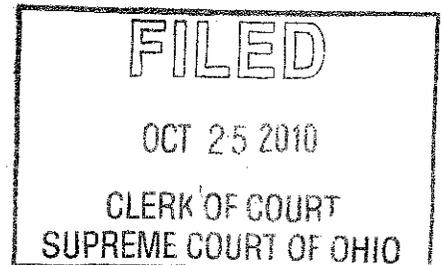
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Counsel for Appellants

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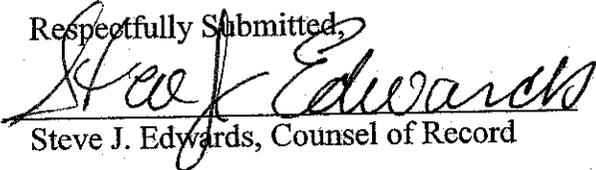
Counsel for Appellee



Notice of Appeal of Plaintiffs-Appellants

Plaintiffs-Appellants Paul Jones, Latosha Sanders, Eric Estep, and Ginger Estep hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case Nos. 09AP-1032 and 09AP-1033 on September 9, 2010.

This case is one of public or great general interest.

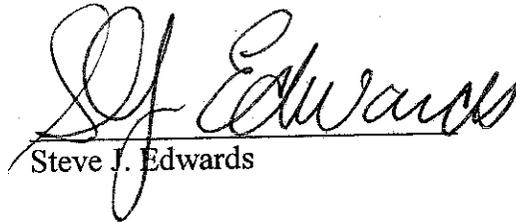
Respectfully Submitted,  
By:   
Steve J. Edwards, Counsel of Record

COUNSEL FOR APPELLANTS

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  
Vorys, Sater, Seymour & Pease, LLP  
52 East Gay Street  
Columbus, Ohio 43215

  
Steve J. Edwards

Handwritten initials/signature in the top left corner.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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10th DISTRICT, OHIO

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CLERK OF COURTS

Paul Jones et al.,

Plaintiffs-Appellants,

v.

Centex Homes,

Defendant-Appellee.

No. 09AP-1032  
(C.P.C. No. 07CVH02-2478)

(REGULAR CALENDAR)

Eric Estep et al.,

Plaintiffs-Appellants,

v.

Centex Homes,

Defendant-Appellee.

No. 09AP-1033  
(C.P.C. No. 07CVH02-2479)

(REGULAR CALENDAR)

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MEMORANDUM DECISION

Rendered on January 20, 2011

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*Steve J. Edwards*, for appellants.

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

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ON MOTION FOR RECONSIDERATION

BROWN, J.

{¶1} Plaintiffs-appellants, Paul Jones, Eric Estep, and Latosha Sanders, have filed an application for reconsideration of this court's decision in *Jones v. Centex Homes*,

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10th DISTRICT

10th Dist. No. 09AP-1032, 2010-Ohio-4268, in which this court affirmed the trial court's grant of summary judgment in favor of defendant-appellee, Centex Homes. In that decision, this court addressed appellants' contentions that: (1) Ohio law does not allow for waiver of the implied duty to construct a home in a workmanlike manner; (2) any such waiver is against public policy; (3) the language employed in the sales agreements at issue was insufficient to waive the warranties; and (4) the waiver of claims and limitations of remedies provisions should not be enforced because they are unconscionable.

{¶2} The test generally applied in considering an application for reconsideration is whether it "calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, paragraph 2 of the syllabus. However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens* (1996), 112 Ohio App.3d 334, 336.

{¶3} Appellants argue that reconsideration is warranted because of their claim that they did not read the limited home warranty until after they signed their respective sales contracts. Appellants cite to affidavits they submitted before the trial court, and assert that the law does not permit a party to disclaim warranties based upon language given to a party after it becomes legally bound to a contract.

{¶4} Appellants' argument essentially goes to the issue of whether the sale agreement each signed was unconscionable. Appellants previously argued under their single assignment of error that the sale agreement was unconscionable because it left

them without a remedy. Appellants also asserted procedural unconscionability based upon "the age of the buyers, their relative inexperience in home purchases, and the fact they did not have an attorney review the documents." *Centex* at ¶28. Those issues, as well as the issue of substantive unconscionability, were addressed and rejected in this court's decision.

{¶5} We similarly do not find merit with the claim advanced in appellants' application for reconsideration. This court's prior decision noted no evidence suggesting the builder exerted undue pressure on appellants to sign the sale agreements, and the limited home warranty was explicitly incorporated into, and made a part of the basis for, the sale agreements. This court's decision noted that the sale agreement contained 34 paragraphs, and that three of those paragraphs "specifically refer to the 'limited home warranty.'" *Centex* at ¶21. We further noted that "[p]aragraph 8 informs the buyer that the '[s]eller 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.'" *Id.* at ¶22. Paragraph 9 of the sale agreement provided in part that purchasers "agree to rely solely on Seller's Limited Home Warranty." Thus, as noted by appellee, the limited home warranty was not an after-the-fact modification to the sale contracts, nor do appellants allege they were denied the opportunity to read and review the relevant documents prior to signing the contracts (i.e., there is no evidence that the limited warranty was not available for review until after the agreements were signed). Accordingly, appellants' claim that they did not review the limited home warranty until after signing the sale agreements does not, under these

circumstances, render those agreements, and the limitations contained therein, unconscionable.

{¶6} Based upon the foregoing, appellants' application for reconsideration is hereby denied.

*Application for reconsideration denied.*

TYACK and DORRIAN, JJ., concur.

DORRIAN, J., concurring.

{¶7} I concur with the denial of the application for reconsideration. I have reviewed our September 9, 2010 decision and find specific discussion of appellants' argument that the language of the sales contract was not sufficiently conspicuous and clear to waive the implied duty because the limited warranty was incorporated "by reference" and not provided to appellants until after they signed the sales contract. Appellants contend there was no discussion of this issue, and thus it was not properly considered; therefore, appellants believe reconsideration is warranted.

{¶8} Reconsideration of this issue is not warranted. Our decision states that the language in the sale agreement was considered "in conjunction with the limited warranty." This approach is consistent with this court's precedent that "[w]here one instrument incorporates another by reference, both must be read together." *Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508, 2006-Ohio-2957, ¶¶64, citing *Christe v. GMS Mgt. Co., Inc.* (1997), 124 Ohio App.3d 84, 88. Furthermore, specific to incorporation by reference of limited warranties, I note the Eleventh District Court of Appeals' acknowledgement of limited home warranties being incorporated by reference: "Paragraph 23 of the contract *incorporates by reference* the New Home Limited

Warranty." (Emphasis sic.) *Birchfield Homes, Inc. v. McMahan* (Oct. 9, 1992), 11th Dist. No. 91-L-166.

