

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

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

Steve J. Edwards (000398)
4030 Broadway
Grove City, Ohio 43123
(614) 875-6661

Counsel for Appellants

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

Counsel for Appellee Centex Homes

FILED
JUN 24 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	ii
Argument	1
<u>Proposition of Law No. I:</u>	
Any waiver of the duty to construct a new home in a workmanlike manner is against public policy and therefore void.....	1
<u>Proposition of Law No. II:</u>	
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 of workmanlike manner, when the waiver is construed against the seller.....	6
<u>Proposition of Law No. III:</u>	
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.....	9
<u>Proposition of Law No. IV:</u>	
A limited warranty given by a seller to a buyer as consideration for the buyer waiving the seller's duty to construct the new home in a workmanlike manner fails its essential purpose if it does not repair the defect.....	9
Conclusion	12
Proof of Service.....	13

TABLE OF THE CASES

	<u>PAGE</u>
<i>Centex Homes v. Buecher</i> (Texas 2002), 95 S. W. 2d 266	4
<i>Glidden Co. v. Lumbermens Mutual</i> (2006), 112 Ohio St. 3d 470.....	6
<i>Goddard v. General Motors</i> (1979), 60 Ohio St.2d 41.....	10
<i>Graham v. Drydock Coal Co.</i> (1996), 76 Ohio St. 3d 311.....	6
<i>Jones, et al. v. Centex</i> (10 th Dist. 2010), 2010 Ohio 4286.. ..	7
<i>Keyes v. Guy Bailey Homes, Inc.</i> (Miss. 1983), 439 So. 2d 670	5
<i>Mark-It Place Foods, Inc. v. New Plan</i> (4 th Dist. 2004), 156 Ohio App.3d 65 ...	7
<i>McMillan v. Brune-Torbeck Builders, Inc.</i> (1983), 8 Ohio St. 3d 3	6
<i>Protek, Ltd. v. Lake Erie Screw Corp.</i> (5 th Dist. 2005), 2005 Ohio 5958.....	11
<i>State ex rel. Gill v. School Employees Retirement System</i> (2009), 121 Ohio St. 3d 567	7
<i>State Farm Ins. Co. v. Ingle</i> (2 nd Dist. 2008), 180 Ohio App. 3d 201.....	8
<i>Sutphen Towers v. PPG Industries</i> (10 th Dist. 2005), 2005 Ohio 6207.....	11
<i>Turner v. Westhampton Court</i> (Alabama 2004), 903 So. 2d 82.	3
<i>Velotta v. Landscaping, Inc.</i> (1982), 69 Ohio St.2d 376.....	2
<i>White Co. v. Canton Transportation Co.</i> (1936), 131 Ohio St. 190.....	6, 8
 <u>Rules and Treatises</u>	
Rule 8(C) of the Ohio Rules of Civil Procedure.....	6
Rule 56(C) of the Ohio Rules of Civil Procedure.....	6

ARGUMENT

Introduction

Contrary to the assertions of Appellee and *Amicus*, this case is not an assault on the free-market economy in general or the home building industry specifically. Instead this is a case where the home building industry is seeking to be held immune for its own negligence. No other segment of our society in the private sphere is granted blanket immunity from its own negligence and no reason is given why the home building industry is deserving of this immunity.

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.

Appellee and *Amicus* both argue that other jurisdictions allow waiver of implied warranties and therefore this Court should follow those other jurisdictions. However those other jurisdictions discuss waiver of an implied **warranty** whereas herein we are discussing waiver of an implied **duty**. These are different legal theories as explained by this Court:

In *Mitchem*, we carefully distinguished between (1) an implied warranty of suitability for the purposed 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* on the builder-vendor. Under implied warranty, not imposed by *Mitchem*, the vendee would recover upon showing merely a defect in the structure and causation, even though the builder-vendor proved ordinary care and skill in the construction of the residence. To permit recovery under implied warranty

without requiring proof of negligence would be in the nature of strict liability; it would make the builder-vendor an insurer and would disregard “ *** the harsh truth that unfortunate problems arise on real estate and in real structures which no prudence can avoid and which defy every reasonable skill.” *Id. at page 70*. We therefore held in *Mitchem* there was no implied warranty of suitability for the purpose intended. We also held the vendee must prove lack of ordinary care and skill, or negligence.

*

*

*

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 v. Landscaping, Inc. (1982), 69 Ohio St.2d 376, 378-79

Since duty provides for that basic rule of conduct of reasonable care, waiver of that duty should be more difficult than waiver of a warranty because society ought to be held accountable for the consequences of its negligence.

