
No. 19-0223

**IN THE SUPREME COURT OF TEXAS
AT AUSTIN, TEXAS**

DEVIN LAMAR HARRIS AND MEGHAN THERESA HARRIS,

Petitioners,

v.

SAMUEL ADAM AFLALO,

Respondent.

*On Petition for Review from the Fifth Court of Appeals at Dallas, Texas
No. 05-16-01472-CV*

**BRIEF OF AMICUS CURIAE TEXAS REALTORS®
IN SUPPORT OF RESPONDENT SAMUEL ADAM AFLALO**

**Laurie Ratliff
State Bar No. 00784817
LAURIE RATLIFF LLC
P.O. Box 5010
Austin, Texas 78763
Telephone: (512) 422-3946
Facsimile: (512) 532-6040
Laurie@laurieratliffllaw.com**

**ATTORNEY FOR AMICUS CURIAE
TEXAS REALTORS®**

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INTEREST OF AMICUS CURIAE

Amicus Curiae Texas REALTORS[®] is a statewide trade association made up of 75 local associations and more than 126,000 REALTORS[®] located across the state. Based in Austin, Texas REALTORS[®] has more than 70 employees.

Texas REALTORS[®] represent REALTORS'[®] interests in all segments of the industry. Texas REALTORS[®] provides education and accreditation through certifications and designations for its members. By enforcing ethics and adjudicating grievances against members, Texas REALTORS[®] strives to elevate the standards of professional conduct for REALTORS[®].

Texas REALTORS[®] also provides assistance with real-estate transactions by providing property information and forms. Texas REALTORS[®] encourages legislation that protects private-property-ownership rights of all Texans. Finally, as in this case, Texas REALTORS[®] advocates in litigation on issues that have statewide impact for both its members and consumers.

As the central body for the local REALTOR[®] associations, Texas REALTORS is interested in the correct application of the law to ensure that liability is not expanded in ways that are detrimental to buyers and sellers and its members.

As the trade organization for Texas REALTORS[®], and as the drafter of the forms at issue in this appeal, Texas REALTORS[®] has a strong interest in preserving the use of its carefully drafted forms used across the state in residential real-estate

transactions and in preserving the long-established law that terms cannot be unilaterally added to a contract.

Texas REALTORS[®]'s comments in this Amicus Curiae Brief highlight the detrimental impact if this Court reverses the *en banc* opinion of the Dallas Court of Appeals could have on the industry, as well as on Texans in residential real-estate transactions.

Amicus Curiae Texas REALTORS[®] is the source of the only fee for preparing this Brief.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Texas REALTORS[®] submit this Amicus Curiae Brief in Support of Respondent Samuel Adam Aflalo. Texas REALTORS[®] join Aflalo in requesting that the Court to deny the petition for review or alternatively, if granted, affirm the Dallas Court of Appeals' *en banc* opinion.

INTRODUCTION

If adopted, the Harrises' argument that the failure to comply with a non-contractual term constitutes a breach of contract would have a negative impact on the real-estate industry and Texas consumers. The Harrises' argument and the dissenting opinions below encourage sellers to disclose less information about their properties, create uncertainty in residential real-estate transactions by giving buyers a non-contractual right to terminate a contract, and increase the likelihood of litigation over non-disclosed issues and belatedly terminated contracts.

This is a straight-forward breach-of-contract case. The parties contracted for Aflalo to provide the statutory seller's disclosure notice. Aflalo used a Texas REALTORS[®] Form-1406 that goes beyond the statutory disclosure minimums. Form-1406 requires production of Form-1414, a generic informational document, if the property is in a flood plain or if the seller had flood-insurance coverage. Aflalo completed Form-1406 and satisfied his contractual obligation for disclosure by giving notice that the property was in a flood plain and explaining the issue but did

not provide Form-1414. The parties' contract did not incorporate or even mention Form-1406 or Form-1414.

The Harrises received the only disclosure notice for which they contracted, yet they terminated the contract the day before closing for Aflalo's failure to provide Form-1414. Aflalo sued to enforce the contract.

The *en banc* Dallas Court of Appeals applied long-standing contract law to enforce the parties' contract as written, refused to add terms to it, and reversed the trial court's summary judgment for the Harries. *Aflalo v. Harris*, 583 S.W.3d 236, 239 (Tex. App.—Dallas 2018, pet. pending).