{¶9} The case before this court differs factually from the cases cited above in that the documents incorporated by reference in those cases were either attached to the contract, signed by the complaining party or both; whereas, here the document incorporated by reference was neither attached nor signed by the complaining party. Rather the sale agreement stated: "Seller shall provide its standard Limited Home Warranty" and "[c]opies of the Warranty are available for Purchasers[]" review in the Sales office and will be provided to Purchasers upon request." Sale Agreement at paragraph 8.

{¶10} Appellants cite to *Serv. Guide, Inc. v. Bldg. Sys. Div., Armco, Inc.* (Apr. 22, 1988), 11th Dist. No. 3804, as support for his position that this court is making a dramatic departure from prior law with no precedent. *Serv. Guide* states in pertinent part:

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.

{¶11} *Serv. Guide* can be distinguished from the case before us in two regards. First, *Serv. Guide* involved a products liability claim subject to provisions of Ohio's version of the Uniform Commercial Code. This case involves a claim against a builder for a house. As noted in our decision, the Uniform Commercial Code does not apply to realty.

Second, in *Serv. Guide*, the warranty at issue was provided to the complaining party one year prior to execution of the contract in connection with a different contract bid and there is no indication that it was offered for review at the time of execution of the contract in question. In this case, the warranty was offered to the purchaser upon request. Furthermore, as highlighted by this court, the sale agreement itself states that purchasers "waive and relinquish any and all implied warranties," agree to "rely solely on Seller's Limited Home Warranty" and "acknowledge and agree that Seller is relying on this waiver and would not sell the property to Purchasers without this waiver." Sale Agreement at paragraph 9. The application for reconsideration is not warranted because, as this court found, the sale agreement in conjunction with the limited warranty is clear, unambiguous, and conspicuous and, therefore, constitutes a valid disclaimer.

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IN THE COURT OF APPEALS OF OHIO

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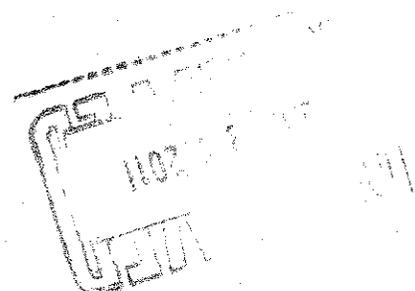
Paul Jones et al.,  
Plaintiffs-Appellants,  
v.  
Centex Homes,  
Defendant-Appellee.

No. 09AP-1032  
(C.P.C. No. 07CVH02-2478)  
(REGULAR CALENDAR)

Eric Estep et al.,  
Plaintiffs-Appellants,  
v.  
Centex Homes,  
Defendant-Appellee.

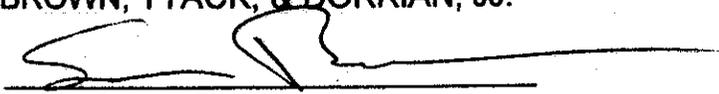
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(C.P.C. No. 07CVH02-2479)  
(REGULAR CALENDAR)

JOURNAL ENTRY



For the reasons stated in the memorandum decision of this court rendered on January 20, 2011, it is the order of this court that appellants' September 17, 2010 application for reconsideration is denied.

BROWN, TYACK, & DORRIAN, JJ.

  
\_\_\_\_\_  
Judge Susan Brown

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IN THE COURT OF APPEALS OF OHIO

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FRANKLIN CO. OHIO

TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Paul Jones et al.,

Plaintiffs-Appellants,

v.

Centex Homes,

Defendant-Appellee.

No. 09AP-1032  
(C.P.C. No. 07CVH02-2478)

(REGULAR CALENDAR)

Eric Estep et al.,

Plaintiffs-Appellants,

v.

Centex Homes,

Defendant-Appellee.

No. 09AP-1033  
(C.P.C. No. 07CVH02-2479)

(REGULAR CALENDAR)

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D E C I S I O N

Rendered on September 9, 2010

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*Steve J. Edwards*, for appellants.

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

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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

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FRANKLIN CO. OHIO

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 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).

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<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)).

{¶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.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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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

RECORDED  
SEP 14 2010  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

2009 OCT 20 PM 1:

FINAL APPEALABLE ORDER  
CLERK OF COURT

Paul Jones, et al.,

Plaintiffs,

-v-

Centex Homes,

Defendant.

Case No. 07CVH02-2478

JUDGE PFEIFFER

BY	18
TERMINATION NO.	VG

Eric Estep, et al.,

Plaintiffs,

-v-

Centex Homes,

Defendant.

Case No. 07CVH02-2479

JUDGE PFEIFFER

BY	18
TERMINATION NO.	VG

DECISION AND ENTRY GRANTING DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT  
AND  
ENTRY DENYING PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT  
AND  
NOTICE OF FINAL APPEALABLE ORDER

Rendered this 20<sup>th</sup> day of October, 2009

PFEIFFER, J.

This matter is before the Court on Defendant's Motion for Summary Judgment and Plaintiffs' Motion to Amend their Complaints. The Motions are opposed<sup>1</sup>.

<sup>1</sup> Due to the length of delay in rendering a Decision, the Court feels that an apology and explanation is owed to counsel and the parties. This Decision was actually completed and was thought to have been filed sometime ago. The Court, upon becoming aware of the lack of any ruling, did conduct a second review of the entire record and relevant case law. The Court sincerely apologizes for the hardship caused by the delay, which counsel are aware is not the typical practice of this Court.

Plaintiffs' Complaints allege that steel floor joists in their homes, which were constructed by Defendant, have become magnetized causing interference with their televisions, phones, and computers. Based on this alleged defect, they assert causes of action against Defendant for breach of contract, breach of express and implied warranties, negligence, and failure to perform in a workmanlike manner. Defendant now moves for summary judgment as to these causes of action arguing that Plaintiffs' claims are limited pursuant to a Limited Home Warranty, which does not cover the magnetization of steel framing. Additionally, Defendant argues that Plaintiff Ginger Estep lacks standing to pursue her claims for the reason that she is not a party to the contract executed between it and Plaintiff Eric Estep. Plaintiffs Paul and Latosha Jones' Complaint further asserts a cause of action for fraud, which Defendant seeks summary judgment upon arguing that there is no evidence to support the necessary elements of this claim. The undisputed facts are as follows.

