

We agree with the court of appeals that the implied warranty of habitability cannot be waived except under limited circumstances not implicated here. We disagree, however, that the implied warranty of good and workmanlike construction cannot be disclaimed. When the parties' agreement sufficiently describes the manner, quality and details of construction, the express agreement may supersede the implied warranty of good workmanship. Although we do not agree in all respects with the court of appeals' reasoning, we affirm its judgment remanding this cause to the trial court.

I

Michael Buecher and other homeowners purchased new homes built by Centex Homes or Centex Real Estate Corporation doing business as Centex Homes. Each homeowner signed a standard form sales agreement prepared by Centex. The agreement contained a one year limited express warranty in lieu of and waiving the implied warranties of habitability and good and workmanlike construction. Specifically, the disclaimer provision provided:

At closing Seller will deliver to Purchaser, Seller's standard form of homeowner's Limited Home Warranty against defects in workmanship and materials, a copy of which is available to Purchaser. PURCHASER AGREES TO ACCEPT SAID HOMEOWNER'S WARRANTY AT CLOSING IN LIEU OF ALL OTHER WARRANTIES, WHATSOEVER, WHETHER EXPRESSED OR IMPLIED BY LAW, AND INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF GOOD WORKMANLIKE CONSTRUCTION AND HABITABILITY. PURCHASER ACKNOWLEDGES AND AGREES THAT SELLER IS RELYING ON THIS WAIVER AND WOULD NOT SELL THE PROPERTY TO PURCHASER WITHOUT THIS WAIVER. Purchaser's initials in the margin indicate their approval of this section 8.

(Emphasis in original.)

After Buecher and the other plaintiffs purchased their homes, they sued Centex alleging fraud, misrepresentation, negligence, and violation of the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”) in connection with the construction and sale of their new homes. The homeowners also sought to certify a class action against Centex, seeking (1) an injunction to prevent Centex from asserting that the implied warranties of habitability and good and workmanlike construction had been waived by the provisions in its sales contracts; (2) an injunction prohibiting Centex from asserting to any homeowner or subsequent purchaser that it had no liability for construction defects beyond the one-year period set forth in the express warranty it gave in lieu of implied warranties; (3) a declaration that the disclaimer provision is unenforceable as a matter of law; and (4) notification to all purchasers and subsequent purchasers within the putative class that Centex’s waiver of implied warranties is void and unenforceable.

Centex filed a special exception and motion to dismiss the proposed class action. Relying on *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392 (Tex. 1982), it argued that a purchaser of a new home can waive the implied warranties of good and workmanlike construction and habitability if the language waiving those warranties is clear and free from doubt. Centex asserted that the waiver at issue in this case was clear and free from doubt. Centex also argued that its waiver provision did not violate the DTPA’s anti-waiver provision because the DTPA does not create any implied warranty of good and workmanlike construction or habitability, but only provides an additional remedy for breach of implied warranties.

The homeowners announced in open court that they could not amend their petition to meet Centex’s special exception. The trial court (1) granted the special exception; (2) struck all the class action

allegations based on the contention that the disclaimer provision is illegal, void, or unenforceable; (3) severed those claims from the homeowners' individual claims; and (4) dismissed the proposed class action. The homeowners appealed. A divided court of appeals, sitting en banc, reversed the trial court's judgment and remanded the cause for further proceedings. 18 S.W.3d 807, 811. The court of appeals held that a homebuilder may not disclaim or cause a homeowner to waive the implied warranties of habitability and good and workmanlike construction. *Id.* at 808.

II

In *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968), this Court recognized that a builder of a new home impliedly warrants that the residence is constructed in a good and workmanlike manner and is suitable for human habitation. In replacing caveat emptor with these two implied warranties, we noted the significance of a new home purchase for most buyers and the difficulty of discovering or guarding against latent defects in construction:

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 houses, is manifestly a denial of justice.