The language in the sale contract herein distinguishes this case factually from the cases cited by Appellee and *Amicus*. Herein, not only were Appellants waiving all warranties but they were also waiving all other claims relating to the house, “ Purchasers hereby waive and relinquish all claims against the seller for damages to property or personal injury arising after the date of this contract and relating to any of the following:
*** D. Any claims for repairs or modifications to the property except as specifically covered by the sellers Limited Home Warranty.” (Supplement at pp. 12, 20). In contrast, in the cases cited by Appellee and *Amicus* the only claims being waived were warranty claims, which would still allow a buyer to sue a builder based on negligence, fraud, misrepresentation, estoppel or other tort claims. None of the cases cited supports the

position of Appellee and *Amicus* that a buyer of a new home should have no claim against a builder.

In *Turner v. Westhampton Court* (Ala. 2004), 903 So. 2d 82, discussed at length in the briefs of Appellee and Amicus, the Supreme Court of Alabama permitted the disclaimer of warranties but also held that negligence claims could still be brought against the builder, “The Turners first appeal the trial court’s summary judgment in favor of Westhampton as to their claim asserting general negligence and/or wantonness in the construction of their house. ***. Reviewing the facts in the light most favorable to the Turners, we conclude that the trial court erred in entering a summary judgment for Westhampton as to the Turners’ general negligence and/or wantonness claim.” *Id.* at 87-88. *Turner* therefore does not stand for the proposition asserted by Appellee and *Amicus* that duty of good workmanship can be waived. Instead *Turner* stands for the proposition that a negligence claim can be pursued even after a valid waiver of an implied warranty. If *Turner* were the law in Ohio then plaintiffs could proceed on their negligence claim. Decisions that allow waiver of an implied warranty do not support the waiver of an implied duty of good workmanship. This trend is not in the public interest. Public policy supports the idea that everyone ought to be responsible for the consequences of their negligence.

Neither Appellee nor Amicus provide any compelling reason why the home building industry should be immune from the consequences of their negligence. If this Court permits a consumer to waive his or her rights against a home builder, what is next? Will a doctor, lawyer, or accountant insert a waiver into their written agreements?

If this Court permits the waiver of an implied duty to construct a new home then what protection would be left to a buyer? Appellee's answer to this question is on p. 13 of its Brief and states that a buyer would retain "all of the traditional contract defenses recognized under Ohio law. This would include, as Appellants acknowledge, the doctrine of unconscionability." Contract defenses provide no affirmative relief to an aggrieved buyer who discovers a defect, so they are of no value. Upon a closer reading of the WAIVER OF FUTURE CLAIMS provision of the sales contract, paragraph 33, See pp. 12, 20 of the Supplement, it would appear that a claim for unconscionability, since it relates to repairs or modifications of the house, would be covered and therefore waived. The result being that a buyer would have no recourse against a seller for a defective home. Appellee also notes that the purchase of a home is usually preceded by a long period of inspection, thereby providing additional protection for a buyer. A long period of inspection and chance for negotiation is of no benefit if one does have the appropriate expertise.

The old rule of caveat emptor does not satisfy the demands of justice in [the sale of new homes]. The purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime. To apply the rule of caveat emptor to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling homes, is manifestly a denial of justice.

Centex Homes v. Buecher (Texas 2002), 95 S.W. 3d 266, 269 (quoting *Humber v. Morton* (Texas 1968), 426 S.W. 2d 554)

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, 671-672.

The answer is if this Court permits a waiver then there would be no remedy for an aggrieved homeowner, since there is no guarantee that any limited warranty must be offered. If the waiver is not accompanied by an express limited warranty, the buyers will be stuck with a defective house. Assuming this result is unacceptable, how much of an express, limited warranty must be provided before a waiver is permitted? Such a question can only be answered on a case-by-case basis, unless this Court adopts the doctrine of failure of essential purpose and holds that a waiver will only be given effect if an express limited warranty provides a complete remedy for the claimed defect.

Even with a limited warranty there is no guarantee of the protection that a buyer would have, since that would depend on the quality of the limited warranty. The limited warranty in this case is an extremely difficult document to understand. It seems to have as many exclusions as it has coverages. Most of the coverages are for one year only. Presumably if a defect with a one year coverage shows up after the first year, then the buyer has no remedy. In order to take advantage of the limited warranty herein, the defect must occur to something that is warranted, during the time period of the warranty, must be reported according to a certain procedure and then the Warrantor can repair, replace or correct the defect back to the tolerances listed in the limited warranty. (Supplement at p. 26). If waiver is only allowed when there is an express limited warranty provided, then there must still be some analysis as to the quality of the limited warranty. The simplest procedure is to adopt the doctrine of failure of the essential

purpose and hold that the waiver can be ignored and the builder sued when the limited warranty fails to provide a complete remedy for the defect.