Plaintiff Eric Estep entered into a Real Estate Sales Agreement with Defendant on August 25, 2004. Plaintiffs Paul and Latosha Jones entered into a Real Estate Sales Agreement with Defendant on October 30, 2004. (Defendant's Ex. A). The Agreements provide that "[s]eller shall provide its standard Limited Home Warranty covering defects in materials and workmanship as described in the Limited Home Warranty documents." (Id.). It further states that "[p]urchasers 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." (Id.). Additionally, Plaintiffs agreed

to waive "[a]ny claims for repairs or modifications to the property except as specifically covered by the Sellers Limited Home Warranty" and "[a]ll claims for \* \* \* damage to property unless directly resulting from acts or omissions of Seller for which acts or omissions Seller bears direct legal responsibility." (Id.). This waiver provision further states:

[p]urchasers 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.

(Id.).

The front page of the Limited Home Warranty states that:

*[t]he Builder makes no housing merchant implied warranty or any other warranties, express or implied, in connection with the attached sales contract or the warrant 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.*

(Defendant's Ex. B). (Emphasis in original).

The Limited Home Warranty expresses that "[o]nly warranted items which are specifically designated in the Warranty Standards are covered by this Limited Warranty." (Id.). The Limited Home Warranty then sets forth numerous conditions that, should they occur, are covered and subject to repair by Defendant. (Id.). The Limited Home Warranty does not provide coverage for magnetized steel framing. (Id.).

Plaintiff Paul Jones testified that he was not informed at the time of the real estate purchase that the house had steel framing and further did not discover that fact until six months after he had moved in. (Plaintiff Paul Jones deposition, p. 13). Plaintiff Eric Estep avers that Defendant did not explain the terms of the preprinted contract, that

he did not understand the effect of the contract, and believed that he did not have the ability to change any of the preprinted terms. (Plaintiff Eric Estep Affidavit, ¶¶4,5,9,10). Finally, the evidence reflects that Plaintiff Ginger Estep did not execute any agreement with Defendant and further is not listed on the General Warranty Deed as the owner of the home. (Defendant's Ex. C).

The Complaints allege that Defendant made express and implied warranties that the construction was performed in a safe, workmanlike manner and that the house was of merchantable quality, satisfactory, fit for the purpose intended, and met designated standards. (Complaint, ¶6). Plaintiffs allege:

Defendant's performance under the contract was negligent, including errors, mistakes, omissions, blunders, oversights, delays, inadequate supervision and inspections, and substandard workmanship. Plaintiffs on the other hand, have satisfactorily performed all of their obligations under the contract.

As a partial enumeration of the errors, mistakes, omissions, deficiencies and substandard workmanship, the metal floor members on the 2<sup>nd</sup> floor were magnetized resulting in Plaintiffs being unable to use cordless telephones, Plaintiffs' television sets not functioning properly and Plaintiffs' being unable to use computers in their home.

This has resulted in Plaintiffs being unable to fully use and enjoy their home, having their personal property destroyed by said resulting magnetic field, and having their person(s) exposed to magnetic field.

(Id. at ¶¶7-9).

These allegations form the basis of their claims for breach of contract, breach of express and implied warranties, negligence, and failure to perform in a workmanlike manner. As to their claim for fraud, Plaintiffs Paul and Latosha Jones allege:

[d]uring the negotiations for the purchase of said home, Defendant specifically represented to the Plaintiffs that the steel members in the home would be a benefit to Plaintiffs, would improve the quality of Plaintiffs' living experience and would improve the value of their home.

Plaintiffs purchased said home in reliance upon said representations.

The representations of Defendant were false and fraudulent as the steel members in said home magnetized and as a result they are not a benefit to Plaintiffs, have not improved the quality of Plaintiffs' living experience and have lessened the value of Plaintiffs' home.

The representations concerning the steel members were made with knowledge of their falsity.

(Id. at ¶¶27-30).

Again, Defendant argues it is entitled to summary judgment on the claims sounding in contract and negligence on the grounds that they are barred by the Limited Home Warranty, while Defendant seeks summary judgment on the fraud claim on the grounds that Plaintiff Paul Jones' admissions demonstrate that no false representations were made or relied upon concerning the steel framing of the house. Additionally, Defendant seeks summary judgment on the claims asserted by Plaintiff Ginger Estep on the grounds that she lacks standing as she is not a party to the Real Estate Purchase Contract nor does she hold legal title to the real estate at issue.

Under Civ. R. 56, summary judgment is proper when "(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against

whom the motion for summary judgment is made, that conclusion is adverse to that party." Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327. Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. Murphy v. Reynoldsburg (1992), 65 Ohio St.3d 356, 360. Nevertheless, summary judgment is appropriate where a party fails to produce evidence supporting the essentials of its claim. Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St.3d 108 at paragraph three of the syllabus.

Additionally, the nonmoving party must go beyond the allegations or denials contained in the pleadings and affirmatively demonstrate the existence of a genuine issue of material fact in order to prevent the granting of a motion for summary judgment. Mitseff v. Wheeler (1988), 38 Ohio St.3d 112. Moreover, the entry of summary judgment against a party is mandated when the nonmoving party:

[f]ails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . [by designating] specific facts showing that there is a genuine issue for trial.

Celotex Corp. v. Catrett (1986), 477 U.S. 317.

The Supreme Court of Ohio has adopted and approved the Celotex burden on the nonmoving party, provided that the moving party meets its initial burden of informing the court of the basis for the motion and identifying portions of the record demonstrating the absence of any genuine issue of material fact. Dresher v. Burt (1996), 75 Ohio St.3d 280.

Additionally, Civ. R. 56(E) provides, in pertinent part, that:

[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise

provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Upon review, the Court first agrees that Plaintiff Ginger Estep, not being a party to the contract executed between Plaintiff Eric Estep and Defendant and not having any legal ownership in the subject real estate, lacks standing to pursue any claims against Defendant. Thus, Defendant is entitled to summary judgment as to all claims asserted by her. The Court further finds that Defendant is entitled to summary judgment on Plaintiffs Jones' cause of action for fraud. The elements of a claim for fraudulent misrepresentation are:

- (1) a false representation concerning a fact material to the transaction;
- (2) knowledge of the falsity of the statement or utter disregard for its truth;
- (3) intent to induce reliance on the misrepresentation;
- (4) reliance under circumstances manifesting a right to rely; and
- (5) injury resulting from the reliance.

Sanfillipo v. Rarden (1985), 24 Ohio App.3d 164, 166.

