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BREVORKA v. WOLFE CONSTRUCTION, INC.: DID I JUST WAIVE MY RIGHTS TO THE IMPLIED WARRANTY OF WORKMANLIKE CONSTRUCTION?

LINDA SEAY ROBERTSON*

INTRODUCTION

The implied warranty of workmanlike construction has been recognized in North Carolina since 1925, but was not specifically applied to new home residential construction until the 1970's.¹ With the boom of new home construction and the skyrocketing costs of housing, the courts have found many reasons for holding a builder liable for breach of an implied warranty.² But this increased liability burden has caused the builder to look for ways to disclaim the implied warranties or get buyers to waive their rights to these warranties.³

In *Brevorka v. Wolfe Construction, Inc.*,⁴ the majority of the North Carolina Court of Appeals held that the warranty of workmanlike construction can be waived by a homebuyer's simple acknowledgment of receipt of a limited warranty, disclaiming liability under any other warranties the buyers might have. The dissent disagrees that enrollment in the limited warranty program sufficiently reflects that the parties agreed to give up their right to the implied warranty.⁵

This case was wrongly decided and the dissent should be followed. The majority sets a dangerous precedent that is contrary to the public policy of consumer protectionism for which the implied warranty of workmanlike construction was created.

This case note will discuss how this procedure of disclaimer undermines the rights of homebuyers and fails to give guidance to builder-vendors trying to protect themselves from liability. The common law

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1. Hartley v. Ballou, 209 S.E.2d 776, 783 (N.C. 1974) (citing Moss v. Best Knitting Mills, 130 S.E. 635 (N.C. 1925)).

2. See Stanley P. Sklar et al., *Implied Duties of Contractors: Wait a Minute, Where is That In My Contract?*, 21 CONSTR. L. 11 (2001).

3. *Id.* at 14.

4. *Brevorka v. Wolfe Constr., Inc.*, 573 S.E.2d 656 (N.C. Ct. App. 2002).

5. *Id.* at 661.

in this area has evolved very rapidly over the last thirty years, and parties on both sides of the warranty need clarification.

THE CASE

In May 1999, Peter and Carole Brevorka signed an "Offer To Purchase and Contract" for a newly constructed home in Greensboro, North Carolina.⁶ The contract was with the home's builder, Wolfe Construction, Inc. (Wolfe).⁷ The Brevorkas closed on the house August 4, 1999.⁸ Three weeks later they received a letter from Wolfe offering them an extended limited warranty from Quality Builders Warranty Corporation (QBW).⁹ Two days later, the Brevorkas signed an enrollment form acknowledging that they read the Agreement.¹⁰

One item in the Agreement stated: "Other than the Expressed Warranties contained herein, there are no other warranties expressed or implied including Implied Warranty of Merchantability or Implied Warranty for Particular Purpose."¹¹

Also included was a term of operation stating: "This agreement is separate and apart from your contract with your Builder. It cannot be altered or amended in any way by any other agreement which you have. Contractual disputes shall not involve [Quality Builders Warranty Corporation]."¹²

The Brevorkas brought an action against Wolfe for breach of implied warranty of habitability or workmanlike construction, as well as breach of express warranties, willful misrepresentation, and negligent misrepresentation.¹³ They alleged the house was constructed "in a manner contrary to and different from the agreement between the parties," "in a defective manner, with poor and faulty workmanship," "in a careless and negligent manner," and not "in compliance with applicable building codes and regulations."¹⁴ Wolfe asserted numerous affirmative defenses and later filed a motion to stay the action pending arbitration.¹⁵ Following a hearing on Wolfe's motion, the trial court found the Brevorkas had signed the limited warranty agreement but concluded their claims did not arise under the agreement.¹⁶ Wolfe appealed, contending all of the Brevorkas' claims fell within the

6. *Id.* at 657.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 661.

12. *Id.*

13. *Id.* at 658.

