

RECENT DEVELOPMENTS

DECEPTIVE TRADE PRACTICES AND WARRANTIES

NO IMPLIED WARRANTY IN THE RENDERING OF A PROFESSIONAL SERVICE

Hogue v. ProPath Lab., 192 S.W.3d 641 (Tex. App.—Fort Worth 2006).

FACTS: Donald and Elta Hogue sued ProPath Laboratory, Inc. and ProPath Services, L.L.C. (collectively “ProPath”) after a ProPath employee failed to detect the presence of melanoma in a lesion removed from Mr. Hogue’s skin. The Hogues complained that ProPath routed the specimen to a pathologist rather than a dermatopathologist (a pathologist who evaluates diseases of the skin). The Hogues sued ProPath alleging breach of implied warranties of merchantability, fitness for a particular purpose, and superior service. The Hogues’ breach of implied warranty claim proceeded to trial, but the trial court granted a directed verdict against the Hogues’ at the close of evidence. The Hogues appealed.

HOLDING: Affirmed.

REASONING: A valid directed verdict occurs “(1) when the evidence conclusively establishes the right of the movant to judgment or negates the right of the opponent or (2) when the evidence is insufficient to raise a material fact issue.” The court held that under the evidence of this case, viewed in the light most favorable to the Hogues, ProPath provided a professional service, and Texas law does not recognize a cause of action for breach of an implied warranty of professional services. Further, implied warranties do not apply to “a product provided as an inseparable part of the rendition of medical services.”

In *Dennis v. Allison*, 698 S.W.2d 94, 96 (Tex. 1985), the Supreme Court of Texas held that no implied warranty arose when a patient acquired psychiatric services because adequate remedies existed to address the wrongs committed during treatment. The Hogue’s tried to distinguish their case by arguing that the professional service provided by the pathologist and the services provided by ProPath were separate. The court saw no distinction, noting that the “pathology interpretation [was] the service provided by [ProPath].” In addition, the Hogues argued that an implied warranty breach should be available because ProPath did not provide a service to them personally. The court found that the Hogues “cite[d] no authority to explain how the lack of direct contact renders the service anything other than a professional service.” The court held that ProPath provided a professional service to the Hogues, but because a cause of action for breach of implied warranty is not recognized in this context, the trial court did not err by directing a verdict against the Hogues.

BUSINESS AND COMMERCIAL CODE REQUIRES NOTICE PRIOR TO BREACH OF WARRANTY ACTION

Ibarra v. Nat’l Constr. Rentals, Inc., 199 S.W.3d 32 (Tex. App.—San Antonio 2006).

FACTS: F. A. Nunnelly Company (“Nunnelly”) rented temporary fencing from National Construction Rentals (“National”) for use during construction at a middle school. Ibarra was injured when a child pulled down the fencing, causing it to fall on Ibarra.

Ibarra filed suit against both Nunnelly and National for, *inter alia*, breach of implied warranty of fitness for a particular purpose, and breach of the implied warranty of merchantability. The trial court granted National’s motion for directed verdict on these claims because Ibarra failed to provide the statutorily required notice for a breach of implied warranties cause of action.

HOLDING: Affirmed.

REASONING: Though Ibarra claimed that the statutory notice requirement did not apply to a plaintiff who was a “nonlessee” or “nonbuyer” claiming damages for personal injuries, the court relied upon Comment 5 to Section 2.607 of the Texas Business and Commercial Code to find that the sections requiring notice of injury extend to beneficiaries of both the lessor/lessee and seller/buyer relationships.

The comment explains that beneficiaries of the seller/buyer relationship are not required to give notice regarding discovery of defects after acceptance of the product, but they are required to notify the seller when an injury occurs. Because the language and purpose of Section 2.607 (governing seller/buyer relationships) is substantially similar to that of Section 2A.516 (governing lessor/lessee relationships), the court reasoned that the notice requirement also extended to beneficiaries of the lessor/lessee relationship.

Because Ibarra was a beneficiary of the lessor/lessee relationship between Nunnelly and National, the court held that she was required to provide notice of her injuries to National within a reasonable time, and that her failure to do so barred any remedy for her claim.

WARRANTY OF GOOD AND WORKMANLIKE DEVELOPMENT MAY BE WAIVED

Welwood v. Cypress Creek Estates, Inc., 205 S.W.3d 722 (Tex. App.—Dallas 2006).

FACTS: Curt Welwood was the chairman of Hawkins-Welwood Homes, L.P. (“HWH”), a custom home builder. Welwood, on behalf of HWH, purchased five subdivision lots in Cypress Creek Estates from Legacy Lakes, a subdivision developer. Welwood purchased a lake-front home built on one of the lots from his partnership, HWH. Behind the home, the lot sloped down to a lake. Welwood made improvements to the lot, including a deck and a retaining wall. Shortly thereafter, the slope failed and slid towards the lake, resulting in damages to the improvements. Welwood sued Legacy Lakes for damages resulting from the slope collapse. He claimed that Legacy Lakes had failed to conduct soil stability tests required by city standards, which constituted negligence, a violation of the DTPA, and a breach of an implied warranty of good and workmanlike development services. The

Supreme Court of Texas held that no implied warranty arose when a patient acquired psychiatric services because adequate remedies existed to address the wrongs committed during treatment.