The Complaint alleges that Defendant falsely represented that the steel framing would be a benefit by improving the quality of Plaintiffs Jones' home life and the value of their home and that Plaintiffs Jones purchased the home based upon these representations. These allegations are belied by the evidence, which demonstrates that no such misrepresentations were made and that Plaintiffs Jones did not even know their home was constructed with steel framing until six months after their purchase.

Consequently, Plaintiffs Jones cannot establish the necessary elements of fraud as a matter of law.

In addressing the remaining claims, the Court will begin with the proposition that “[t]he duty to perform in a workmanlike manner is imposed by common law upon builders and contractors.” Hanna v. Groom, Franklin App. No. 07AP-502, 2008-Ohio-765, at ¶19 (citing Barton v. Ellis (1986), 34 Ohio App.3d 251, 252). “The implied duty of builders and contractors to perform their services in a workmanlike manner “requires a construction professional to act reasonably and to exercise the degree of care which a member of the construction trade in good standing in that community would exercise under the same or similar circumstances.” *Id.* (quoting Jarupan v. Hanna, 173 Ohio App.3d 284, 2007-Ohio-5081, at ¶19).

Significantly, the Tenth District Court of Appeals has held that “[a]bsent express or implied warranties as to the quality or fitness of work performed, the liability of a builder-vendor of a completed structure for failure to exercise reasonable care to perform in a workmanlike manner sounds in tort, and arises ex delicto. The essential allegation is that the builder-vendor's negligence proximately causes the vendee's damages.” *Id.* at ¶20 (citing Barton, supra). (Emphasis added). Here, Plaintiffs were provided with express warranties, albeit limited in nature. It is undisputed that Plaintiffs agreed to waive any claims for property damage other than claims covered under the Limited Home Warranty. Plaintiffs further acknowledged that, other than the Limited Home Warranty, Defendant made “no other warranties either expressed or implied,” and they waived and relinquished “any and all implied warranties of habitability and fitness.”

Thus, it is clear that their right to recovery is limited to claims for breach of the Limited Home Warranty.

Plaintiffs argue that the Limited Home Warranty should be deemed invalid as they did not receive any consideration in exchange for waiving their claims and implied warranties, it is unconscionable, and it fails its essential purpose as it provides Plaintiffs with no remedy for the defect at issue. The Court disagrees that no consideration was provided in exchange for the relinquishment of certain claims and warranties. The Limited Home Warranty identifies almost 100 defects that, should they occur, will be repaired by Defendant in exchange for Plaintiffs' promises to waive any other express or implied warranties and to forgo any claims other than for breach of the Limited Home Warranty. Similarly, the fact that the Limited Home Warranty does not provide a remedy for the defect at issue does not mean that it fails its essential purpose given the fact that it clearly provides remedies for numerous other problems that could arise.

Plaintiffs further contend that the Limited Home Warranty is unconscionable. "Unconscionability has been defined as an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party." Benefit Mortg. Co. v. Leach, Franklin App. No. 01AP-737, 2002-Ohio-2237, at ¶56. "The purpose of the doctrine of unconscionability is to prevent oppression and unfair surprise." *Id.* "Unconscionability is a question of law to be decided by the court." *Id.* at ¶57. The doctrine consists of two prongs: "(1) substantive unconscionability, i.e., unfair and unreasonable contract terms, and (2) procedural unconscionability, i.e., individualized circumstances surrounding parties to a contract such that no voluntary meeting of the minds was possible." *Id.* "A certain quantum of

both substantive and procedural unconscionability must be present to find a contract unconscionable.” Id. “In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied.” Id. at ¶60. One test is “whether the terms are ‘so extreme as to appear unconscionable according to the mores and business practices of the time and place.’” Id. (Citations omitted).

Plaintiffs argue that the Limited Home Warranty was a preprinted form and the terms were never explained to them. However, the Limited Home Warranty and the Real Estate Sales Agreement both explain 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. The effect of the waiver of all warranties is further explained in both documents. Moreover, Plaintiffs expressly acknowledged that Defendant was relying on their agreement to be bound to the Limited Home Warranty and further would not be selling the properties without the waivers of all other warranties. The Court finds as a matter of law that the Limited Home Warranty is not unconscionable.

Based on the foregoing, the Court finds that Plaintiffs can only proceed on a claim for breach of the Limited Home Warranty. As there is no dispute that the Limited Home Warranty does not cover the magnetization of the steel framing, the Court finds that Defendant is entitled to summary judgment on Plaintiffs’ claims for breach of contract, breach of express and implied warranties, negligence, and failure to perform in a

workmanlike manner. Accordingly, Defendant's Motion for Summary Judgment is well-taken and is GRANTED.

Also before the Court is Plaintiffs' Motion to Amend their Complaints to add claims for violation of the Consumer Sales Practices Act. However, as the parties' agreements involved the purchases of existing homes and were not for the construction of future homes, the CSPA would not apply. Keiber v. Spicer Constr. (1993), 85 Ohio App.3d 391. Thus, Plaintiffs' Motion to Amend is DENIED.

Judgment is hereby entered in favor of Defendant as a matter of law. Costs to Plaintiffs. Pursuant to Civ. R. 58(B), the Clerk of Courts is hereby directed to serve upon all parties notice and the date of this judgment.

  
BEVERLY Y. PFEIFFER, JUDGE

Copies to:

Steve J. Edwards  
Counsel for Plaintiffs

Michael G. Long  
Kathreen Nuber McGinnis  
Counsel for Defendant



LEXSEE

**Service Guide, Inc., Plaintiff-Appellee, v. Building Systems Division, Armco, Inc.,  
Defendant-Appellant**

Case No. 3804

**Court of Appeals of Ohio, Eleventh Appellate District, Trumbull County**

**1988 Ohio App. LEXIS 1500**

**April 22, 1988, Decided**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas, Case No. 83 CV 1169

**DISPOSITION:** JUDGMENT: Affirmed.

**COUNSEL:** ATTY. ANTHONY ROSSI, Warren, OH, For Plaintiff-Appellee.

ATTY. THOMAS G. CAREY, JR., Warren, OH, For Defendant-Appellant.

**JUDGES:** HON. ALBA L. WHITESIDE, P.J., Tenth Appellate District, HON. HAROLD THOMAS, J., Belmont County Court of Common Pleas, HON. JOSEPH MALLONE J., Ret., Ashtabula County Court of Common Pleas, sitting by assignment, concur.

