

IN THE SUPREME COURT OF OHIO

Paul Jones, et al.,	:	
	:	No. 10-1826
Plaintiffs-Appellants,	:	
	:	On Appeal from the Franklin
vs.	:	County Court of Appeals, Tenth
	:	Appellate District,
Centex Homes,	:	Case Nos. 09 AP-1032; 09 AP-1033
	:	
Defendant-Appellee.	:	

BRIEF OF *AMICUS CURIE* NATIONAL ASSOCIATION OF HOME BUILDERS, OHIO HOME BUILDERS ASSOCIATION, INC. IN SUPPORT OF APPELLEE

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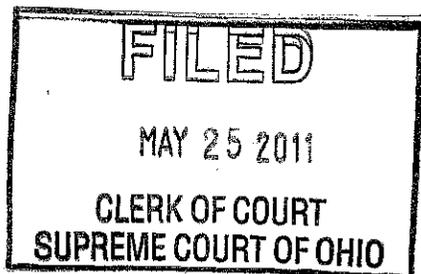


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INTRODUCTION

The National Association of Home Builders (NAHB) and the Ohio Home Builders Association, Inc. (OHBA) respectfully submit this brief as amicus curiae in support of defendant-appellee Centex Homes. NAHB and OHBA urge the Court to affirm the Court of Appeals's grant of summary judgment to Centex and hold that Ohio law allows for the waiver of the implied duty to construct a home in a workmanlike manner.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae The National Association of Home Builders is a Washington, DC based trade association whose mission is to enhance the climate for housing in the building industry. Chief among NAHB's goals is providing for expanding opportunities for all consumers to have access to safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations, including the Ohio Home Builders Association. About one-third of NAHB's 160,000 members are homebuilders and/or remodelers and its builder members construct about 80 percent of the new homes built each year in the United States. NAHB's website address is www.nahb.org.

Amicus curiae Ohio Home Builders Association, Inc. is a 5,500 member trade association representing home builders, land developers and their associate vendors in a legislative and regulatory capacity on a statewide basis. OHBA serves its membership by taking a proactive approach to state issues and legislation to promote the residential construction business. As Ohio's premier home building industry representative, OHBA represents an industry that creates significant economic growth in Ohio while also advocating for statewide policies that foster the public's ability to obtain affordable housing.

As the only statewide association representing the residential construction and land development industry, OHBA has unique insight into the practical reality of the home building industry. Further, OHBA can offer valuable perspective on the level of impact promoting certainty and predictability in the building process can have on its membership and their ability to provide affordable housing opportunities in Ohio, as well as, the vital role the residential construction industry plays in the Ohio economy. The goal of our membership is to provide safe, quality, affordable housing to all of the citizens of this great state. OHBA has experience examining the industry practice of ensuring certainty and predictability by providing express warranties to new home buyers in lieu of implied warranties.

The poor economic conditions that continue to persist in Ohio are aggravated by any uncertainty involved in the home building process; predictability is essential. Precluding a disclaimer of the implied warranty of workmanlike construction will result in uncertainty and higher costs. An adverse ruling would negatively impact the building industry, the purchaser and local economy.

ARGUMENT

I. The Building Industry Plays A Vital Role In A Healthy Economy And Allowing The Waiver of An Implied Warranty Supports Sound Public Policy By Providing for Certainty and Predictability

The building industry is a vital participant in a healthy economy. Housing is a critical component of local economic development: creating jobs and demand for goods and services, generating revenues, and providing affordable housing. Allowing the waiver of an implied warranty supports sound public policy by providing for certainty and predictability.

Residential construction provides significant income and jobs for local workers. Home building generates important local economic activity, stimulating positive results for residents, as well as added returns for local governments. The construction activity has an ongoing impact, rippling into new homes occupied by residents who pay taxes and buy goods and services in the area. Such rippling effects and ongoing benefits are essential in fully appreciating the positive impacts home building has on the economy. For example, NAHB estimates the one year local impacts of building 100 single family homes in a typical metro area include \$21.1 million in local income, \$2.2 million in taxes and other revenue for local governments and 324 local jobs.¹ On a smaller scale, NAHB has estimated for each new single-family home that is built, three jobs are created and between federal, state and local taxes, the activity generates a total of \$90,000 in government revenue.²

The ability to compete efficiently in the home building industry and optimally price a home depends on the degree to which overall costs are certain and predictable. Any exposure to

¹ *The Local Impact of Home Building in a Typical Metro Area: Income, Jobs, and Taxes Generated*, NAHB Housing Policy Dept., <http://www.nahb.org/generic.aspx?sectionID=784&genericContentID=35601>. June 2009.