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purchase agreement between Legacy Lakes and HWH contained an “as is” clause that disclaimed representations and warranties as to physical condition, habitability, merchantability, and fitness for a particular purpose.

Legacy Lakes moved for summary judgment on the grounds that any warranties were waived and that the “as is” clause barred all of Welwood’s claims. The trial court granted the motion without disclosing specific grounds. Welwood appealed.

HOLDING: Affirmed.

REASONING: Welwood argued that the implied warranty of good and workmanlike development services could not be waived. He relied on a Fort Worth Court of Appeals decision that recognized such a warranty. *See Luker v. Arnold*, 843 S.W.2d 108 (Tex. App.—Fort Worth 1992). However, the court pointed out that the Texas Supreme Court had not recognized the warranty in that case.

Without deciding whether to impose the warranty, the court considered whether it could be waived. The Texas Supreme Court has recognized an implied warranty for services, but only when they relate to the repair or modification of existing goods. In those cases, public policy dictated that the warranty cannot be waived or disclaimed. The court also discussed the warranty of habitability imposed on homebuilders, which is considered an essential part of the home sale and generally cannot be waived or disclaimed. Welwood acknowledged that neither of these warranties applied in the case. The court then likened the warranty in the instant case to the implied warranty of good and workmanlike construction imposed on homebuilders. It distinguished this warranty from the warranty of habitability, explaining that the warranty of habitability is result oriented whereas a warranty of good and workmanlike construction is conduct oriented. The court deemed the warranty of good and workmanlike construction a “default warranty” or “gap filler” to be used only in the absence of an agreed upon standard of construction. The court explained that the implied warranty may be disclaimed when the agreement provides for the manner, performance, or quality of the services. *See Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002). In this case, the agreement specified that the lots were to be constructed in accordance with the City of Frisco standards, and the court found this sufficient to waive/disclaim the application of the “gap filler” warranty.

COURT DISCUSSES “AS IS” CLAUSE

Welwood v. Cypress Creek Estates, Inc., 205 S.W.3d 722 (Tex. App.—Dallas 2006).

FACTS: Curt Welwood is the chairman of Hawkins-Welwood Homes, L.P. (“HWH”), a custom home builder. Welwood, on behalf of HWH, purchased five subdivision lots in Cypress Creek Estates from Legacy Lakes, a subdivision developer. Welwood purchased a lake-front home built on one of the lots from his

partnership, HWH. Behind the home, the lot sloped down to a lake. Welwood made improvements to the lot, including a deck and a retaining wall. Shortly thereafter, the slope failed and slid towards the lake, resulting in damages to the improvements. Welwood sued Legacy Lakes for damages resulting from the slope collapse. He claimed that Legacy Lakes had failed to conduct soil stability tests required by city standards, which constituted negligence, a violation of the DTPA, and a breach of an implied warranty of good and workmanlike development services. The purchase agreement between Legacy Lakes and HWH contained an “as is” clause that disclaimed representations and warranties as to physical condition, habitability, merchantability, and fitness for a particular purpose.

Legacy Lakes moved for summary judgment on the grounds that any warranties were waived and that the “as is” clause barred all of Welwood’s claims. The trial court granted the motion without disclosing specific grounds. Welwood appealed.

HOLDING: Affirmed.

REASONING: The court noted that a typical “as is” clause disclaims any express or implied warranties, with the buyer assuming all responsibility to inspect the property being purchased. An “as is” clause is not always valid, however, as in a case when there is evidence of fraudulent inducement. Accordingly, the court looked at the totality of the circumstances surrounding the transaction. There was no evidence that Welwood was fraudulently induced into signing the agreement with the “as is” clause, nor did Welwood contend that HWH was prevented from examining the lots prior to the purchase. The court found that Welwood had subjective knowledge of the “as is” clause and the disclaimer. Welwood did claim that the clause was boilerplate, but failed to present evidence that it wasn’t part of the basis of the bargain. Welwood did not assert that the parties were of unequal bargaining power or that the transaction was anything other than at arm’s length. The court found that the “as is” clause was valid under the totality of circumstances test.

The court noted that a typical “as is” clause disclaims any express or implied warranties, with the buyer assuming all responsibility to inspect the property being purchased.

Although Welwood claimed that he should not be personally bound by the “as is” clause because he signed the agreement as an officer of HWH and not individually, the court stated that Welwood’s interests were aligned with those of HWH in the transaction, and that Welwood should have no greater rights as a subsequent purchaser than HWH would have against Legacy Lakes. Additionally, the “as is” clause negates the causation element and therefore Welwood cannot claim that Legacy Lakes was responsible for the damage to his property.