

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

CHARLES P. HAMPTON and :  
HEATHER A. HAMPTON, :  
 : C.A. No. 02C-10-037 WLW  
Plaintiffs, :  
 :  
v. :  
 :  
WARREN-WOLFE ASSOCIATES, :  
INC., HARRINGTON REALTY, INC., :  
JAMES ELDERS, t/a HELP-U-SELL/ :  
ELDERS REALTY, PHILIP C. JEFFRIES :  
and HOWARD DAVID CAREY, :  
 :  
Defendants, :  
\*\*\*\*\* :  
WARREN-WOLFE ASSOCIATES, INC., :  
 :  
Third Party Plaintiff, :  
 :  
v. :  
 :  
NATIONAL UNION FIRE INSURANCE :  
COMPANY OF PITTSBURGH, PA, and :  
BANKERS INSURANCE COMPANY, :  
 :  
Third Party Defendants. :

Heard: March 19, 2004  
Decided: March 19, 2004  
Order Issued: March 25, 2004

Upon Defendant Warren-Wolfe Associates, Inc.'s  
Motion for Summary Judgment. Denied.

Alan G. Davis, Esquire of Henry Clay Davis, III, P.A., Georgetown, Delaware, attorneys for the  
Plaintiffs.

Scott E. Chambers, Esquire of Schmittinger & Rodriguez, P. A., Dover, Delaware, attorneys for Warren-  
Wolfe Associates, Inc.

C. Scott Reese, Esquire and Noriss E. Cosgrove, Esquire of Cooch and Taylor, Wilmington, Delaware,  
attorneys for Defendants Harrington Realty, Inc. and Philip C. Jeffries.

WITHAM, J.

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### **Introduction**

Before this Court is Defendant Warren-Wolfe Associate, Inc.' s motion for summary judgment. Defendants Harrington Realty, Inc. and Philip C. Jeffries oppose the motion. Plaintiffs Charles and Heather Hampton also oppose the motion. Based on the arguments of counsel on March 19, 2004, the memoranda submitted by the parties and the exhibits, Warren-Wolfe' s motion for summary judgment was *denied*. The Court issues this Order outlining the reasons for denial.

### **Background**

Plaintiffs purchased the residence at 2355 White Oak Road, Dover, Delaware, from David Carey (" Seller"). Prior to the sale a termite inspection was conducted and termite damage was found. Seller hired Warren-Wolfe to generate a structural engineering report which was distributed to Seller' s realtor and the Hamptons' settlement attorney. The Warren-Wolfe report stated that the accessible structure members were visually inspected and were in sound condition, thus, according to the report, the house was structurally sound. However, after taking possession of the property, the Hamptons allegedly found the house was not structurally sound due to termite damage. Necessary repairs to the home are alleged to cost approximately \$40,000. In their complaint, the Hamptons state that but for the combined actions of the Defendants, they would not have purchased the home, and thus are seeking damages totaling \$74,900 plus punitive damages and costs. Plaintiffs filed suit against Warren-Wolfe alleging consumer fraud, fraud, misrepresentation, breach of contract and professional negligence.

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Warren-Wolfe filed this motion for summary judgment arguing that there is no evidence in the record to support Plaintiffs' allegations of consumer fraud or other fraudulent behavior. Further, Warren-Wolfe alleges that the Plaintiffs did not see the report prior to purchasing the home, nor did they rely on its contents, and thus there is no legal basis for Plaintiffs' claims against Warren-Wolfe for breach of contract and negligence. Finally, the contract contained a limitation of liability clause which stated, in relevant part:

This report is not intended as a warranty or guarantee, expressed or implied, and should not be relied upon as such. Warren-Wolfe Associates, Inc. shall not be liable for loss or damages including, but not limited to negligence, breach of contract, or errors in judgment of its inspectors beyond the cost of this inspection.<sup>1</sup>

Thus, Warren-Wolfe contends that it could be liable to Plaintiffs for no more than \$85.00, the cost of the inspection.

Harrington Realty and Philip Jeffries (collectively, "Harrington") argue that the Plaintiffs and their attorney relied on the report obtained by the Seller because it certified that the home was structurally sound. Harrington further contends that even though the Hamptons do not recall seeing the report, their attorney knew that the report represented that there were no structural problems and permitted them to go ahead with the settlement. In addition, Harrington contends that the limitation of liability clause is unenforceable because it is unconscionable as it was intended

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<sup>1</sup> Warren-Wolfe Associates, Inc. report, March 27, 2001.

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to restrict a consumer's recovery to \$85.00.