² *Economic Benefits of New Home Construction*, http://www.nahb.org/fileUpload_details.aspx?contentID=155811&fromGSA=1. April 2011.

builders of increased risk of uncertainty, liability, and litigation expenses will be reflected in home prices. The ability to disclaim a vaguely defined implied warranty, in exchange for express warranties, will aid in keeping prices lower by mitigating increased risk and cost associated with related increased litigation. Further, low to moderate income home buyers, who often only marginally qualify for the financing necessary for them to buy a house, may be priced out of the market. As the price of the home increases, those who are on the verge of qualifying for a new home purchase will no longer be able to afford to purchase a new home. A priced-out analysis done by NAHB illustrates the number of households priced out of the market for a median priced new home by a \$1000.00 price increase. Broken down into various housing markets around the state, the results of the study evidence this priced-out effect. For example, as the median price of a new home increases \$1000, 1,792 households in the Cleveland-Elyria-Mentor, Ohio market would no longer be able to qualify for a new home purchase, and 1,397 households would be priced out of the Columbus, Ohio market.³

An inability to disclaim the implied warranty of workmanlike construction would have several broader impacts on the industry: uncertainty and higher costs. Given the vital role the home building industry plays in a healthy economy, it is imperative to contemplate the positive impact both certainty and predictability have on the industry.

II. The Great Weight of Authority Allows For The Waiver of The Implied Duty To Construct A Home In A Workmanlike Manner

It is well recognized that new home implied warranties can be waived. *Tusch Enterprises v. Coffin*, 740 P.2d 1022, 1030 (Idaho 1987) (stating that the majority of states permit a disclaimer of an implied warranty of habitability); *Greeves v. Rosenbaum*, 965 P.2d 669, 673

³ Elliot F. Eisenburg, *Metro Area House Prices and Affordability*, www.HousingEconomics.com. July 2007.

(Wyo. 1998) (“as is” disclaimer in home buyers’ contract was effective waiver of the implied warranty and public policy did not warrant a different result). See 77 Am. Jur. 2d *Vendor and Purchaser* § 283 (2011) (A builder-vendor may disclaim implied warranties if the disclaimer is printed conspicuously on the contract where it can be noticed by anyone signing the contract); James R. Pomeranz, Note, *The State of Caveat Emptor in Alaska as it Applies to Real Property*, 13 Alaska L. Rev. 237, 256 (1996) (“courts seem to agree that disclaimers of implied warranties are not contrary to public policy”); Mary Dee Pridgen, *Consumer Protection and the Law* §18:20 (2010) (“Home Builders have several viable defenses against implied warranty claims. There may be a waiver through disclaimers”). See also 3 Philip L. Bruner & Patrick J. O’Connor, *Bruner & O’Connor on Construction Law* § 9:74 (2010) (As is the case with U.C.C. implied warranties, the warranty of habitability can be disclaimed).

Although these states might disagree on what constitutes an adequate disclaimer, they agree that the parties should have the freedom to contractually define their respective responsibilities. See Marc M. Schneier, *Builder-Vendor May Disclaim Implied Warranties, Replaced with Its Own, Limited Express Warranty*, 32 No. 3 Construction Litigation Reporter 15 (March 2011) (noting that with the issuance of the *Jones [v. Centex Homes]* decision, Ohio joins the majority rule that a builder-vendor may, using clear, unambiguous and conspicuous language, disclaim implied warranties, but then adding, “As shown in the following cases, the matter in contention is not the ability to disclaim implied warranties, but the adequacy of the disclaimer itself[.]” (citing *O’Mara v. Dykema*, 942 S.W.2d 854, 859 (Ark. 1997) (stating that “implied warranties [of workmanship] may be excluded when the circumstances surrounding the transaction are in themselves sufficient to call the buyer’s attention to the fact that no implied warranties are made or that a certain implied warranty is excluded”); *Belt v. Spencer*, 585 P.2d 922, 925 (Colo. App. 1978) (warranty that new home was built in workmanlike manner and is suitable for habitation may be limited by express disclaimer; however, disclaimer was narrowly

