

warranty of good workmanship may be disclaimed by the parties when their agreement provides for sufficient detail on the manner and quality of the desired construction.”³ The Court’s opinion did not discuss Centex’s argument that any limitations on the disclaimers of these implied warranties should apply prospectively only.⁴

Centex moved for rehearing, supported by twenty-three amici curiae representing virtually the entire Texas home building industry, which counts among its ranks thousands of small businesses as well as four of the five biggest home builders in America.⁵ Centex and the amici argue that the Court has misunderstood their industry — no doubt, they say, because of the sparse factual record in this case — and that its decision is likely to cause unintended harm. They urge four things: (1) that the Court respond to their argument that its decision should not apply retroactively; (2) that the Court clarify whether the express warranty of workmanship most common in the industry can displace the implied warranty; (3) that the Court reconsider its general prohibition of disclaimers of the implied warranty of habitability; and (4) that the Court correct its factual misstatement that the express warranty Centex provided was for only one year. Since most courts are ordinarily disinclined to reconsider their decisions, one would not expect (3) to have much chance of success. But one might reasonably expect that: as to (1), out of respect for the parties to a case,

³ *Id.*

⁴ *Ante* at ___ (Hecht, J., dissenting).

⁵ Amici are Home Builders Association of Greater Dallas; Greater Fort Worth Builders Association; Greater Houston Builders Association; Greater San Antonio Builders Association; Texas Capitol Area Builders Association; Texas Association of Builders, Inc.; Lennar Homes; U.S. Home; Village Builders; NuHome Design; KBHome; D. R. Horton, Inc.; Highland Homes, Ltd.; Huntington Homes, Ltd.; Beazer Homes Texas L.P.; Legacy Homes; Hammonds Homes; Perry Homes; The Ryland Group, Inc.; Sotherby Homes; Pulte Home of Texas, L.P.; Residential Warranty Corp.; and HOME of Texas.

the Court would at least *mention* all of the dispositive arguments; as to (2), out of respect for an industry and its consumers, the Court would make the law as clear as possible; and as to (4), out of respect for itself, the Court would correct its own factual misstatements.

Here is the Court's ruling: re prospectivity, silence, meaning that Centex and the amici still do not deserve to have their argument addressed at all; re workmanship, a few words are changed in three sentences, and three parenthetical explanations of cited authorities are deleted (as if deleting the explanation deletes the authority), dispelling none of the confusion; re habitability, the scope of the implied warranty is changed at no one's request and without deliberation, generating new confusion; and re the factual error, it is corrected only in a begrudging way that remains misleading. Reading the arguments on rehearing and then the changes the Court has made in its opinion, one is given the distinct impression that the JUSTICES in today's majority share no fundamental agreement on what the law in this case is (or else they would explain themselves) and yet are determined to say what it is before the Court's membership changes again (tomorrow), resulting in an opinion that more resembles legislation than judicial decision-making: compromise cobbled together remotely responding to the parties' arguments but providing as little guidance as possible. Parties hoping for a reasoned decision so that they can order their affairs in accordance with the law and avoid litigation are ill-treated by the Court's opinion. For reasons that follow, I would grant the motion for rehearing.

I

Centex and the amici argue that the Court should make its decision prospective only and should not void disclaimers of the implied warranties of good workmanship and habitability retroactively. In *Elbaor v. Smith*,⁶ the Court refused to retroactively void hundreds of past Mary Carter agreements even though it was convinced that those agreements had all caused trials to be unfair. In the present case, the Court voids *hundreds of thousands* of agreements based on disclaimers of implied warranties without evidence of a single injustice, ever. A retroactive application of the decision in this case simply cannot be squared with *Elbaor*.

As a rule, court decisions apply retrospectively,⁷ but there are exceptions, which are determined by balancing the following three factors:

(1) whether the decision establishes a new principle of law by either overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether prospective or retroactive application of the particular rule will further or retard its operation through an examination of the history, purpose, and effect of the rule; and (3) whether retroactive application of the rule could produce substantial inequitable results.⁸

As for whether the decision in this case establishes a new principle: The invalidity of disclaimers of the implied warranties of good workmanship and habitability has been argued by commentators,⁹ just as

⁶ 845 S.W.2d 240, 250 (Tex. 1992).