14. *Id.*

15. *Id.*

16. *Id.*

scope of the limited warranty agreement.¹⁷ The Brevorkas countered that the rights and obligations they sought to enforce predated and existed independent of the limited warranty.¹⁸ The majority opinion by the Court of Appeals held the provision stating exclusion of other warranties was a disclaimer such that the Brevorkas, by signing the enrollment form, relinquished their right to sue Wolfe for breach of implied warranty of habitability or workmanlike construction.¹⁹

Chief Judge Eagles dissented in a separate opinion, maintaining that the Brevorkas' signed acknowledgement of the limited warranty was not sufficient to waive the implied warranty of habitability or workmanlike construction.²⁰ He contended that the language of the exclusion did "not clearly and unambiguously show that both parties intended to exclude the implied warranty of habitability or workmanlike quality of construction."²¹ The dissent also finds the limited warranty agreement was separate from the purchase contract between Wolfe and the Brevorkas.²²

The trial court's denial of Wolfe's motion to stay the Brevorkas' cause of action was reversed and remanded pending arbitration.²³

BACKGROUND

And in the beginning was *caveat emptor*, let the buyer beware.²⁴ Originally, all purchases, homes or otherwise, were acquired at one's own risk.²⁵ Where certain purchases involved were susceptible to fraud, or a seller or manufacturer wanted to offer assurances to its consumers, warranties were created. A warranty is a promise that certain facts are truly as they are represented to be and that they will remain true, subject to any specific limitations.²⁶

Generally, two classes of warranties exist: express warranties and implied warranties. An express warranty is an overt promise made by the words or actions of one party to perform an obligation for another.²⁷ An implied warranty arises by operation of law as a consequence of making a contract, regardless of the intent of the parties.²⁸ Several categories of warranties can be involved in new residential

17. *Id.*

18. *Id.*

19. *Id.* at 660.

20. *Id.* at 661.

21. *Id.*

22. *Id.* at 662.

23. *Id.* at 661.

24. BLACK'S LAW DICTIONARY 215 (7th ed. 1999).

25. Sklar, *supra* note 2, at 15.

26. BLACK'S LAW DICTIONARY, *supra* note 24, at 1581.

27. *Id.* at 1582.

28. *Id.*

construction, including a warranty of habitability and warranty of construction.

The implied warranty of habitability is a product of English common law that occurs by operation of law and imposes strict liability on the warranting party. The doctrine first applied to landlord tenant relationships whereby the landlord warrants to the tenant that the leased property is fit to live in and will remain so for the term of the lease.²⁹ In the 1950's, American jurisdictions begin to apply this concept to the purchase of a new home, and it was limited to purchases completed while the dwelling was still under construction.³⁰

A construction warranty is a guarantee from the builder that the structure is free of electrical, plumbing, structural, and other defects and is fit for its intended purpose.³¹ In 1925, the North Carolina Supreme Court in *Moss v. Best Knitting Mills*³² found the construction warranty to be an implied agreement.³³ The builder was required to perform his work in proper and workmanlike manner with such skill as is customary.³⁴ This case involved a building addition onto a manufacturing plant, not a residence, and the contract between plaintiff and defendant was executed prior to construction completion.³⁵

Major real estate development in the 1970's dismissed the doctrine of caveat emptor as applied to new home sales.³⁶ The implied warranty of habitability was found to extend to the initial purchaser of a completed home, not just homes under construction.³⁷ The North Carolina courts held in the case of *Hartley v. Ballou*³⁸ that the implied warranty of workmanlike construction from *Moss* extends at the time of passing of the deed.³⁹

In a subsequent North Carolina case two years later, *Griffin v. Wheeler-Leonard & Co., Inc.*,⁴⁰ the North Carolina Supreme Court relied on *Hartley* to find a breach of the warranty of workmanlike construction.⁴¹ The court held that "failure to meet this standard would constitute a breach of the implied warranty regardless of whether the house could be deemed livable."⁴² Therefore, a breach of

29. *Id.*

30. Sklar, *supra* note 2, at 15.

31. BLACK'S LAW DICTIONARY, *supra* note 24, at 1581.

32. *Moss v. Best Knitting Mills*, 130 S.E. 635 (N.C. 1925).

