IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

IAN MAYE, et al.	)	**CASE NO. CV 11 769995**
	)	
Plaintiffs	)	**JUDGE PAMELA A. BARKER**
	)	
v.	)	**JOURNAL ENTRY AND OPINION**
	)	**ON CROSS-MOTIONS FOR SUMMARY**
NVR, INC. d/b/a/ RYAN HOMES, et al.	)	**JUDGMENT OF PLAINTIFFS, DEFENDANT**
	)	**NVR, INC., d/b/a/ RYAN HOMES, AND**
Defendants	)	**MODERN POURED WALLS, INC.**
	)	

This matter is before the Court on Plaintiffs' Motion For Summary Judgment ("Plaintiffs' Motion") against Defendants NVR, Inc., d/b/a/ Ryan Homes ("NVR") and Modern Poured Walls, Inc. ("MPW"),[1] these Defendants' Briefs In Opposition thereto, and Plaintiffs' Reply to NVR's Brief In Opposition; and the Motions For Summary Judgment of NVR ("NVR's Motion") and MPW ("MPW's Motion") against Plaintiffs, Plaintiffs' Briefs In Opposition thereto and these Defendants' Reply Briefs.

The Facts

The evidence submitted with the parties' motions and briefs demonstrates the following. On November 16, 2003 Plaintiffs and NVR entered into a purchase agreement for the sale and purchase of Lot #92 in the Westfield Park subdivision, together with a home to be built on the Lot by NVR.[2] NVR built the home and recorded the Warranty Deed conveying the

[1] Plaintiffs' Motion was filed on September 30, 2013 when, in addition to NVR, Inc. d/b/a Ryan Homes and Modern Poured Walls, Inc., the City Of Cleveland, D.J. Neff Enterprises, Inc., Republic Development, LLC, and Westfield Park, LLC were named defendants in this lawsuit. However, on November 6, 2013 Plaintiffs filed a Notice Of Partial Dismissal, pursuant to Civil Rule 41(A)(1), voluntarily dismissing, without prejudice, their claims against the City of Cleveland, D.J. Neff Enterprises, Inc., Republic Development, LLC and Westfield Park, LLC. Thus, Plaintiffs' Motion For Summary Judgment as to these dismissed defendants has become moot.

[2] Plaintiff's Exhibit "2" attached to Plaintiffs' Motion.

property to Plaintiffs on June 21, 2004.[3] The foundation at Plaintiffs' property is a "floating slab" foundation, as more fully described by NVR through the Affidavit of Ryan Homes attached as Exhibit "A" to NVR's Motion.[4]

NVR's subcontractor, MPW, performed the excavating and foundation work to include installing the drain tile, dampproofing and installing the footer walls.[5] According to Mr. Johnson with MPW, all of the homes in the Westfield Park Development were dampproofed – as opposed to waterproofed – at the specific direction of NVR; in other words it was NVR's decision to dampproof.[6] MPW did not perform any work related to the soils or flow of waters, as it is not within the scope of MPW's work or certification.[7] Although MPW experienced excessive water in the sanitary and storm sewers during Phase 1 on Shady Road, MPW did not experience any unusual water-related problems in the remaining phases of the development or in any basement, including Plaintiffs'.[8] Mrs. Maye testified that she saw water in the hole that was to be the basement but she did not know how much.[9]

According to Mr. Johnson, MPW did not apply "joint sealing" at the area where the basement floor and foundation of Plaintiffs' home meet because: 1.) the foundation plan utilized for the construction of Plaintiffs residence did not call for or require it; 2.) pursuant to industry standards, the juncture between residential foundation walls and basement slabs are never sealed for the purpose of preventing water from entering through the joints; and 3.)

---

[3] Affidavit of Ryan Homes, through Rich Vastagh, attached as Exhibit "A" to NVR's Motion, at ¶6, and its Exhibit 1.
[4] Affidavit of Ryan Homes, through Rich Vastagh, Exhibit "A", ¶11.
[5] Deposition of Michael Johnson, p. 34, lines 13-25, p. 47, lines 1-7, p. 67, lines 3-24.
[6] *Id.* at p. 70, lines 10-16.
[7] *Id.* at p. 110, lines 7-13.
[8] *Id.* at p. 41, lines 12-20, p, 45, lines 11-24.
[9] Deposition of Kerrie Maye, p. 202, lines 14-25. Kerrie Maye's testimony cited at pages 7-8 of Plaintiffs' Motion does not support Plaintiffs' assertion that MPW encountered "significant" water in the hole while building the foundation.