Humber, 426 S.W.2d at 561 (quoting *Bethlahmy v. Bechtel*, 415 P.2d 698 (Idaho 1966)). Subsequently, in *G-W-L, Inc. v. Robichaux*, we conflated the *Humber* warranties of good workmanship and habitability, concluding that the "Humber warranty" could be disclaimed or waived if that intent were clearly expressed in the parties' agreement. *Robichaux*, 643 S.W.2d at 393. Centex therefore argues that

the court of appeals' holding that the implied warranties of good and workmanlike construction and habitability cannot be waived conflicts with *Robichaux*.

The homeowners respond that *Robichaux* is no longer the law in Texas because it was overruled in *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987). *Melody Home* recognized for the first time an implied warranty of good workmanship in the repair or modification of tangible goods or property. *Id.* at 354. The Court further announced as a matter of public policy that this implied warranty for repair services could not be waived or disclaimed. *Id.* at 355. Referencing the dissent in *Robichaux*, the Court noted the incongruity of requiring the creation of an implied warranty and yet permitting its elimination “by a pre-printed standard form disclaimer or an unintelligible merger clause.” *Id.* The Court suggested that such disclaimers should not be allowed because they encouraged shoddy workmanship, thus circumventing the consumer’s reasonable expectations that the job would be performed with reasonable skill. *Id.* At the end of this discussion, the Court purported to overrule *Robichaux* “[t]o the extent that it conflicts with this opinion.” *Id.* The meaning and scope of this statement have proven elusive because it is unclear to what extent *Robichaux* and *Melody Home* actually conflict.

Factually, the two cases do not conflict at all. *Melody Home* does not apply the *Humber* warranties at issue in *Robichaux*. But the implied warranty of good and workmanlike construction in *Humber* and the implied warranty of good and workmanlike repair services in *Melody Home* are very similar, and yet the two cases diverge drastically on appropriate public policy in this area. *Melody Home* rejects *Robichaux*’s notion that the implied warranty of good workmanship may freely be disclaimed as long as that intention is clearly expressed. *Id.* Because the two cases are factually distinguishable, yet

legally antithetical, other authorities have had trouble determining how much of *Robichaux* survives *Melody Home*.

Some have concluded that after *Melody Home* the *Humber* warranties could no longer be waived or disclaimed. See *Haney v. Purcell Co.*, 796 S.W.2d 782, 786 n.3 (Tex. App.--Houston [1st Dist.] 1990, writ denied) (*Melody Home* overruled *Robichaux* “with regard to the issue of waiver of warranty”), 18 WILLIAM DORSANEI III, TEXAS LITIGATION GUIDE § 270.121[1][b], at 270-113 (2002) (*Humber* warranties may not be waived or disclaimed, citing *Melody Home*), and 20 HERBERT S. KENDRICK AND JOHN J. KENDRICK, JR., TEXAS TRANSACTION GUIDE § 83A:21[3] at 83A-18 (2002) (same). But because *Melody Home* and *Robichaux* involve different implied warranties, an argument can be made that the two opinions do not actually conflict, and thus *Robichaux*’s waiver of the *Humber* warranties survives. Because *Melody Home* has cast doubt on the validity of *Robichaux*’s waiver holding, we re-examine our holding in that case.

III

In *Robichaux*, the alleged defect in the buyers’ new home was a sagging roof. The trial court rendered judgment for the buyers on jury findings that the builder “had failed to construct the roof in a good workmanlike manner and that the house was not merchantable at the time of completion.” *Robichaux*, 643 S.W.2d at 392. The court of appeals affirmed.

We disagreed and rendered judgment for the builder. *Id.* We held that the implied “warranty of merchantability” was a sales warranty under the Texas Uniform Commercial Code, which did not apply

to the sale of a house. *Id.* at 394. Then, in reviewing the jury finding that the roof was not constructed in a good and workmanlike manner, the Court conflated the *Humber* warranties of good workmanship and habitability, referring to the warranty at issue as both the “implied warranty of fitness” and the “implied warranty of habitability.” *Id.* at 393. In fact, the implied warranty of habitability was not at issue in the case because the jury had only found a breach of the implied warranty of good and workmanlike performance. *See id.* at 392. The Court nevertheless concluded that language in the sales documents that there were no “warranties, express or implied, in addition to said written instruments” was sufficiently clear to effectively disclaim the implied warranty of habitability. *Id.* at 393.