33. *Id.* at 637.

34. *Id.*

35. *Id.* at 636.

36. Sklar, *supra* note 2, at 15.

37. *Id.*

38. *Hartley*, 209 S.E.2d 776.

39. *Id.* at 783.

40. *Griffin v. Wheeler-Leonard & Co., Inc.*, 225 S.E.2d 557 (N.C. 1976).

41. *Id.*

42. *Id.* at 567.

the implied warranty of workmanlike construction does not necessarily equal a breach of the implied warranty of habitability.

The purpose of the implied warranty of habitability has been to protect the public from unsafe places to live, based on the premise that one's home is first and foremost shelter.⁴³ The purpose of the warranty of workmanlike construction has been to protect the consumers' investments from fraud.⁴⁴

With the advent of these implied warranties has come the attempt of builders to disclaim them to avoid liability for a breach of warranty. In *Griffin*, the court reiterated that the implied warranty of workmanlike construction arises by operation of law, not by a specific factual agreement between the parties.⁴⁵ Although the builder-vendor and the purchaser may enter into a binding agreement that such an implied warranty would not apply to their transaction, such an agreement must be accomplished "by clear, unambiguous language, reflecting the fact that the parties fully intended such a result."⁴⁶ The court adopted this language from the Uniform Commercial Code section governing exclusion or modification of the implied warranties of merchantability and fitness,⁴⁷ which applies to movable goods but not real property.⁴⁸

On the same day as the *Brevorka* decision, December 31, 2002, the Supreme Court of Texas ruled on a similar case involving disclaimer of the implied warranties of habitability and workmanlike construction by Centex Homes, a national home building corporation.⁴⁹ In a split decision, the Texas court held that the implied warranties are separate, that habitability may not be generally disclaimed, and workmanship may be disclaimed but only if the agreement provides for the manner, performance, or quality of desired construction.⁵⁰ In this case, the standard form sales agreement prepared by Centex provided a disclaimer provision to all implied warranties which the buyers had approved by initialing that section.⁵¹ This disclaimer was made at the time of the sales transaction prior to closing.⁵² Interestingly, the ma-

43. Sklar, *supra* note 2, at 15.

44. *Id.* at 13.

45. *Griffin*, 225 S.E.2d at 568.

46. *Id.*

47. N.C. GEN. STAT. § 25-2-316(2) (2002).

48. §§ 25-2-105, -107.

49. *Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002).

50. *Id.* at 273-75.

51. *Id.* at 268. "PURCHASER AGREES TO ACCEPT SAID HOMEOWNER'S WARRANTY 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 PURCHASE WITHOUT THIS WAIVER."

52. *Id.*

majority's holding in *Centex* interprets the holding of the *Griffin* court as failing to differentiate between the implied warranties of habitability and workmanship and as allowing disclaimers of workmanship but not mentioning habitability.⁵³ The scathing dissent in *Centex* accuses the majority of sharing no agreement on the fundamental law in Texas.⁵⁴

Different states handle disclaimer of the implied warranties in a variety of ways. Although the existence of an express warranty has been used as a defense against enforcement of an implied warranty of workmanlike construction, a number of jurisdictions specifically reject such a defense.⁵⁵ In the absence of an explicit contract provision stating that the express warranty was the exclusive remedy, only a few jurisdictions have allowed an express warranty to replace the implied warranty of workmanlike construction.⁵⁶ And as a general rule, courts will not enforce boilerplate disclaimers of liability.⁵⁷ If a disclaimer is contained in a separate release with no consideration for the release, it may also be unenforceable.⁵⁸ A release may be required to spell out in detail the implied warranties it purports to disclaim,⁵⁹ and some states require proof that the disclaimer was actually communicated to the purchaser.⁶⁰ As to the implied warranty of habitability, Texas and Washington both prohibit any disclaimer in the context of a new home sale, as such a disclaimer would contravene public policy.⁶¹ For most jurisdictions, it has been a common law evolution but for some it has become codified by statute.⁶²

Currently, North Carolina statutes clarify laws relating to express and implied warranties applicable to the sale of condominium units.⁶³ The implied warranties under the Condominium Act⁶⁴ include the implied warranties of suitability for a particular purpose, which the official comment analogizes to habitability, and construction in a workmanlike manner.⁶⁵ As to residential condominium units, the statute prohibits general disclaimers for any of the implied warranties

53. *Id.* at 271.