In this Court, the Harrises contend that Aflalo "promised to provide certain information," but fail to point to any evidence in the record of such promise. Pet. Br. at 11, 17. That Aflalo used a standard-form document to comply with his disclosure obligation that went beyond the statutory minimum was not a promise to do anything and did not modify the contract.

Texas REALTORS[®] urge this Court to deny the Harrises' petition, or alternatively, if granted, affirm the Dallas Court of Appeals' *en banc* opinion, and hold that the use of a Texas REALTORS[®] seller disclosure notice does not modify the parties' contract or expand the statutory disclosure requirements.

ARGUMENT

I. There will be negative consequences to the real-estate industry and consumers if the Dallas Court’s *en banc* opinion is reversed.

If the Court reverses the Dallas Court of Appeals and adopts the HARRISES’ argument that the failure to comply with a non-contractual term constitutes a breach of contract there will be several problems.

First, the HARRISES’ argument decreases the level of transparency in residential real-estate transactions. Their argument and the dissent below discourages sellers from providing any additional disclosure beyond the statutory minimum for fear that any additional information will be considered an amendment to an existing contract. If adopted, the HARRISES’ argument will make sellers more reluctant to be forthcoming with details of their properties beyond the statutory disclosure minimums in Property Code Section 5.008. That means, less information for buyers when making the one of their largest financial decisions.

By statute, sellers must disclose certain information about their property in the process of a sale. TEX. PROP. CODE § 5.008(a). The statute recognizes, but not does not require, additional disclosures. *Id.* (the notice must contain “at a minimum” the items prescribed by this section). As this Court has observed, a seller of real estate is “under a duty of disclosing material facts which would not be discoverable by the exercise of ordinary care and diligence on the part of the purchaser, or which

a reasonable investigation and inquiry would not uncover.” *Smith Nat’l Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979).

The purpose of Property Code Section 5.008 is for sellers to inform potential buyers of the details of the property—most importantly, defects or problems of which the seller is aware and that buyers, even using due diligence, are not. Many of the items that the statute requires to be disclosed are issues that develop over time and thus would be uniquely within the seller’s knowledge. *See* TEX. PROP. CODE § 5.008(b) (*e.g.*, termites, wood rot, water damage, drainage issues, and soil movement or settling).

Form-1406, the “Seller’s Disclosure Notice,” complies with Property Code Section 5.008 but states that it “contains additional disclosures which exceed the minimum disclosures required by the Code.” CR40-44. The additional disclosures on Form-1406 benefit buyers by giving more information to aid in the decision to purchase a property. The disclosures alert buyers to issues relating to the property and let the buyer more fully investigate to allay their concerns or timely terminate the contract.

Form-1406 also provides an easy and uniform format for a seller to make certain additional disclosures. REALTORS® across Texas routinely use Form-1406 to satisfy the disclosure requirement in Property Code Section 5.008.

That Form-1406 includes additional disclosures, however, does not require a seller to surpass the statutory seller disclosure obligations in Property Code Section 5.008, nor does not modify the terms of the TREC form sales contract.

If the Court adopts the Harrises' argument, sellers will no longer provide any information beyond the bare minimum in Section 5.008. Otherwise, sellers risk creating additional contract terms that a buyer could claim were violated to terminate a contract. The reality is that the forms will be changed to have sellers disclose only the bare minimum.

Further, as agents of their clients, REALTORS[®] similarly will have little incentive to discuss a property with a buyer's agent and risk that a comment about a property could be construed as an amendment to a contract and provide a buyer grounds to terminate.

Second, the Harrises' argument that a non-contractual "promise" creates a binding obligation on a seller creates uncertainty in real estate transactions.

The standard form residential sales contract incorporates the statute's deadlines for the seller to provide the disclosure notice and the statute's option for the buyer terminate. TEX. PROP. CODE § 5.008(f). The disclosure provision gives a buyer two ways to terminate a contract relating to a seller's disclosure notice. First, if a seller fails to provide the notice, the buyer can terminate "at any time prior to the closing." CR68. Second, if the seller delivers the notice, a buyer can terminate "for

any reason within 7 days” after receipt of the notice or before the closing, whichever occurs first. *Id.*

The disclosure notice deadlines motivates sellers to timely deliver the statutory disclosure notice and protects buyers by allowing a week to back out after receiving the disclosures for any reason. The buyer’s deadline protects a seller who may be relying on the closing of one property for the purchase another. That is, a seller can be confident that a transaction will close if the buyer has not terminated seven days out.