A

Centex argues that we should adhere to *Robichaux* because it is consistent with decisions from other states allowing parties to expressly disclaim the implied warranties that ordinarily arise with new home sales. *See, e.g. Greeves v. Rosenbaum*, 965 P.2d 669, 673 (Wyo. 1998); *O’Mara v. Dykema*, 942 S.W.2d 854, 859 (Ark. 1997); *Frickel v. Sunnyside Enters., Inc.*, 725 P.2d 422, 426 (Wash. 1986) (en banc); *Dixon v. Mountain City Constr. Co.*, 632 S.W.2d 538, 542 (Tenn. 1982); *Petersen v. Hubschman Constr. Co.*, 389 N.E.2d 1154, 1159 (Ill. 1979); *Griffin v. Wheeler-Leonard & Co.*, 225 S.E.2d 557, 567 (N.C. 1976); *Casavant v. Campopiano*, 327 A.2d 831, 833 (R.I. 1974). These cases, however, generally fail to differentiate between the implied warranty of good workmanship and the implied warranty of habitability. For example, the Supreme Courts of Tennessee and North Carolina hold that the implied warranty of good workmanship can be disclaimed, but never mention the implied warranty of habitability. *Dixon* 632 S.W.2d at 541; *Griffin*, 225 S.E.2d at 566.

The Supreme Court of Arkansas mentions habitability as an implied warranty that may be waived, but includes it as part of its good workmanship warranty. *See O'Mara*, 942 S.W.2d at 859 (implied warranty of “habitability, sound workmanship, and proper construction” can be waived). The Arkansas court apparently recognizes an alternative tort remedy for the sale of a unsafe house. *Id.* at 858 (suggesting strict products liability may apply if house is “in a defective condition unreasonably dangerous”). Illinois and Rhode Island also do not view the implied warranties as separate. *See Peterson*, 389 N.E.2d at 1158-59; *Casavant*, 327 A.2d at 833-34. The Illinois Supreme Court, for example, observes that the implied warranty of habitability is unfortunately named because it does not mean that the house is literally uninhabitable. *Peterson*, 389 N.E.2d at 1158. In contrast, we have defined a breach of this implied warranty in Texas to be a defect “of a nature which will render the premises unsafe, or unsanitary, or otherwise unfit for living therein.” *Kamarath v. Bennett*, 568 S.W.2d 658, 661 (Tex. 1978).

Another case cited by Centex, *Frickel v. Sunnyside Enters., Inc.*, 725 P.2d 422 (Wash. 1986) (en banc), involved the sale of an apartment complex rather than a new home. The Washington Supreme Court held that the implied warranty of habitability could be disclaimed in this type of sale. The dissent noted, however, that the warranty of habitability was not really at issue in *Frickel*, because the claim was merely that the apartments were poorly constructed. *Id.* at 432 (Pearson, C.J., dissenting). The dissent further observed that a disclaimer of the warranty of habitability in the context of a new home sale would contravene public policy:

As yet, Washington courts have not determined the validity of disclaimers of the implied warranty of habitability. In the landlord-tenant area, this court held that such disclaimers contravene public policy. *Foisy v. Wyman*, 515 P.2d 160 (Wash. 1973). Arguably, the

result should be the same in the new house context.

Id. at 434 (Pearson, C.J., dissenting).

Greeves v. Rosenbaum, 965 P.2d 669 (Wyo. 1998), on the other hand, does involve a new home sale and does mention the implied warranty of habitability, but does not directly support Centex's position. There, the buyer signed a contract for deed on a new home. The buyer knew at the time that "the property was currently the subject of ongoing litigation." *Id.* at 671. A visual inspection of the property during that litigation revealed potential problems with the lumber used for the floor joists. "The Greeves then hired their own inspector, who concurred with the results of the first inspection." *Id.* The Greeves nevertheless closed on the property, acknowledging that they had inspected the property and were taking it "as is" except for a one year express warranty. They later sued under the express warranty and also alleged breach of the implied warranty of habitability. The Wyoming Supreme Court rejected the implied warranty claim, relying in part on a state statute providing that an "as is" sale eliminates all implied warranties "[U]nless the circumstances indicate otherwise." *Id.* at 673 (quoting WYO. STAT. § 34-21-233(c) (1977)). The court further observed that this was "not a case where the builder-vendor attempted to hide a latent defect or dissuade the buyer from inspecting the premises; the [buyers] had an unobstructed opportunity to protect their investment through the engagement of a professional to conduct a visual inspection." *Id.* at 674. Although the buyers denominated their implied warranty claim as one involving habitability, it was in fact a claim for breach of the implied warranty of good workmanship.