Neither Appellee nor *Amicus* discuss the awkward posture Ohio law would be placed in if a waiver is permitted. Under *McMillan v. Brune-Torbeck Builders, Inc.* (1983), 8 Ohio St. 3d 3 a subsequent buyer would be in a superior legal position over the immediate buyer in his ability to sue a builder since the waiver would not be binding on the subsequent buyer. Such a position is without legal justification.

Leaving the buyer of a defective new home without a remedy is against the public policy in Ohio.

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.

Waiver is an affirmative defense upon which Appellee bears the burden of proof. Civil Rule 8(C); *The White Co. v. Canton Transportation* (1936), 131 Ohio St. 190, 198. The sales contract containing the written waiver must be construed against Appellee because [“... a contract is to be construed against the party who drew it.” (citations omitted). *Graham v. Drydock Coal Co.* (1996), 76 Ohio St. 3d 311, 314. Appellants are also entitled to have the sales contract construed in their favor because they are the party opposing summary judgment. Civil Rule 56(C).

Waiver is a “voluntary relinquishment of a known right”. *Glidden Co. v. Lumbermens Mutual* (2006), 112 Ohio St. 3d 470, 478. There are several aspects of a

“known” right. For a right to be known it must be established that the waiving part had knowledge of the right. *Mark-It Place Foods v. New Plan Excel Realty* (4th Dist. 2004), 156 Ohio App. 3d 65, 94-95; *State ex rel. Gill v. School Employee Retirement System* (2009), 121 Ohio St. 3d 567, 573. There is no evidence that Appellants knew that Appellee owed them a duty to construct the home in a workmanlike manner. Nowhere in the sales contract or in the limited warranty is the implied duty of good workmanship mentioned. Even if Appellants had been given the implied warranty, which they were not, the waiver would not be valid because it does not mention the implied duty of good workmanship and therefore does not convey this knowledge to Appellants.

Another aspect of a “known” right is that the language of the waiver must be clear and conspicuous in order to bring it to the attention of the buyer and make it known. The Court of Appeals below found that in order to waive the duty to construct in a workmanlike manner the waiver must be clear, unambiguous, and conspicuous. *Jones v. Centex Homes*, (10th Dist. 2010) 2010 Ohio 4286, at ¶ 21. Applying that 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”. *Id.* at ¶ 23. However the Court of Appeals went beyond the sale contract and considered the language of the implied warranty in determining if there was a valid waiver, “ We consider, however, the sale agreement in conjunction with the limited warranty.” *Id.* at para. 23. How can there be a voluntary relinquishment of a known right when the right isn’t made known, by it being clear, unambiguous , and conspicuous until after the waiver is signed? These facts fail to establish that Appellants knew of the right they were waiving.

Appellee's arguments on this issue are without merit. This is not a case where Appellants kept themselves purposely ignorant of the limited warranty. Appellee never provided Appellant a copy of the Limited warranty until after Appellants signed the sales contract containing the waiver. Appellants had no affirmative duty to seek out the limited warranty. In a comparable instance this Court has held, " Mere silence will not amount to waiver where one is not bound to speak" *White Co.*, supra, at 198.

Appellee speaks of the doctrine of incorporation by reference as supporting its argument. A close reading of the sales contract shows that while the limited warranty is mentioned several times in the sales contract, there is no language incorporating the limited warranty into the sales contract. Therefore the limited warranty can provide no evidence on whether the implied duty of good workmanship was known to the Appellants.

Another part of waiver is a **voluntary** relinquishment of a known right. There was nothing voluntary in this waiver. The sales contract provided in paragraph 9 dealing with Waiver of Implied Warranties that "Purchasers acknowledge and agree that Seller is relying on this waiver and would not sell the property to Purchasers without this waiver." (Supplement, pp. 10, 18). This language defeats any argument that this was a voluntary act.

Finally a waiver must be based on an intentional act. "**** Whether an alleged waiver is express or implied, it must be intentional. Mere negligence, oversight, or thoughtlessness does not create a waiver. (citations omitted)" . *State Farm Ins. Co. v. Ingle* (2nd Dist. 2008), 180 Ohio App. 3d 201, 207-208. The record is devoid of any

evidence that Appellants intentionally waived their right to have Appellee construct their home in a workmanlike manner.

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.