industry standard is to fill the space between the foundation wall and the floor with sponge-like materials.[10]

Plaintiffs moved into the home located at 8566 Bentley Drive, Olmsted Township, Ohio 44138 during the July 4, 2004 weekend.[11] Within the first year, Plaintiffs contacted NVR because they had some concerns about "minor water seepage" where the wall and floor meet in the basement and some water markings on the concrete basement floor; Mrs. Maye described it as "nothing significant" and she could not recall if she actually saw water.[12] According to Mrs. Maye, a representative from NVR came out to the house and told Plaintiffs that the way their basement had been constructed was perfectly fine and that what they saw was normal and there were no issues.[13] Also, in December, 2004 Plaintiffs contacted NVR to express concerns that their sump pump was running excessively, and in response, NVR daylighted it to see if it was operating properly and then had the existing 1/3 horsepower sump pump replaced with a ½ horsepower sump pump on April 8, 2005.[14] On October 27, 2006 NVR

---

[10] Affidavit of Michael Johnson, attached to MPW's Brief In Opposition to Plaintiffs' Motion, and its Exhibits. Mr. Johnson's deposition does contain some testimony concerning his background and experience, to include his employment with MPW and as an account representative for NVR. However, his deposition and Affidavit testimony combined is not sufficient to qualify him as an expert for purposes of rendering opinions regarding industry standard which is at issue in the cross-motions for summary judgment. Nonetheless, Mr. Johnson's affidavit testimony that the foundation plan did not call for sealing of the joint between the walls and floor is an undisputed statement of fact, as distinguished from an opinion. It should be noted, however, that Mr. Johnson's Affidavit does not contain averments that: MPW satisfactorily completed the work in accordance with the terms and conditions of its contract with NVR; that the plans and specifications provided by NVR to MPW for the foundation were standard for this type of project; and/or that the plans and specifications provided to it by NVR were not so obviously defective or dangerous that no reasonable person would follow them. *See Jackson v. City of Franklin*, 51 Ohio App.3d 51, 54-55, 554 N.E.2d 932, 936 (2nd Dist. 1988), at ¶1 of the Syllabus; and *Staley v. Bogner Construction Co.*, 2002-Ohio-317, 2002 Ohio App. LEXIS 255 (6th Dist. No. 01CA0032.

[11] Deposition of Kerrie Maye, p. 12.

[12] *Id.*, p. 25, lines 9-21.

[13] *Id.* p. 26, lines 15-19.

[14] Affidavit of Ryan Homes, through Rich Vastagh, Exhibit A attached to NVR's Motion, ¶7; Deposition of Kerrie Maye, p. 212 lines 20-25 and its Ex. NN.

provided another sump pump.[15] Prior to the filing of this lawsuit, Plaintiffs never reported instances of actual water intrusion to NVR.[16]

Plaintiffs experienced four flooding events in their basement.[17] The first occurred on February 28, 2011 and was described as water coming in through the walls at the point where the walls meet the floor; the sump pump was working and the crock was not overflowing.[18] The second happened on April 25, 2011 with about the same if not slightly more water as compared to the first flooding.[19] The third occurred sometime in November of 2011 and like on the prior two occasions water started to fill up the basement through the seams where the walls meet the floor.[20] The fourth flooding event happened in October, 2012 after hurricane Sandy had come through Ohio, which flooding event was much, much more significant.[21]

On May 25, 2005 Plaintiffs had had their sump pump replaced by Royal Flush Plumbing,[22] and on June 3, 2009 Plaintiffs had had a battery back-up installed.[23] After the second flooding, another new internal sump pump and an external sump pump were installed by Service Master.[24] Shortly after the November 2011 flooding occurrence Plaintiffs had ServiceMaster install a second external sump pump.[25]

---

[15] Deposition of Kerrie Maye, p. 214, lines 9-23 and its Ex. OO.
[16] *Id.* at p. 77, lines 6-17.
[17] In Plaintiffs' Brief In Opposition to NVR's Motion, Plaintiffs allege that a fifth flood occurred on June 26, 2013, but they have not presented any evidence to support this allegation.
[18] *Id.* at pp. 101-103 and its Ex. P, p. 17, lines 14-25, p. 18, 1-19.
[19] *Id.* at p. 117, lines 7-24 and its Ex. W, p. 32, lines 6-12.
[20] *Id.* at p. 39, lines 24-25, p. 40, lines 1-7.
[21] Deposition of Ian Mayes, p. 11, lines 16-22; Deposition of Kerry Mayes, p, 45, lines 15-25, p. 46, lines 1-2.
[22] Deposition of Kerry Mayes, p. 29, lines 10-23, and its Exhibit "D".
[23] *Id.* at p. 30, lines 11-25, p. 31, lines 1-8 and its Exhibit "E".
[24] *Id.* at p. 36, lines 7-23, p. 37, lines 1-12.
[25] Deposition of Kerry Mayes, p. 42, lines 1-12, p. 44, lines 6-11, p. 45, lines 7-11.