⁷ *Id.* at 250 (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 434 (Tex. 1984)).

⁸ *Id.* (citing *Carrollton Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 518-519 (Tex. 1992), and *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971)).

⁹ *Ante* at ___ (citing 18 WILLIAM DORSANEO III, TEXAS LITIGATION GUIDE § 270.121[1][b], at 270-113 (2002), and 20 HERBERT S. KENDRICK & JOHN J. KENDRICK, JR., TEXAS TRANSACTION GUIDE § 83A:21[3], at 83A-18 (2002)).

the invalidity of Mary Carter agreements has.¹⁰ Unlike Mary Carter agreements, however, such disclaimers have been expressly permitted in other states¹¹ and were expressly approved by this Court in *G-W-L, Inc. v. Robichaux*.¹² Before *Elbaor*, this Court had never approved Mary Carter agreements, and JUSTICE SPEARS had argued that they were void.¹³ The Court's decision in *Melody Home Manufacturing Co. v. Barnes*¹⁴ may have, in the Court's words, "cast doubt" on *Robichaux*,¹⁵ but *Melody Home* did not involve the same warranties and was, as the Court concedes, "factually distinguishable".¹⁶ Even now, the Court only modifies *Robichaux* and does not overrule it. So even if *Melody Home* could be said to have foreshadowed the decision in this case fifteen years later, surely home builders were nevertheless justified in relying on the express language in *Robichaux*, which retains some vitality after the decision in this case, instead of the veiled hint in *Melody Home*. In *Elbaor*, the Court's decision to invalidate Mary Carter agreements, though one of first impression, was consistent with the law in Texas and other states; in the present case, the Court's decision to invalidate disclaimers of implied warranties is directly contrary to its

¹⁰ *Elbaor*, 845 S.W.2d at 250 ("commentators have routinely criticized the Mary Carter agreement").

¹¹ *Ante* at ___ n.14 & 15 (Hecht, J., dissenting) (citing authorities).

¹² 643 S.W.2d 392 (Tex. 1982).

¹³ *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 8-12 (Tex. 1986) (Spears, J., concurring); see *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858 (Tex. 1977) ("There is no contention in this case that the settlement agreement was void."); *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978) (not addressing whether the Mary Carter agreement in the case was invalid).

¹⁴ 741 S.W.2d 349 (Tex. 1987).

¹⁵ *Ante* at ____.

¹⁶ *Ante* at ____.

own prior decision and the law in other states and is not supported by a single case anywhere in the country. The first factor weighed in favor of withholding retroactive effect to our decision in *Elbaor*, and it weighs even more heavily in favor of the same result in the present case.

As for furthering desired policies: In *Elbaor* we concluded that retroactively invalidating Mary Carter agreements would prevent unfair trials but that that consideration was outweighed by the other two factors.¹⁷ In the present case, it is unclear what effect retroactively invalidating disclaimers of implied warranties will have. We have no evidence that the disclaimers have been operating unjustly, like the evidence regarding Mary Carter agreements in *Elbaor*. On the contrary, amici tell us that federal regulations have long required that FHA and VA home buyers be given specified warranty protections,¹⁸ and that these protections have come to be an industry standard for other homes. The Court does not mention these federal regulations — indeed, before the motion for rehearing was filed it did not know they existed — or discuss their impact on implied warranties. Moreover, we are told that disclaimers of implied warranties are the consideration given for express warranties, so that an express warranty is tied to the waiver of an implied warranty. If that is so and the disclaimers are void, then consideration has failed, the express warranties cannot be enforced, and home buyers are left with an implied warranty of habitability that may or may not provide as much protection as the express warranty would have. Again, without a factual record the Court cannot know what will be the impact of giving its decision retroactive effect. In

¹⁷ *Elbaor*, 845 S.W.2d at 251.