A third aspect of known in the voluntary relinquishment of a known right is **when** the right to be waived is made known to the holder of that right. If one is trying to establish that the holder of a right knew of the existence of that right, then bringing it to the attention of the holder of that right after the waiver is accomplished would be of no significance. For a right to be waived, it must be known and for it to be known it must be brought to the attention of the holder of that right prior to that right being waived. Again, there is no evidence that Appellants knew of their right prior to signing the sales contract and therefore they could not have waived that right by the signing of the sale contract.

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.

If waiver of the duty to construct in a workmanlike manner is permitted, then it should only be allowed when there is an express warranty provided by the builder that provides a complete remedy for the claim defect. If the limited warranty does not

provide such a remedy then the buyer should be able to avoid the effect of the waiver and limited warranty by arguing that the limited warranty fails its essential purpose, it can be disregarded and a buyer retains any claims he may have against the builder.

Appellee argues that the doctrine of a waiver that fails its essential purpose can only be used to make a seller perform under its limited warranty. (“...but instead is simply designed to ensure that a party reaps the benefits that were actually bargained for.” Appellee’s Brief, p. 20). That argument is wrong. In *Goddard v. General Motors* (1979), 60 Ohio St.2d 41 this Court held:

Where a new car express warranty limits a buyer’s remedy to repair and replacement of defective parts, but the new car is so riddled with defects that the limited remedy of repair and replacement fails its essential purpose, the buyer may institute an action to recover damages for breach of warranty under R.C. 1302.88(B) and, in a proper case, incidental and consequential damages under R.C. 1302.88(C) and 1302.89.

Id., at syllabus.

There, this court held that a limited warranty failed its essential purpose and allowed the buyer to disregard the limited warranty and sue for damages excluded by the limited warranty. This holding refutes Appellee’s argument. In *Goddard*, the buyer wasn’t asking that General Motors be made to comply with its limited warranty but instead the buyer was asking that he be allowed to avoid the effect of the limited warranty and seek additional damages excluded by the limited warranty.

Defendant’s position is contrary to common sense. A seller would logically issue a limited warranty in order to narrow its area of potential liability or limit the damages a buyer could recover or shorten the statute of limitations. There would be no other reason to limit a warranty. A buyer logically would attempt to avoid the effects of the limited warranty. One method of avoiding the effects of any limited warranty is to argue that the

limited warranty fails its essential purpose. The goal in arguing that the limited warranty fails its essential purpose is to avoid the effects of the limited warranty and resort to a broader remedy. Defendant's argument skews this logic by arguing that the purpose of the failure of the essential purpose is to make sure the buyer only obtains what the limited warranty provides.

In *Protek, Ltd. V. Lake Erie Screw Corporation*, (5th Dist. 2005), 2005 Ohio 5958

the Court held:

Upon review, the trial court properly concluded the limited remedies clause failed of its essential purpose in covering the late delivery of product; therefore, Protek is entitled to recover damages from LES caused by late delivery. We agree with the trial court LES could have not have cured or repaired the late delivery of product; therefore, the limited warranty clause necessarily failed of its essential purpose, and Protek was entitled to incidental damages arising out of LES' breach.

Again, when the limited warranty clause was found to have failed its essential purpose, the buyer could disregard it and obtain damages excluded by the limited warranty.

In *Sutphen Towers v. PPG Industries* (10th Dist. 2005), 2005 Ohio 6207, the Court of Appeals stated:

As we noted, *supra*, the significance of a determination under R.C. 1302.93(B) that a warranty's exclusive or limited remedy "failed of its essential purpose" is that the buyer may then avail itself of the general remedy provisions of, *inter alia*, R.C. Chapter 1302. Pursuant to R.C. 1302.88, a seller's breach of warranty gives rise to the buyer's right to recover the incidental and consequential damages provided under R.C. 1302.89. Here, the trial court determined that the warranty's credit only remedy failed of its essential purpose which, in turn, invalidated the warranty's consequential damages exclusion. Thus, regardless of whether or not the warranty was orally modified, plaintiff was entitled to recover consequential damages flowing from defendant's breach of warranty.

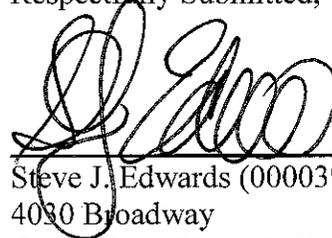
Id., at p. 15, para. 60.

Again, this holding demonstrates that when a limited warranty fails its essential purpose, the remedy is that a buyer is entitled to the remedy that would normally flow from the contractual obligations.

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,



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 24 day of June, 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