**OPINION BY:** WHITESIDE

**OPINION**

*OPINION*

ALBA L. WHITESIDE, PRESIDING JUDGE

Defendant Building Systems Division, Armco, Inc., appeals from a judgment of the Trumbull County Court of Common Pleas and raises six assignments of error as follows:

"1. The trial court erred as a matter of law in its findings that the contract for roofing panel was entered into by appellee Service Guide and defendant Armco.

"2. The court erred in concluding that the case should be treated as a breach of contract case.

"3. The trial court erred in finding a failure of consideration and substantial breach of the contract in that the materials provided were precisely those that were ordered.

"4. The trial court [\*2] erred in refusing to enforce the conspicuous warranty exclusion that was part of the contract.

"5. The trial court erred in concluding that the stainless steel roofing panels were not suitable for the intended use. (Conclusion No. 6).

"6. The trial court erred in concluding that the roofing panels were defective and subject to corrosion and rusting. (Conclusion No. 6)."

Plaintiff, Service Guide, Inc., brought this action seeking to recover damages because of an allegedly defective aluminized steel roof manufactured and installed by defendant. Plaintiff, in 1982 determined to enlarge its plant by the construction of an one hundred foot by one hundred and fifty foot addition. Plaintiff engaged defendant Warren Engineering Company, a general contracting firm, to build the addition. Warren Engineering entered into a contract with defendant Neil T. Lowry Company for the installation of the roof on the building addition. Plaintiff contends that Warren Engineering was acting as its agent, and Lowry was acting as the agent of defendant in connection with the contract for furnishing the stainless steel roof, which covered not only the building addition but also the original building [\*3] at a cost of \$ 159,768.

Lowry had submitted a bid to Warren Engineering to supply an aluminized steel roof to the new building, which proposal included Armco's standard twenty-year guarantee. This same warranty had been included in an earlier proposal submitted by Lowry the previous year, but rejected. Plaintiff decided instead to install a stainless steel roof and Warren Engineering solicited bids for a stainless steel roof from Lowry. Thereafter, Lowry submitted a written proposal to supply a 24 gage Armco 400 stainless steel roof for the building. It was indicated that the roof would contain Armco's twenty-year guarantee. After consultation with plaintiff, Warren Engineering accepted the Lowry proposal and issued a purchase order for the stainless steel standing seam roof. The series 400 stainless steel roofing panels were manufactured by Armco and delivered to the site. Prior to installation, the panels showed signs of corrosion and after installation additional corrosion occurred. Plaintiff contends that as a result of Armco's manufacturing process the roof panels varied in color and light reflection and, as well, exhibited evidence of continuing corrosion and deterioration.

[\*4] The trial resulted in a judgment in favor of plaintiff against defendant Armco in the amount of \$ 39,942 with the remaining defendants being dismissed.

The first assignment of error raises the issue of whether the contract was in fact between plaintiff Service Guide and defendant Armco.

The case was tried to the court without a jury. By finding of fact No. 3, the trial court found expressly that Lowry " \* \* \* is an agent and manufacturer's representative of Defendant, Building Systems Division, Armco, Inc. \* \* \*." The trial court also found that plaintiff, through its principal shareholder, president and chief executive officer, directly negotiated with Lowry with respect to the purchase and installation to the stainless steel roof. By finding of fact No. 10, the trial court found that " \* \* \* a contract was entered into by Warren Engineering, as agent for Plaintiff, and Lowry, the authorized agent and manufacturer's representative of Armco, for a new 24 gage Armco 400 Stainless Steel Concealed Fastener Standing Seam Roof for an area 100 feet by 338.8 feet to be installed to the addition and existing building of Plaintiff \* \* \*." By finding of fact No. 11, the trial court found that [\*5] plaintiff was a third-party beneficiary, if not a principal of the contract, and by finding of fact No. 12 found that plaintiff paid the contract price of \$ 159,768 for the stainless steel roof while an aluminized standing seam steelox roof would have cost only \$ 98,800.

Accordingly, the issue with respect to the first assignment of error is whether the evidence supports the finding of the trial court. Defendant Armco contends that the evidence does not and as a matter of law it was not a

party to the contract. Defendant Armco contends that the following are not supported by evidence: (a) findings of fact Nos. 3 and 4 insofar as they indicated that Lowry negotiated or had discussions directly with plaintiff Service Guide, (b) findings of fact No. 6 that Lowry was aware of plaintiff's interests and concern for aesthetics in connection with the roof, (c) findings of fact No. 7 that the contract as entered into by plaintiff in reliance on the expertise of defendant Armco, (d) findings of fact No. 10 that Warren Engineering in entering into the contract acted as an agent of plaintiff and (e) findings of fact No. 19 that defendant Armco, through its agent Lowry, negotiated with plaintiff [\*6] prior to the contracts being executed.

Defendant Armco does not contend that the trial court's finding that Lowry was the agent and manufacturer's representative of defendant Armco is not supported by the evidence.

Defendant Armco correctly points out that Warren Engineering, rather than plaintiff, issued the purchase order to Lowry for the stainless steel roof. Lowry testified that he was of the opinion that he had entered into a contract with Warren Engineering, but also testified that he could not recall whether he had had dealings directly with the president of plaintiff prior to execution of the contract. Lowry did identify himself as an agent for Armco.

The testimony of the president of Warren Engineering was somewhat equivocal, in that he testified that although no written contract was entered into with plaintiff for construction of the project, Warren Engineering was " \* \* \* proceeding to do the entire project as a general contractor \* \* \*" (Tr. p. 6), and that he negotiated with Lowry on behalf of Warren Engineering. He did, however, indicate that Lowry was selected as the supplier, only upon the agreement of the president of plaintiff. However, payment for the labor [\*7] and materials was made directly by plaintiff to Lowry as a result of a " \* \* \* mutual understanding of changing scope of our work \* \* \*" (Tr. p. 9) between plaintiff and Warren Engineering. He could not, however, indicate when this scope of work was changed except that it was subsequent to June 1, 1982 which was the date that Lowry issued his written proposal for the stainless steel roof to Warren Engineering. The purchase order itself from Warren Engineering is dated June 8, 1982.

Plaintiff's chief operating officer testified (Tr. p. 47) that Warren Engineering negotiated a contract as a service to plaintiff and in expediting matters for plaintiff. He also testified that payments were made directly by plaintiff to Lowry and that Warren Engineering received no payments in connection with the roof. He also testified that he initially had discussed the matter directly

with Lowry in discussing an aluminized roof rather than the stainless steel roof.