construed to not apply to the defect in this case); *Breckenridge v. Cambridge Homes, Inc.*, 616 N.E.2d 615 (Ill. Ct. App. 1993) (disclaimer enforced where it stated, “seller hereby expressly disclaims the implied warranty of habitability,” husband and wife purchasers were both business people, the disclaimer was brought to their attention, and they initialed it); *Griffin v. Wheeler-Leonard & Co., Inc.*, 225 S.E.2d 557, 567-68 (N.C. 1976) (disclaimer providing that purchaser had inspected the property, “that no representations or inducements have been made” and “that this contract contains the entire agreement between all parties hereto” does not disclaim implied warranty of workmanlike construction); *Tyus v. Resta*, 476 A.2d 427, 432-34 (Pa. Super. Ct. 1984) (builder-vender can limit or disclaim the implied warranty of reasonable workmanship by clear and unambiguous language; however, statement that purchaser has inspected house and agreed to buy it in present condition did not preclude claim of dampness in crawl space); *Dixon v. Mountain City Construction Co.*, 632 S.W.2d 538, 542 (Tenn. 1982) (adopting doctrine of implied warranty of workmanship in new homes built by builder-vendor, but finding, “This warranty is implied only when the written contract is silent. Builder-vendors and purchasers are free to contract in writing for a warranty upon different terms and conditions or to expressly disclaim any warranty.”); and *Heath v. Palmer*, 915 A.2d 1290 (Vt. 2006) (one-year express warranty does not preclude implied warranties of habitability and good workmanship where contract “contained no express exclusion of either implied warranty, and contained no clear and unambiguous provision—agreed to by plaintiffs—waiving defendants’ liability for such defects not reported within one year of closing”).

Freedom of contract principles also led the Alabama Supreme Court to permit a party to effectively limit warranty coverage, including the implied warranty of workmanlike performance *Turner v. Westhampton Court, L.L.C.*, 903 So. 2d 82, 93 (Ala. 2004). The evidence showed that Westhampton offered the Turners a “Limited New Home Warranty” when the Turners purchased the house. The warranty was offered in consideration for the Turners’ waiving all other

warranties - express or implied. Because the evidence established that the Turners read the warranty and produced no evidence indicating that they did not agree to disclaim all implied warranties, the supreme court affirmed the summary judgment in favor of the home builder as to the purchasers' claim of breach of the implied warranty. *See also, Stewart v. Bradley*, 15 So. 3d 533 (Ala. Civ. App. 2008) (holding that the Bradleys waived their claims alleging breach of the implied warranties of habitability and workmanship); *accord Kirkman v. Parex, Inc.*, 632 S.E.2d 854 (S.C. 2006) (“We agree with the Supreme Court of Alabama ‘that the principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability’”). As the concurring opinion in *Buecher v. Centex Homes*, 18 S.W.3d 807, 811 (Tex. Civ. App. 2000), *aff'd but criticized*, 95 S.W.3d 266 (Tex. 2002) recognized:

Every day throughout the state, homebuyers negotiate with home sellers over the terms of the transaction. As it happens, some consumers are better negotiators than others. But they all share the position of greatest strength in the transaction – the ability to walk away from a deal they do not like.

Id. at 811.

There are valid reasons for allowing the parties to contractually waive and/or replace the implied warranties. In contrast to the express performance standards typically included in express warranties, implied warranties requiring the builder to perform good and workmanlike construction create uncertainty and unpredictability because they are vague. Often neither a buyer nor a builder can ascertain responsibility for claimed deficiencies in a house until litigation resolves the question because there is no consensus among the courts as to what constitutes “good workmanship,” the type of defects covered by the implied warranties, or the duration of the implied warranties. *See, e.g.*, 1 Steven G.M. Stein, *Construction Law* ¶5B.01[2][c] (courts have often been troubled in their attempts to classify a defect as being within or beyond the coverage of the implied warranty of habitability). And the legal obligations imposed by implied

warranties cannot be so easily determined since the breach of such a warranty is premised on the often varying professional judgment of engineers, architects, and members of the building repair trade. To protect both home builders and buyers from uncertainties inherent in the implied warranties, as well as lawsuits that typically follow uncertainty, the standard practice throughout the country has been to define the responsibilities of the builder expressly, either in express homeowner warranties or by statute.

Buyers are uniquely positioned to obtain objective information before purchasing a newly-constructed home. Between the time a home buyer signs a contract and the time the sale is closed, the buyer is free to inspect the home, retain one or more outside professional inspectors, and consult realtors, attorneys, or other professionals. In the case of custom homes, buyers often possess extensive experience with real estate transactions. Typically, these sophisticated customers and the builders they choose agree to disclaim the vague implied warranties in exchange for specific express warranties with clear, certain and agreed upon standards for performance. Likewise, builders who build for a broader market offer their own express warranties or 10-year warranties issued by warranty companies and backed by third party insurance companies. Insured warranties offer builders and customers the extra protection of having a third party stand behind the home. Typically, these warranties include detailed performance guidelines, which establish criteria for determining whether a problem constitutes a defect, and if so, what will be done to correct it.

CONCLUSION

Amicus NAHB and OHBA request the Court to Affirm the Court of Appeals's decision in order to protect both home builders and buyers. Uncertainties inherent in the implied warranties have resulted in the standard practice throughout the country to define the responsibilities of the builder expressly, utilizing express homeowner warranties. An adverse ruling would impact the building industry, the purchaser and the local economy.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was served by regular U.S. Mail this 25th day of May, 2011, on the following:



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