All of these cases either ignore the implied warranty of habitability or treat it as part of the implied warranty of good workmanship. In Texas, however, the two warranties provide separate and distinct

protection for the new home buyer. *See Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex. 1985) (possible to breach warranty of good workmanship without breaching warranty of habitability); *accord Chandler v. Madsen*, 642 P.2d 1028, 1031 (Mont. 1982) (distinguishing between the two implied warranties). Unfortunately, as in *Robichaux*, we have not always been careful to distinguish between the two. *See Robichaux*, 643 S.W.2d at 393. But because they are distinct and different warranties, it is important to consider the particular purpose of each when considering issues of waiver or disclaimer.

B

The implied warranty of good workmanship focuses on the builder's conduct, while the implied warranty of habitability focuses on the state of the completed structure. *See Clarkson, Note, Implied Warranties of Quality in Texas Home Sales: How Many Promises to Keep?*, 24 HOUS. L. REV. 605, 617-18 (1987). Through the implied warranty of good workmanship, the common law recognizes that a new home builder should perform with at least a minimal standard of care. *See Jones, Economic Losses Caused by Construction Deficiencies: The Competing Regimes of Contract and Tort*, 59 U. CIN. L. REV. 1051, 1059-60 (1991) ("proper-efforts contracts" impose liability only for breaches of the applicable standard of care while "result-oriented contracts" impose absolute liability); Block, *As the Walls Came Tumbling Down: Architects' Expanded Liability Under Design-Build/Construction Contracting*, 17 J. MARSHALL L. REV. 1, 18 n.86 (1984) (warranty of workmanlike performance is a warranty not to act negligently); Greenfield, *Consumer Protection in Service Transactions – Implied Warranties and Strict Liability in Tort*, 1974 UTAH L. REV. 661, 666 (implied warranty of workmanlike performance requires non-negligent performance, not a guarantee of results). This implied warranty requires the builder to

construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances. See *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354-55 (Tex. 1987). The implied warranty of good workmanship serves as a “gap-filler” or “default warranty”; it applies unless and until the parties express a contrary intention. See Davis, *The Illusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework*, 72 NEB. L. REV. 981, 999-1009 (1993) (historical and intended purpose of good workmanship warranty was to serve as a gap-filler). Thus, the implied warranty of good workmanship attaches to a new home sale if the parties’ agreement does not have enough detail about how the builder is to perform.

The implied warranty of habitability, on the other hand, applies to the finished product rather than the builder’s performance:

[T]he implied warranty of habitability is a result oriented concept based upon specific public policy considerations. These include the propriety of shifting the costs of defective construction from consumers to builders who are presumed better able to absorb such costs; the nature of the transaction which involves the purchase of a manufactured product, a house; the buyer's inferior bargaining position; the foreseeable risk of harm resulting from defects to consumers; consumer difficulty in ascertaining defective conditions; and justifiable reliance by consumers on a builder's expertise and implied representations.

Davis, 72 NEB. L. REV. at 1019 (footnotes omitted). This implied warranty is more limited in scope, protecting the purchaser only from those defects that undermine the very basis of the bargain. *Id.* at 1015. It requires the builder to provide a house that is safe, sanitary, and otherwise fit for human habitation. *Kamarath*, 568 S.W.2d at 660. In other words, this implied warranty only protects new home buyers from conditions that are dangerous, hazardous, or detrimental to their life, health or safety. As compared to the warranty of good workmanship, “the warranty of habitability represents a form of strict liability since

the adequacy of the completed structure and not the manner of performance by the builder governs liability.” Davis, 72 NEB. L. REV. at 1015 (1993) (footnotes omitted).