54. *Id.* at 276.

55. Sklar, *supra* note 2, at 14.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Centex*, 95 S.W.3d at 272 (citing *Frickel v. Sunnyside Enters., Inc.*, 725 P.2d 422 (Wash. 1986)).

62. *Id.* at 271.

63. N.C. GEN. STAT. §§ 47C-4-114, -115 (2002).

64. *Id.* § 47C.

65. *Id.* § 47C-4-114.

of quality.⁶⁶ Like the majority holding in *Centex*,⁶⁷ the North Carolina statute allows for disclaimer of specified defects only. It requires the purchaser's signature in an agreement as to the specified defects so this becomes a "basis of the bargain."⁶⁸ The statute's official comment states that the section governing exclusion or modification of implied warranties of quality "is not intended to be inconsistent with, or to prevent, the use of insured warranty programs offered by some home builders" but reemphasized the prohibition against disclaimer by general language."⁶⁹

The rapid development of this area of the law has led to incompleteness and fragmentation, leaving both buyers and builders confused as to how to best protect their interests. North Carolina law involving implied warranties of new home construction desperately needs clarification. Are the implied warranties of workmanlike construction and habitability separate principles, or one and the same as applied to new home construction? Does the procedure for exclusion of the implied warranty of workmanlike construction effectively disclaim the warranty of habitability as well? Can the warranty of habitability, if separate, be disclaimed in the same manner that allows workmanlike construction to be disclaimed? How should an implied warranty of habitability or workmanlike construction be properly disclaimed? How does an exclusionary clause properly reflect the parties' intended as to its effect? Should a buyer be bound to a disclaimer agreement that occurs after closing on the purchase transaction? What actions should a builder-vendor take to insure an implied warranty is effectively disclaimed?

ANALYSIS

The North Carolina Court of Appeals decision in *Brevorka v. Wolfe Construction, Inc.*⁷⁰ fails in several respects to give clear answers to many of the above questions, and the holdings the court does make are misguided and set a dangerous precedent.

66. N.C. GEN. STAT. § 47C-4-115(b) (2002), ("With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant and any person in the business of selling real estate for his own account may disclaim liability in an instrument signed by the purchaser for a specified defect . . . if the defect . . . entered into and became a basis of the bargain.")

67. *Centex*, 95 S.W.3d at 266.

68. *Id.* at 274.

69. § 47C-4-115 cmt. 5 (2002).

70. *Brevorka*, 573 S.E.2d at 656.

Implied Warranty of Workmanlike Construction

The complaint by the Brevorkas sets forth a claim for breach of the implied warranties of habitability OR workmanlike construction.⁷¹ Are these warranties dictated by the same principle when applied to new home construction or are they separate duties? Several sources indicate that the warranties are separate duties. North Carolina continues to recognize breach of the implied warranty of habitability as a cause of action in new home construction as well as in landlord-tenant disputes.⁷² The decision in *Hartley v. Ballou*, seems to create the implied warranty of workmanlike construction as a separate principle exclusive to a builder-vendor.⁷³ The court in *Griffin v. Wheeler* states that the warranty of workmanship applies whether or not the home is livable, indicating workmanship and habitability are separate principles.⁷⁴ The North Carolina Condominium Act⁷⁵ notes that habitability and construction warranties are distinct, even though they are both considered implied warranties of quality and treated similarly.