Under the Harrises’ argument, sellers will have no certainty until the transaction actually closes. Their argument allows a buyer to game the system by declaring a purported deficiency in a disclosure notice but waiting until the eve of closing to raise it by claiming the notice was not “completed.”

Finally, the Harrises’ argument if adopted is likely to increase in litigation. Less information disclosed by sellers will lead to more disputes and more opportunity for buyers to claim a defect discovered after purchasing a home was not disclosed. Also, allowing a non-contractual basis to support termination of a contract could increase litigation by sellers suing buyers who belatedly terminate like the Harrises.

Further, if a seller's agent were involved in a communication that was construed as creating an additional contract term, there will be an increase in disputes between sellers' agents and their clients.

II. Aflalo complied with his contractual and statutory disclosure requirements.

The Aflalo-Harris contract obligated Aflalo to comply with the disclosures in Property Code Section 5.008. CR260. The contract did not mention Form-1406 or Form-1414. CR257-69; *Aflalo*, 583 S.W.3d at 243.

As the *en banc* Dallas Court observed, nothing prevented the parties from contracting for Aflalo to provide additional disclosures beyond those in Property Code Section 5.008, or for him to provide a Form-1414 or Form-1406. *Aflalo*, 583 S.W.3d at 249-50. The parties simply did not do so. CR257-69. Further, the court observed that the forms are not required by Property Code Section 5.008 but could be if the Legislature chose to do so. *Aflalo*, 583 S.W.3d at 249.

Aflalo complied with Property Code Section 5.008 and met his contractual obligation by using Form-1406. He gave notice that the property was in a flood plain and explained the issue. CR270-74. That is all the parties bargained for and all that Property Code Section 5.008 requires.

That Aflalo used a form that provided *more* information than the statute requires that mentioned another form, Form-1414, does not modify the parties' contract or require him to provide a form that was not part of the contract. Realize

too that Aflalo completed Form-1406 *before* the parties entered the sales contract. CR274 (disclosure signed September 16, 2015); CR264 (contract executed November 20, 2015).

As the Dallas Court concluded, Aflalo disclosed everything the Property Code required and he had no obligation to provide any non-contractual forms. *Aflalo*, 583 S.W.3d at 249-50. As the *en banc* Majority noted, this is a breach-of-contract case, not a “breach of form” case. *Id.* at 246.

The dissent, without authority, concluded that a seller’s decision to provide additional information and use a form—both beyond the contract’s terms—were grounds for breach of contract. *Id.* at 255-56. The dissent further concluded that using Form-1406 obligated Aflalo to provide Form-1414. *Id.* at 255.

The Harrises’ argument and the dissent ignore long-standing contract law. It is well-established Texas law that, when there is a dispute over a contract’s meaning, the instrument alone expresses the intent of the parties, not the parties’ subjective intent. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005); *Matagorda Cnty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006).

Courts “presume parties intend what the words of their contract say.” *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd’s London*, 327 S.W.3d 118, 126 (Tex. 2010). Courts interpret contract language according to its “plain, ordinary, and

generally accepted meaning unless the instruct directs otherwise.” *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996).

As here, with an unambiguous contract, the Court must construe the language used in the Aflalo-Harris contract and enforce it as written. *See In re Davenport*, 522 S.W.3d 452, 456-57 (Tex. 2017) (orig. proceeding). As this Court instructed: “we cannot make new contracts between the parties and must enforce the contract as written.” *Id.* at 457. “Courts may not rewrite the parties’ contract, nor should courts add to its language.” *Id.*

The Harrises’ argument and the dissent violate these well-established principles and add terms—that Aflalo was obligated to comply with Form-1406 and provide Form 1414—that are nowhere in the sales contract.

An example demonstrates the problem with the Harrises’ argument that failure to comply with a non-contractual term constitutes a breach of contract. Suppose a seller emails her agent and states that she will give the buyer all of the owner’s manuals for the various mechanical items in the house. The seller’s agent forwards the email to the buyer’s agent. Is the statement in the email a contract term such that the failure to provide every owner’s manual is a breach of contract that permits the buyer to terminate the contract?

Under the Harrises’ argument it would be.

This example shows precisely why the terms in the signed, written contract control and not what one party thought, hoped, or wished to be a term in a contract.

Finally, consider the contents of Form-1414. CR327-29. The form provides nothing specific about a particular property. Rather, it is generic information about flood zones and flood insurance. It encourages buyers to inspect and investigate the issue for themselves.