¹⁸ 24 C.F.R. § 203.205 (2002).

any event, this second factor certainly weighs no more in favor of retroactivity than it did in *Elbaor* and might even be to the contrary.

As for the likelihood of inequitable results: In *Elbaor* we were concerned that retroactively invalidating Mary Carter agreements would disrupt bargains and revive litigation.¹⁹ Such agreements, although not rare, were certainly not routine. There may have been scores of them, even hundreds. In the present case, amici tell us that invalidating disclaimers of implied warranties of good workmanship and habitability will affect not just hundreds but *hundreds of thousands* of agreements between home builders and home buyers. Residential Warranty Corporation and HOME of Texas say they have about 429,000 warranties in force that were provided by builders to new home buyers in Texas. The same concerns we had in *Elbaor* are not only present in this case, they are multiplied by an order of magnitude.

To apply the decision in this case retroactively is to upset thousands of bargains reached over decades in reliance on express language in this Court's opinion in *Robichaux*. However disruptive this turns out to be, one can hardly expect it to be less so than retroactively voiding Mary Carter agreements would have been. Following *Elbaor*, the Court should give its decision prospective effect only.

II

In holding that an implied warranty of habitability cannot generally be disclaimed, the Court stated in its first opinion that this implied warranty

¹⁹ *Elbaor*, 845 S.W.2d at 251.

requires the builder to provide a house that is safe, sanitary, and otherwise fit for human habitation. *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.²⁰

The Court reiterated that this warranty “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.”²¹ On motion for rehearing, Centex and the amici argue that the Court should reconsider its prohibition of disclaimers of the warranty, and the plaintiffs respond that the Court’s decision is correct. No one has asked that the warranty be redefined.

On its own, the Court now says that the warranty applies whenever a home is “so defective that it is unsuitable for its intended use as a home.”²² Now, “safe, sanitary, and otherwise fit for human habitation” are “other words” for “unsuitable for its intended use as a home.” What does “unsuitable” mean? The dictionary definition is “inappropriate”.²³ Does it mean a bad paint job? A crack in the wall? An unlevel floor? A leaky roof? Few people would actually want to live in a new home with such defects or find it “suitable”. The Court seems to be thinking of a very limited warranty tied not to esthetics but to safety, sanitariness, and danger to life and health. But if so, how does “unsuitable” express that limitation when suitability as a standard for defining the implied warranty of fitness for a particular purpose under the

²⁰ 45 Tex. Sup. Ct. J. 1216, 1220 (Aug. 29, 2002) (citation omitted) (emphasis added).

²¹ *Id.* at 1221.

²² *Ante* at ____, ____.

²³ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2512 (1981).

UCC is a fairly broad concept.²⁴ How is this new standard different from “dangerous, hazardous, or detrimental to life, health, or safety”? Does it contemplate a broader warranty or a narrower one, or is no change intended at all?

The Court’s lack of explanation for this change in its opinion will doubtless leave the industry and consumers more confused than ever. Even if the Court could define a very limited implied warranty, it could not prevent the assertion in virtually every case that the warranty has been breached. When this Court created a cause of action of intentional infliction of emotional distress in 1993, it defined the culpable conduct as being “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”²⁵ Since then, intentional infliction of emotional distress has been alleged in every context imaginable and considered in hundreds of reported cases. It takes no prophet to predict that the Court’s new, undisclaimable, limited, implied warranty of habitability will be alleged in virtually every case involving defects in a residence. The Court thrusts this burden of endless litigation on an industry and its consumers with no evidence whatever that an implied warranty is necessary to protect homeowners against injustice, and with no authority from any American jurisdiction that has found disclaimers intolerable.

²⁴ See TEX. BUS. & COM. CODE § 2.315.

²⁵ *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993) (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965)).