In *Brevorka*, the court did not address any differences between these implied warranties but it is an important issue for future cases and deserves clarification. A breach in workmanship may not rise to the level of being a breach of habitability. So should an implied warranty of workmanship be as protective as an implied warranty of habitability? The effect of the *Brevorka* decision, by not addressing the differences in the warranties, is to give habitability and workmanship equal weight. That weakens the protective power of the implied warranty of habitability and undermines its public policy purpose.

Does the procedure for disclaiming the implied warranty of workmanlike construction disclaim habitability as well? Under the *Brevorka* holding, any implied warranty may be disclaimed by a builder-vendor through a standard enrollment into a limited warranty program. The court erred in allowing a blanket disclaimer of any implied warranty, since *Griffin*⁷⁶ only outlines the method for allowing a disclaimer of workmanship, and does not apply it to habitability. The court in *Brevorka* misapplied the precedent. The effect of this misapplication is that in waiving one's rights to the implied warranty of

71. *Id.* at 659.

72. *Mitchell v. Linville*, 557 S.E.2d 620 (N.C. Ct. App. 2001).

73. *Hartley*, 209 S.E.2d at 782.

74. *Griffin*, 225 S.E.2d at 567.

75. N.C. GEN. STAT. § 47C-4-114 (2002) ("The law relating to implied warranties, including but not limited to, implied warranties that the premises are free from defective materials, constructed in a workmanlike manner, . . . and that the premises may be used for a particular purpose.")

76. *Griffin*, 225 S.E.2d at 567-68.

workmanlike construction, one is also inadvertently waiving one's rights to habitability as well.

Disclaimer of the Implied Warranties in a Limited Warranty Agreement

Even if the court in *Brevorka* did properly combine the implied warranties of habitability and workmanlike construction, the disclaimer and the circumstances around the signing of the agreement do not follow the proper procedure for disclaimer set forth in *Griffin*: "Such an exclusion, if desired by the parties to a contract for the purchase of a residence, should be accomplished by clear, unambiguous language, reflecting the fact that the parties fully intended such result."⁷⁷ There are five elements to this procedure, and the majority in *Brevorka* misses the mark on all of them.

First, "such an exclusion" means that the parties need to state exactly what warranties are being excluded. The catchall phrase of the Quality Builders Warranty Corporation (QBW) enrollment form, "there are no other warranties,"⁷⁸ does not communicate to a buyer the rights they are waiving. Because the implied warranties of habitability and workmanlike construction are created by operation of law, not statute, it is all the more important that those rights are specified. The enrollment form only specifies the implied warranties of merchantability and fitness for a particular purpose,⁷⁹ no terminology mentioning "habitability" or "workmanlike construction."

Second, the warranty exclusion must be "desired by the parties."⁸⁰ The Brevorkas signed an enrollment form acknowledging they had read the agreement and were accepting the limited warranty.⁸¹ This action certainly indicates the Brevorkas desired to have the limited warranty, and that it was offered by QBW shows Wolfe Construction intended to offer such a warranty. Simply having a disclaimer of implied warranties including merchantability and particular purpose as part of the limited warranty only indicated that Wolfe intended it to be a condition of the agreement. The boilerplate language does not show that both "parties" "desired" the warranty exclusions.

Third, the desired exclusion must be "to a contract for the purchase of a residence."⁸² There was an "Offer to Purchase and Contract" between Wolfe Construction and the Brevorkas, but it was extin-

77. *Id.* at 568.

78. *Brevorka*, 573 S.E.2d at 657.

79. *Id.*

80. *Griffin*, 225 S.E.2d at 568.

81. *Brevorka*, 573 S.E.2d at 657.

82. *Griffin*, 225 S.E.2d at 568.

guished at the closing on the house, August 4, 1999.⁸³ The limited warranty was not offered until August 25, three weeks after closing.⁸⁴ In *Centex*, enrolling in a limited warranty was a condition precedent to the sales contract and was explained in a provision of the sales contract.⁸⁵ So even though the disclaimer in *Centex* failed for other reasons, the subsequent enrollment merged into the sales contract making it part of the agreement. In *Brevorka*, the limited warranty was not even offered until the purchase contract was closed and stipulated as a general term that the warranty agreement was “separate and apart from” the Brevorkas’ contract with Wolfe.⁸⁶ There is no merger that takes place here.