Accordingly, there is a predicate for defendant Armco's contention that the evidence is insufficient to support the factual finding that Warren Engineering was acting as an agent of plaintiff at the time it placed the order for installation [\*8] of the stainless steel roof with defendant Armco's agent Lowry. Nevertheless, Lowry admitted that during the process of the performance of the contract, he had contact with plaintiff's representatives and received payments solely from plaintiff. This, together with testimony of Warren Engineering's president and plaintiff's chief executive officer constitutes evidence tending to indicate that plaintiff contracted directly with Lowry for the stainless steel roof with Warren Engineering acting as its agent in the negotiations, whether the principal-agency relationship was disclosed or nondisclosed at the time of the placing of the order. Lowry later had contact directly with plaintiff and accepted payment from plaintiff indicating, at least later, awareness of the principal-agency relationship between plaintiff and Warren Engineering, even if it were not disclosed at the time of the issuance of the purchase order.

Additionally, even assuming that the trial court technically erred in finding the principal-agent relationship to exist between plaintiff and Warren Engineering with respect to the stainless steel roof, we fail to see how such error is prejudicial to defendant Armco under [\*9] the circumstances. If the roof be defective, and Warren Engineering was a general contractor rather than an agent of plaintiff, then Warren Engineering would be liable to plaintiff, Lowry would be liable to Warren Engineering, and defendant Armco liable to Lowry. We fail to find any prejudice to defendant Armco with respect to its ultimate liability merely because the action did not proceed in that fashion even assuming that Warren Engineering was not the agent of plaintiff with respect to this particular transaction. Thus, there is privity of contract, even if no direct contractual relationship exists. Defendant Armco was aware that plaintiff would be the ultimate consumer or user of the product, that is, that the stainless steel roof was being constructed for plaintiff's building. Even if there were no privity, plaintiff still could recover from defendant Armco as manufacturer and supplier of the defective product. See *Iacono v. Anderson Concrete Corp.* (1975), 42 Ohio St. 2d 88. Accordingly, the first assignment of error is not well-taken.

The second assignment of error raises an issue related to the first, defendant contending that the trial court erred in finding that [\*10] the case was one for breach of contract. As defendant points out, the contract consists of the written offer of Lowry to Warren Engineering to

supply the 24 gage Armco 400 stainless steel roof and the oral acceptance of that proposal followed by the written purchase order of Warren Engineering, coupled with Armco's twenty-year warranty against rupture, structural failure, or perforation. Defendant Armco thus contends, that when the trial court dismissed Warren Engineering as a party-plaintiff and Lowry as a party-defendant, no recovery could thereafter be had on a contract theory. First, as indicated in discussing the first assignment of error, the evidence permits a finding that there is privity of contract present. Accordingly, the second assignment of error is not well-taken essentially for the reasons discussed in connection with the first assignment of error.

By the third assignment of error, defendant Armco contends that the trial court erred in finding a failure of consideration and substantial breach of the contract. Armco contends that the trial court erroneously found that defendant Armco should have supplied a type 300 rather than a type 400 roof. There is nothing in the [\*11] findings of fact of the trial court supporting such a contention. By conclusion of law No. 6, the trial court did find that there had been a failure of consideration and a material substantial breach of the contract by Armco because the materials provided pursuant to the contract are " \* \* (a) [n]ot suitable for the intended use; (b) [a]re defective and subject to corrosion (rusting), and (c) [a]esthetically unacceptable." The evidence does permit the trial court's finding that when plaintiff, through Warren Engineering, requested Lowry to supply a stainless steel roof for the building, the concern for various considerations, including aesthetics was expressed. For whatever reason, Lowry then, after consultation with Armco, proposed to provide the type 400 roof for which the contract was finally entered into. In proposing to supply this roof, Lowry was well aware of the intended use and the needs and concerns of plaintiff. The evidence indicates that there were unacceptable color variations in the panels and that they were subject to corrosive rust. Many had to be replaced soon after installation.

As the trial court found, Armco's brochures depict a perfect roof of uniform [\*12] color, even though those brochures do not depict a stainless steel roof. Neither Lowry nor Armco advised plaintiff or Warren Engineering to expect color variations because a stainless steel roof was being used. Rather, an expert witness for Armco testified that it would be bad business to advise customers that the stainless steel roof would not be perfectly uniform, apparently upon an assumption that customers would not purchase the roof if they were aware of the color variation. There is ample evidence to support the trial court's conclusion of law that there was a substantial breach of contract. Even assuming that the evidence was insufficient to prove a failure of consideration, such error is not prejudicial since the result would be the

same because of the finding of substantial material breach. The third assignment of error is not well-taken.

By the fourth assignment of error, defendant Armco contends that the trial court erred in refusing to enforce a warranty exclusion that allegedly is part of the contract relying upon *R.C. 1302.27* and *1302.29*. Defendant Armco points to language in the warranty which states that "[t]he guarantee of remedies stated herein are exclusive of [\*13] and in lieu of all others, thus there are no other guarantees, express or implied, except those stated herein." Defendant Armco contends that this is sufficient to comply with the exclusion prerequisite set forth in *R.C. 1302.29(B)*, which permits exclusion or modifications of the implied warranty of merchantability if the exclusionary language mentions "merchantability" and if it is conspicuous. The implied warranty of fitness may be excluded if the exclusion is in "writing and conspicuous." The statute suggests that all implied warranties of fitness may be excluded by language such as "[t]here are no warranties which extend beyond the description on the face hereof." However, *R.C. 1302.28* provides that where the seller knows that the goods are being purchased and are required for a particular purpose and that the purchaser is relying upon the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that such goods will be fit for such purpose, unless expressly excluded or modified under *R.C. 1302.29*.

Plaintiff contends that there is no exclusionary language since the Lowry proposal did not contain such exclusionary language, but instead contained [\*14] only a statement that "[t]he new roof will carry Armco's 20 year guarantee against rupture, structural failure or perforation in normal atmospheric conditions." The exclusionary language upon which defendant Armco relies was furnished to plaintiff only after purchase and installation of the roofing panels. Thus, plaintiff contends the exclusionary language is not part of the contract. The trial court made no determination of the issue instead determining by conclusion of law No. 7, that in view of the other conclusions of the court with respect to breach of contract and failure of consideration, "\* \* \* the warranty issue is irrelevant \* \* \*."

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. That is the apparent situation herein, although defendant suggests that plaintiff should have been aware of [\*15] the warranty exclusion language from the proposal sub-

mitted 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. Accordingly, we find no error and the fourth assignment of error not well-taken.