III

The Court holds that an express warranty regarding workmanship can displace the implied warranty. As for what such an express warranty should cover, the Court in its first opinion simply *assumed* that it would ordinarily “describe[] the manner, quality and details of construction”.²⁶ The Court had nothing to support its assumption, and Centex and the amici now tell us that express warranties typically guarantee a result, not the manner of construction: in other words, that the roof won’t leak, not that the roof will be built of such-and-such wood with such-and-such nails, etc. Centex and amici have asked for clarification whether the type of express warranty of workmanship that is commonly given will also displace an implied warranty. The answer must surely be yes. The Court’s basic rationale is that parties should be allowed to agree to a more specific express warranty of workmanship in lieu of a vaguer implied warranty. This rationale does not turn on whether the specificity of the express warranty is in the manner of construction rather than the result to be achieved.

The Court’s response is not to acknowledge that express warranties like those described by Centex and the amici are common or that they even exist at all. Rather, the Court changes three sentences in its opinion to delete “detail” and “details” and add “performance”,²⁷ and then deletes three parenthetical explanations of cited authorities. Presumably, eliminating the parentheticals did not alter the authorities themselves, so one wonders whether anything has been accomplished other than the illusion of invisibility a child thinks he creates by pulling a blanket over his head.

²⁶ *Ante* at ____.

²⁷ *Ante* at ____, ____, and ____.

As I have already noted, the amici tell us that federal regulations govern the quality of many newly constructed homes and have come to be followed industry-wide. The Court refuses to admit that such regulations exist or to acknowledge that similar standards could substitute for an implied warranty. The Court's intention appears to be to accept the industry's criticism and hold that warranties already commonly used in the industry can supersede an implied warranty. Again, however, the Court's inscrutable obscurity can only be expected to generate more disputes and more litigation, not settle the law.

IV

Finally, there was a factual error in the Court's first opinion: Centex's warranty was not for a one-year period, as the Court stated.²⁸ The plaintiffs' pleading alleged that it was, as the Court's new opinion now states,²⁹ but there is nothing in the record to support the allegation, and they do not claim here that the warranty was for so short a period. Both plaintiffs and Centex have moved, at different times, to supplement the record with a copy of the warranty, which would establish that the warranty was for a longer period. It was well within the Court's discretion to deny these motions, but it is unfair to refuse to consider evidence and then repeat an allegation that everyone admits was incorrect.

The issue is significant for two reasons. The shorter the express warranty period, the more abusive it appears for builders to press it on buyers in lieu of an implied warranty that is not so limited. But more importantly, the refusal even to correct a plain factual misstatement in its opinion so as not to mislead the

²⁸ 45 Tex. Sup. Ct. J. 1216, 1216 (Aug. 29, 2002).

²⁹ *Ante* at ____.

reader does not reflect well on this Court or on the process it has employed to reach a decision in this case.

The Court exposes itself to the criticism that its law may be as flawed as its facts. Its silence is assent.

* * * * *

The Court should heed the arguments of Centex and the amici to reconsider its decision altogether. The Court's misstatement of fact, its mistaken assumption about the nature of express warranties of workmanship as they are actually used, and its serious misunderstanding of the nature and operation of the home construction industry can all be explained by the absence of a fully developed factual record that would indicate whether disclaimers of implied warranties are helpful or hurtful to builders and buyers overall. As I wrote in my first dissent, this issue cannot be resolved without factual information that the Court simply does not have. What we do know is that no other jurisdiction in the country has found it necessary or appropriate to prohibit disclaimers of the implied warranties of good workmanship and habitability, and that some jurisdictions have approved such disclaimers. Nothing in the record before us or in any research available to us demonstrates that such disclaimers should be forbidden in the State of Texas.

JUSTICE MAUZY famously ascribed the decision in *Melody Home* to the personal views of the MEMBERS of the Court.³⁰ Ironically, in revisiting the subject of implied warranties in this case, the Court has little more on which to base its decision.

For all these reasons and those previously expressed, I continue to dissent.

³⁰ *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 362 (Mauzy, J., concurring).

Nathan L. Hecht
Justice

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