Fourth, the exclusion of the implied warranties must be “accomplished by clear, unambiguous language.”⁸⁷ In order to waive a right that is created by operation of law, any attempted disclaimer should precisely spell out the right being forfeited, as this is the “consideration” in the contract.⁸⁸ The language in the QBW enrollment is unacceptably vague because it only spells out the implied warranties of merchantability and fitness for a particular purpose, which traditionally extend to goods and services, not real property.⁸⁹ The QBW disclaimer provision was drafted by a corporation involved in the business of building and selling new residential homes, but is addressed to a homebuyer, who has likely never made a new home purchase. Part of the reason these implied warranties were recognized was to protect the unknowing consumer. By not demanding clear, unambiguous language, *Brevorka* takes away that protection.

Fifth, the disclaiming provision must “reflect the fact that the parties fully intended such a result.”⁹⁰ The pertinent part of the QBW enrollment form reads: “Both the Builder and the Purchasers must sign this Enrollment form. By signing, the purchaser acknowledges that has read the attached Agreement and has received a copy.”⁹¹ The majority in *Brevorka* hold that “enrolling” means the Brevorkas committed to the limited warranty and are contractually bound by the terms of the agreement.⁹² However, “acknowledge” has several defi-

83. *Brevorka*, 573 S.E.2d at 657.

84. *Id.*

85. *Centex*, 95 S.W.3d at 268.

86. *Brevorka*, 573 S.E.2d at 662.

87. *Griffin*, 225 S.E.2d at 567.

88. See *Clifford v. Riverbend Plantation, Inc.*, 323 S.E.2d 23 (N.C. 1984) (holding an agreement to modify terms of a land contract must be based on new consideration and any warranty given subsequent to signing of a sales contract was simply a promise unenforceable by the courts).

89. N.C. GEN. STAT. §§ 25-2-105, -107 (2002).

90. *Griffin*, 225 S.E.2d at 567.

91. *Brevorka*, 573 S.E.2d at 657.

92. *Id.* at 659.

nitions, including: "recognition as fact, acceptance of responsibility, making receipt of something known, and formal declaration by notarization."⁹³ Unless these terms were defined in the QBW agreement, the Brevorkas would not have understood that by contracting for a limited warranty with QBW they were in fact giving up implied warranties from Wolfe Construction. All correspondence came from and went to QBW, and all disputes were to be handled by QBW.⁹⁴ The Brevorkas' signatures to enroll does not "reflect" an intention to waive their implied rights against Wolfe Construction, Inc., only their rights against QBW.

CONCLUSION

The *Brevorka* decision fails to clarify the law in North Carolina concerning the implied warranty of workmanlike construction, as applied to a new home purchase, or its exclusion or modification by a limited warranty agreement. It is not clear whether the implied warranty of habitability is the same as workmanlike construction and can be disclaimed in the same manner. The court erred in allowing the disclaimer to be effective against the implied warranty of workmanlike construction. The disclaimer of implied warranties was ineffective because it was not integrated into the purchase contract, it did not clearly state that the right to the implied warranty of workmanship was being given up, nor did it evidence that the parties intended to waive that warranty.

The law here needs refinement for both parties to a purchase agreement involving new home construction. The buyer, often making a single purchase of lifetime investment, deserves consumer protection because they are the uneducated party to the contract. The builder-vendor needs to know the duties and liabilities which apply to builders in order to plan accordingly.

Statutorily defining the implied warranties of workmanlike construction and habitability, as well as codification of the exclusionary procedure set out in *Griffin* would go a long way in guiding both buyers and builders. The majority decision in *Brevorka* only creates more confusion, and puts both buyers and builders at risk. The court erred in its application of *Griffin* and the ruling should not be followed.

93. BLACK'S LAW DICTIONARY, *supra* note 24, at 23.

94. *Brevorka*, 573 S.E.2d at 658.