By the fifth assignment of error, defendant Armco contends that the trial court erred in finding that the stainless steel roofing panels were not suitable for the intended use. Defendant Armco contends, contrary to the findings of the trial [\*16] court, that Lowry was not advised of any of the needs of plaintiff prior to submitting his proposal for the stainless steel roof, but instead was merely asked to bid on a stainless steel roof. There is substantial evidence to the contrary supporting the finding of the trial court. Additionally, not even defendant Armco contends that plaintiff should have anticipated having a roof subject to corrosion and rusting. There was also an internal report of defendant Armco indicating the rusting to be a result of the manufacturing defect in coating or base steel preparation. There was also expert testimony that panels were fabricated from inappropriate steel. There was ample evidence that the roof was rusty, variable in color and aesthetically unappealing.

We have some difficulty in understanding any predicate for this assignment of error. Defendant Lowry knew the purpose for which the roof was being acquired, and according to testimony of plaintiff's witnesses, had been advised of their concern for aesthetics of the building. In fact, the change from aluminized steel to stainless steel was partially a result of aesthetic consideration. In short, there was competent, credible evidence supporting [\*17] the trial court's finding in this regard. The fifth assignment of error is not well-taken.

By the sixth assignment of error, defendant Armco contends that the trial court erred in finding that the roofing panels were defective and subject to corrosion and rusting.

As we stated in connection with the fifth assignment of error, there was ample evidence permitting the trial court's finding that the roof panels were subject to these conditions. Apparently, defendant Armco contends that

the only possible breach would be that of the twenty-year warranty against rupture, structural failure or perforation. Plaintiff's expert did testify that none of these conditions were present on the roof. However, it was not error for the trial court to determine the panels were defective for other reasons. The warranty protects against the problems involved irrespective of there being a defect. In other words, whether defective or not, the warranty warrants against rupture, structural failure or perforation. In those events, plaintiff is not required to prove that the rupture, structural failure or perforation was a result of a defect.

There was evidence that stainless steel roofs do not ordinarily [\*18] corrode and rust in such a short period of time if properly manufactured. An expert testified that the corrosion and rusting indicated a defective material as pointed out in connection with the fifth assignment of error. We have great difficulty in understanding any con-

tention to the contrary, that is a contention that a stainless steel roof which corrodes and rusts shortly after installation is not defective. Nor has defendant Armco presented any evidence indicating that it is normal for a stainless steel roof to corrode and rust shortly after it is installed. The difference between the 300 and 400 roof came out in testimony as an indication that the 400 roof was not really suitable for outside installation because of possibility of rusting and corroding and that a 300 roof is more suitable. Although this did not necessarily enter into the trial court's determination, it is normal for a stainless steel roof to rust and corrode. There is no merit to the sixth assignment of error.

For the foregoing reasons, all six assignments of error are overruled, and the judgment of the Trumbull County Court of Common Pleas is affirmed.

Judgment affirmed.

**Default judgment**

Trial court abused its discretion in granting judgment to an employee in her action under RC § 4123.512(D), as the employer's counsel's failure to appear at a pretrial conference could not have resulted in a default judgment under Ohio R. Civ. P. 7(A) and 55(A) because the employee did not offer evidence in an ex parte hearing to support her claims and further, the employer had filed an answer; the judgment could not have been based on a dismissal under Ohio R. Civ. P. 41(B) as a sanction, as the employer was never notified that such a sanction could be imposed if it failed to appear and further, counsel's 15-minute delay due to long elevator lines did not warrant such a harsh sanction in the circumstances. *Baur v. Co-Ax Tech.*, — Ohio App. 3d —, 2007 Ohio 3910, — N.E. 2d —, 2007 Ohio App. LEXIS 3565 (Aug. 2, 2007).

Trial court erred in granting an employer's oral request for a default judgment, made on the day of the trial, as an employee's counsel was not afforded sufficient time to show good cause as to his failure to answer a counterclaim within 28 days of the service of the counterclaim and why leave to plead was appropriate. Absent seven days' written notice, the employee's ability to show cause under Ohio R. Civ. P. 55(A) was emasculated. *Shikner v. Solutions*, — Ohio App. 3d —, 2006 Ohio 127, — N.E. 2d —, 2006 Ohio App. LEXIS 104 (Jan. 13, 2006).

**Hearings**

Although a trial court could have held a hearing on a legal guardian's motions regarding jurisdiction over custody and visitation issues involving a child, the court acted properly under Ohio R. Civ. P. 7(B)(2) where it ruled on motions without an oral hearing upon submission of briefs in support of and in opposition to the motions. *In re D.H.*, — Ohio App. 3d —, 2007 Ohio 4069, — N.E. 2d —, 2007 Ohio App. LEXIS 3683 (Aug. 9, 2007).

**Motion**

When, in a real estate contract dispute, the trial court found a contract to be enforceable and found the seller's brokers were entitled to a commission on the resulting sale, it was not error to deny pre-judgment interest, even though an award of pre-judgment interest in a contract case was not discretionary, because the brokers waived pre-judgment interest by failing to file a written motion for it, as required by Ohio R. Civ. P. 7. *Pierce v. J.C. Meyer Co.*, — Ohio App. 3d —, 2006 Ohio 4065, — N.E. 2d —, 2006 Ohio App. LEXIS 4019 (Aug. 8, 2006).

**Motion for intervention**

Property owners met the requirements for intervention as of right under Ohio R. Civ. P. 24(A) in a quiet title and adverse possession action, as they filed a timely motion to intervene under Rule 24(C) and they indicated that they would file an adverse possession claim; although no pleading under Ohio R. Civ. P. 7(A) was included with their motion, the basis of their claim was known to the trial court, they did not have to show lack of access to their property for purposes of the claim, and no objection to the lack of pleading was filed. *Korenko v. Kelleys Island Park Dev. Co.*, — Ohio App. 3d —, 2007 Ohio 2145, — N.E. 2d —, 2007 Ohio App. LEXIS 2004 (May 4, 2007).

**Motion for relief from judgment**

Where a car lessee who was involved in a dispute with a car dealership and a lender on her car lease filed a motion, seeking relief from the trial court's judgment which dismissed her third-party complaint for failure to prosecute, and she asserted grounds under Ohio R. Civ. P. 60(B)(1) and (3), the trial court erred in granting the relief from judgment on other grounds under Rule 60(B)(5), as such amounted to a sua sponte action by the trial court and it lacked that authority. Such a ruling did not afford the dealership due process under Ohio Const. art. I, § 16, in that it did not provide it with an ample opportunity to respond to the unasserted grounds for

relief, and it violated the requirement of Ohio R. Civ. P. 7(B)(1) of setting out the grounds for a motion with particularity. *First Merit Bank v. Crouse*, — Ohio App. 3d —, 2007 Ohio 2440, — N.E. 2d —, 2007 Ohio App. LEXIS 2278 (May 21, 2007).