III. The Harrises' freedom of contract policy argument is flawed.

The Harrises correctly point out that they and Aflalo had the right to contract beyond the bare statutory minimum disclosures. Pet. Br. at 17. But the Harrises fail to point to a single word in the Aflalo-Harris contract that shows they did so. Pet. Br. at 16-17.

As the Dallas Court aptly concluded, the “Harrises’ post-contract, unilateral desire for the information in TAR-1414 does not make it part of the contract or Aflalo’s non-delivery of TAR-1414 a breach of their contract.” *Aflalo*, 583 S.W.3d at 249.


Courts can only enforce the parties’ contract as written. As written, the Harrises and Aflalo contracted only for compliance with Property Code Section 5.008 and nothing more.

PRAYER

FOR THESE REASONS and those set out in Respondent Samuel Adam Aflalo's Brief, Amicus Curiae Texas REALTORS® urges this Court to deny the petition for review. Alternatively, if the Court grants the petition, Texas REALTORS® urges this Court affirm the Dallas Court of Appeals' *en banc* opinion.

Respectfully submitted,

LAURIE RATLIFF LLC



Laurie Ratliff
State Bar No. 00784817
LAURIE RATLIFF LLC
P.O. Box 5010
Austin, Texas 78763
Telephone: (512) 422-3946
Facsimile: (512) 532-6040
Laurie@laurieratliffllaw.com

ATTORNEY FOR AMICUS CURIAE
TEXAS REALTORS®

CERTIFICATE OF COMPLIANCE WITH TRAP 9.4(i)(3)

I hereby certify that this *Brief of Amicus Curiae Texas REALTORS® in Support of Respondent Samuel Adam Aflalo* contains a total of 2,195 words excluding the parts exempted under TEX. R. APP. P. 9.4(i)(1), as verified by Microsoft Word 2013.

Dated: February 3, 2020



Laurie Ratliff
*Counsel for Amicus Curiae
Texas REALTORS®*

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of the *Brief of Amicus Curiae Texas REALTORS® in Support of Respondent Samuel Adam Aflalo*, was served on the following counsel of record on this 3rd day of February 2020:

By e-service and email

Byron K. Henry
Byron.henry@solidcounsel.com
Andrea Bouressa
SCHEEF & STONE, L.L.P.
2600 Network Blvd., Ste. 400
Frisco, Texas 75034

Israel Suster
office@susterlaw.com
THE SUSTER LAW GROUP, PLLC
1316 Village Creek Dr., Ste. 500
Plano, Texas 75093


Attorneys for Respondent

By e-service and email

Christopher D. Kratovil
ckratovil@dykema.com
Amelia H. Marquis
amarquis@dykema.com
DYKEMA COX SMITH
1717 Main Street, Suite 4200
Dallas, Texas 75201

Paul R. Genender
paul.genender@weil.com
Amanda N. Pennington
amanda.pennington@weil.com
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, Texas 75201

Attorneys for Petitioners



Laurie Ratliff

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laurie@laurieratliff.com
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Associated Case Party: SamuelAdamAfalo

Name	BarNumber	Email	TimestampSubmitted	Status
Walker Young		walker.young@solidcounsel.com	2/3/2020 11:16:07 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Israel Suster	19523580	office@susterlaw.com	2/3/2020 11:16:07 AM	SENT
Christopher DKratovil		ckratovil@dykema.com	2/3/2020 11:16:07 AM	SENT
Jennifer Schmitt		jschmitt@dykema.com	2/3/2020 11:16:07 AM	SENT
Melissa Diaz		melissa.diaz@solidcounsel.com	2/3/2020 11:16:07 AM	SENT
Amelia Marquis		amarquis@dykema.com	2/3/2020 11:16:07 AM	SENT
Paul R.Genender		paul.genender@weil.com	2/3/2020 11:16:07 AM	SENT
Amanda PenningtonPrugh		amanda.penningtonprugh@weil.com	2/3/2020 11:16:07 AM	SENT
Byron K.Henry		byron.henry@solidcounsel.com	2/3/2020 11:16:07 AM	SENT
Andrea Bouressa		andrea.bouressa@solidcounsel.com	2/3/2020 11:16:07 AM	SENT
Laurie Ratliff		laurie@laurieratliff.com	2/3/2020 11:16:07 AM	SENT