Plaintiffs also oppose the motion for summary judgment contending that the standard required for summary judgment has not been met. Specifically, the Plaintiffs contend that there remain questions of fact with respect to what Warren-Wolfe inspected and whether he actually saw damage. Additionally, Plaintiffs contend that there is an issue with respect to who relied on the report, contending that Warren-Wolfe should have anticipated that the seller and the buyer would rely on the report. In addition, Plaintiffs contend that the summary judgment motion is premature because written discovery is not yet completed, and no depositions have been taken.

### **Discussion**

Superior Court Civil Rule 56(c) provides that judgment “ shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.”<sup>2</sup> The moving party bears the initial burden of showing that no material issues of fact are present.<sup>3</sup> The burden then shifts to the nonmoving party to demonstrate that there is a genuine issue of material fact.<sup>4</sup> Summary judgment should only be granted when, after viewing the record in a light most favorable to

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<sup>2</sup> Super. Ct. Civ. R. 56.

<sup>3</sup> *Martin v. Nealis Motors, Inc.*, 247 A.2d 831, 833 (Del. 1968).

<sup>4</sup> *Id.*

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the non-moving party, there is no genuine issue of material fact.<sup>5</sup> This Court stated previously, “ If a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts, or to clarify the application of the law, summary judgment is inappropriate.”<sup>6</sup> The Delaware Supreme Court stated, “ Generally, issues of negligence either on the part of a defendant or of a plaintiff, or questions of proximate cause, are, except in rare cases, questions of fact which ordinarily should be submitted to the jury to be resolved.”<sup>7</sup>

*Fraud*

Warren-Wolfe contends that there is no evidence to support Plaintiffs’ allegations of consumer fraud pursuant to title 6, section 2513 of the Delaware Code. However, Plaintiffs argue that written discovery has not been completed, nor have depositions been taken. Therefore, they contend that the summary judgment motion is premature. The deadline for discovery is May 6, 2004, and trial is scheduled for July 26, 2004. It appears that the motion for summary judgment with respect to the allegation of consumer fraud is indeed premature. Therefore, the Court will *deny* Warren-Wolfe’ s motion with respect to the allegations of fraud at this time, but the motion may be renewed following the completion of discovery.

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<sup>5</sup> *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *see also McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

<sup>6</sup> *Christiana Marine Service Corp. v. Texaco Fuel and Marine Marketing, Inc.*, 2002 Del. Super. LEXIS 305.

<sup>7</sup> *Watson v. Shellhorn & Hill, Inc.*, 221 A.2d 506, 508 (Del. 1966).

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*Breach of Contract/Negligence*

Warren-Wolfe argues that because the Plaintiffs did not see the report prior to purchasing the home they did not rely on it and thus have no legal basis for their claims of negligence and breach of contract. However, Plaintiffs contend that they are third-party beneficiaries to the contract and that they did rely on the report, because their attorney relied on it in advising them to go ahead with the purchase of the property. In addition, they argue that Warren-Wolfe knew the report was being prepared for a real estate closing and that each of the parties would be relying on the report.

It is clear that there is a factual dispute over the parties' reliance on the report and whether the Hamptons were actually third-party beneficiaries. At this time, because the factual dispute exists, Warren-Wolfe's motion for summary judgment is *denied*.

*Limitation of Liability Provision*

Warren-Wolfe argues that the limitation of liability clause in the contract would preclude any party from recovering damages against Warren-Wolfe in excess of the cost of the structural report, which was \$85.00. However, Harrington asserts that the limitation of liability clause is unenforceable as it is unconscionable and the limitation is preposterously low.

Contract clauses which exonerate a party from the consequences of its own

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actions are disfavored by the Courts.<sup>8</sup> Further, the Courts in this state have “repeatedly recognized that the issue of whether limitation provisions are enforceable under the contractual relations of the parties and the nature of the contractual performance are matters which generally should not be decided on the pleadings or on summary judgment.”<sup>9</sup> A clause is unconscionable when one party takes unfair advantage of the other party.<sup>10</sup> Here, the Court has no information regarding the parties’ negotiations involving this contract. The case is still in the discovery stages, and the question of unconscionability is one that remains for the trier of fact to decide. Therefore at this time, Warren-Wolfe’ s motion for summary judgment as to the limitation of liability clause is *denied*.

### Conclusion

Based on the information before this Court, Warren-Wolfe’ s motion for summary judgment is *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

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<sup>8</sup> *Koutoufaris v. Dick*, 604 A.2d 390 (Del. 1992).

<sup>9</sup> *J.A. Jones Construction Co. v. City of Dover*, 372 A.2d 540, 553 (Del. Super. Ct. 1977).

<sup>10</sup> *Id.* at 552.