**Prejudice**

Employee's failure to contest damages after a default judgment was entered against him on a counterclaim was irrelevant to the issue of proper notice of a motion for default judgment as the default judgment effectively admitted the averments of the counterclaim and precluded the employee from asserting any affirmative defense that would have been considered an avoidance of the counterclaim. The prejudice resulting from the lack of notice lies in the admission of the counterclaim averments and preclusion of an affirmative defense, not the issue of damages. *Shikner v. Solutions*, — Ohio App. 3d —, 2006 Ohio 127, — N.E. 2d —, 2006 Ohio App. LEXIS 104 (Jan. 13, 2006).

**Trial court's disciplinary rule improper**

Order that a trial court would not consider any future pleadings filed by a bank's lawyers unless they began appearing for "the hearing they have ordered" was, in effect, a "disciplinary rule" as the promulgation of disciplinary rules was within the exclusive jurisdiction of the Supreme Court of Ohio, the trial court exceeded its authority and, thus, abused its discretion when it issued a punitive order. *MBNA America Bank v. Bailey*, — Ohio App. 3d —, 2006 Ohio 1550, — N.E. 2d —, 2006 Ohio App. LEXIS 1436 (Mar. 31, 2006).

**RULE 8. General rules of pleading**

(A) **Claims for relief.** A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled. If the party seeks more than twenty-five thousand dollars, the party shall so state in the pleading but shall not specify in the demand for judgment the amount of recovery sought, unless the claim is based upon an instrument required to be attached pursuant to Civ. R. 10. At any time after the pleading is filed and served, any party from whom monetary recovery is sought may request in writing that the party seeking recovery provide the requesting party a written statement of the amount of recovery sought. Upon motion, the court shall require the party to respond to the request. Relief in the alternative or of several different types may be demanded.

(B) **Defenses; form of denials.** A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make the denials as specific denials or designated averments or paragraphs, or the pleader may generally deny all the averments except

the designated averments or paragraphs as the pleader expressly admits; but, when the pleader does intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Civ. R. 11.

(C) **Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

(D) **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(E) **Pleading to be concise and direct; consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(F) **Construction of pleadings.** All pleadings shall be so construed as to do substantial justice.

(G) **Pleadings shall not be read or submitted.** Pleadings shall not be read or submitted to the jury, except insofar as a pleading or portion thereof is used in evidence.

(H) **Disclosure of minority or incompetency.** Every pleading or motion made by or on behalf of a minor or an incompetent shall set forth such fact unless the fact of minority or incompetency has been disclosed in a prior pleading or motion in the same action or proceeding.

**History:** Amended, eff 7-1-94.

## NOTES TO DECISIONS

### ANALYSIS

Conditions precedent  
Damages  
Failure to comply

Failure to deny  
Federal civil rights claims  
Laches  
Management theory of insurer's liability to insured  
Piercing the corporate veil  
Pleading  
— Fair notice of action  
— Pleading insufficient  
Pro se litigants

### Conditions precedent

Where the complaint in a foreclosure action did not allege that the lender complied with conditions precedent to enforcement of the note, including notice of default and opportunity to cure, CivR 8(D) did not require the borrower to specifically deny such compliance. Where a cause of action is contingent upon satisfaction of some condition precedent, CivR 9(C) requires a plaintiff to plead that the condition has been satisfied, and permits the plaintiff to aver generally that any conditions precedent to recovery have been satisfied rather than requiring the plaintiff to detail specifically how each condition has been satisfied: *Nat'l City Mortg. Co. v. Richards*, 182 Ohio App. 3d 534, 2009 Ohio 2556, 913 N.E.2d 1007, 2009 Ohio App. LEXIS 2123 (2009).

### Damages

Trial court erred in entering judgment for the insurer for \$18,567.03 because, in its complaint, the insurer only sought the amount of \$9,309.69, incurred by the victim in medical bills. Thus, the insurer was limited at trial to recovering \$9,309.69, the amount that it claimed it had paid on behalf of the victim. *Qualchoice, Inc. v. Paige-Thompson*, — Ohio App. 3d —, 2007 Ohio 1712, — N.E. 2d —, 2007 Ohio App. LEXIS 1568 (Apr. 12, 2007).

### Failure to comply

In a legal malpractice action, if the first former client's motion for reconsideration of an involuntary dismissal of the action with prejudice could be considered a motion for relief from judgment under Ohio R. Civ. P. 60(B), it was insufficient to grant the relief requested as the age (90), inter alia, of the first client's counsel could not excuse the first client's failure to file a complaint that complied with Ohio R. Civ. P. 8(A) requirements or to comply with court-ordered deadline. *McGee v. Lynch*, — Ohio App. 3d —, 2007 Ohio 3954, — N.E. 2d —, 2007 Ohio App. LEXIS 3619 (Aug. 3, 2007).

First former client's legal malpractice action was properly dismissed with prejudice under Ohio R. Civ. P. 41(B)(1) because despite numerous extensions, the first client failed to file a complaint that complied with Ohio R. Civ. P. 8(A) and failed to comply with several court-ordered deadlines. *McGee v. Lynch*, — Ohio App. 3d —, 2007 Ohio 3954, — N.E. 2d —, 2007 Ohio App. LEXIS 3619 (Aug. 3, 2007).

### Failure to deny

In homeowners' claims against mortgage brokers and the brokers' principal for violations of the Mortgage Broker Act, RC § 1322.01 et seq., and civil conspiracy, a trial court improperly denied the homeowners' motion for a default judgment against one broker because the broker did not answer the complaint served on the broker, and, under Ohio R. Civ. P. 8(D), the allegations against the broker should have been construed as admitted. *Roark v. Rydell*, 174 Ohio App. 3d 186, 2007 Ohio 6873, 881 N.E. 2d 333, 2007 Ohio App. LEXIS 6043 (Dec. 21, 2007).

### Federal civil rights claims

Ohio courts consistently held that a complaint alleging a violation under 42 U.S.C.S. § 1983 had to meet two requirements: (1) there had to be an allegation that the conduct in question was performed by a person acting under color of state law; and (2) the complaint had to sufficiently allege that