These two implied warranties parallel one another, and they may overlap. For example, a builder’s inferior workmanship could compromise the structure and cause the home to be unsafe. But a builder’s failure to perform good workmanship is actionable even when the outcome does not impair habitability. *Evans*, 689 S.W.2d at 400. Similarly, a home could be well constructed and yet unfit for human habitation if, for example, a builder constructed a home with good workmanship but on a toxic waste site. Unfortunately, many courts, including this one, have not consistently recognized these distinctions.

C

In *Robichaux*, we failed to distinguish between habitability and good workmanship, conflating the two implied warranties and concluding that they could be disclaimed with clear language. *Robichaux*, 643 S.W.2d at 393. And although habitability was not at issue, we indiscriminately swept it into our analysis. That analysis further omitted any discussion of the public policy considerations that prompted the creation of the *Humber* warranties in the first place. *See Humber*, 426 S.W.2d at 561 (rejecting rule of caveat emptor in new home sales); *see also* 17 RICHARD A. LORD, WILLISTON ON CONTRACTS § 50:30(4th ed. 2000) (noting that the modern trend rejects rule of caveat emptor in new home sales).

We created the *Humber* implied warranties to protect the average home buyer who lacks the ability and expertise to discover defects in a new house. *Humber*, 426 S.W.2d at 561. Such buyer generally expects to receive a house that is structurally sound, habitable and free of hidden defects, and these implied warranties serve to protect the buyer’s reasonable expectations. While the parties are free

to define for themselves the quality of workmanship, there is generally no substitute for habitability. The implied warranty of habitability is thus an essential part of a new home sale.

The Supreme Court of Missouri has stated that while it does not “reject outright the possibility of a valid disclaimer or modification [of the implied warranty of habitability] under any set of facts,” a valid waiver requires more than clear and unambiguous language. *Crowder v. Vandendeale*, 564 S.W.2d 879, 881 (Mo. 1978) (en banc). Under *Crowder*, the builder is required to prove that the buyer actually understood what he or she was waiving:

[O]ne seeking the benefit of such a disclaimer must not only show a conspicuous provision which fully discloses the consequences of its inclusion but also that such was *in fact* the agreement reached. The heavy burden thus placed upon the builder is completely justified, for by his assertion of the disclaimer he is seeking to show that the buyer has relinquished protection afforded him by public policy. A knowing waiver of this protection will not be readily implied.”

Id. at 881 n.4. We agree with the Missouri Supreme Court that the warranty of habitability can be waived only to the extent that defects are adequately disclosed. Thus only in unique circumstances, such as when a purchaser buys a problem house with express and full knowledge of the defects that affect its habitability, should a waiver of this warranty be recognized.

The implied warranty of good workmanship, however, defines the level of performance expected when the parties fail to make express provision in their contract. It functions as a gap-filler whose purpose is to supply terms that are omitted from but necessary to the contract’s performance. See RESTATEMENT (SECOND) CONTRACTS § 204 (1981)(*Supplying an Omitted Essential Term*). As a gap-filler, the parties’ agreement may supersede the implied standard for workmanship, but the agreement cannot simply

disclaim it. *See generally Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 570 (Tex. 1996) (interpreting UCC gap-filler).

IV

In conclusion, we hold that the implied warranty of good workmanship may be disclaimed by the parties when their agreement provides sufficient detail on the manner and quality of the desired construction.

We further hold that the warranty of habitability may not be disclaimed generally. This latter implied warranty, however, only extends to defects that render the property unsuitable for its intended use as a home because it endangers the life, health or safety of the resident. Further, the implied warranty of habitability extends only to latent defects. It does not include defects, even substantial ones, that are known by or expressly disclosed to the buyer.

In the trial court, the homeowners, who had purchased homes from Centex under standardized contracts disclaiming the implied warranty of habitability and the implied warranty of good and workmanlike construction, sought a judicial declaration as a class that the disclaimer was unenforceable. The trial court concluded that the disclaimer provision validly waived both implied warranties and dismissed the class claims. Without deciding whether a class action is appropriate in this case, we remand the class claims for consideration in light of our clarification of the purpose and protection afforded by these implied warranties.

The court of appeals' judgment is affirmed.

Thomas R. Phillips
Chief Justice

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