A March 5, 2012 inspection by NVR revealed that the external sump was not tied into the property foundation drains to remove water under the foundation.[26] NVR also determined, through its post-litigation investigation visits, that the internal sump float switch was set incorrectly, which allowed water to rise above the level of the pipe from the footer drains before the internal sump pump would turn on.[27] The result, according to NVR, is that the entire foundation would be filled or "charged" with water, essentially creating a pond beneath the house; so NVR reset the internal float switch and replaced the internal sump pump.[28] During its March 5, 2012 visit to the property, NVR observed the internal sump pump cycle on and off, while the external pumps remained off.[29] During its initial visit to the property, ServiceMaster had found that the internal sump switch was set wrong.[30]

According to John Buckey of Republic Development, LLC, the developer of Westfield Park where Plaintiffs' property is located, a wetlands investigation report dated September 2, 1999[31] he reviewed showed a wetlands area with a light depressional area that tends to collect and hold water for prolonged periods.[32] Soil borings taken by Republic showed that one boring, B-8, was located within the wetlands area where a sand layer began at approximately 8 feet below the surface and above a layer of sandstone, with the sandstone creating a layer of perched water, i.e., water that sits on an impermeable surface; and that Plaintiffs' Lot 92 was

---

[26] Affidavit of Ryan Homes, through Rich Vastagh, ¶8.
[27] *Id.* ¶10.
[28] *Id.*
[29] *Id.* ¶13.
[30] Deposition of Enzo Maddalena, Junior, p. 68, lines 17-24.
[31] Deposition of John Buckey, p. 16, lines 19-25, p. 7, lines 1-11. This report was marked as Buckey Number 2 at Mr. Buckey's deposition but was not submitted by Plaintiff or included in the Buckey deposition filed with the Court.
[32] Deposition of John Buckey, pp. 17-19 and pp. 39-40.

located there.[33] The wetlands investigation report recommended the water table, perched or otherwise, be kept at least two feet below the bottom of any excavation to prevent problems for the excavator.[34]

Mr. Buckey does not have any specific memory of whether or not the wetlands investigation report went to NVR and does not know if Republic communicated the findings of the report to NVR but did state that "it would have been" provided to the builder.[35] He did testify that the EPA would have required the information contained in the report to do their mitigation work, and therefore, that a request made to the EPA for any documents related to the development would include the wetlands investigation report, meaning that the builder and homeowner would have access to the document.[36] Mr. Buckey was very pleased with the report or considered it a fairly favorable report; he did not believe it indicated a serious problem and believed that they could move forward with the development based upon it.[37] Although Plaintiffs cited Mr. Buckey's deposition testimony, specifically page 81, for their assertion at page 7 of their Motion that "the area of perched water was punctured when the initial utilities were laid", his cited testimony does not support this assertion.

Plaintiffs attached as Exhibit "3" to their Motion, an Affidavit of Joseph N. Schaller which in turn attached a report containing his opinions expressed to a reasonable degree of engineering certainty. Mr. Schaller's Affidavit does not set forth any information concerning his education, background and experience that would allow this Court to determine if he is qualified to render the opinions he expressed. Through his Affidavit and based in part upon

---

[33] *Id.* p. 35-40.
[34] *Id.* p. 42, lines 5-16.
[35] *Id.* p. 36 lines 24-25, p. 37, lines 1-5, p. 42, lines 17-25, p. 43, lines 1-19.
[36] *Id.* p. 23, lines 23-25, p. 24, lines 1-14.
[37] *Id.* p. 84, lines 21-25, p. 85, lines 1-6.

"file data provided" to him Mr. Schaller expressed the following opinions: 1.) the "likely reasons why excess groundwater exists near the Mayes' basement and how the water is being carried to the area adjacent to the Mayes' basement are that the level of the Mayes' basement excavation appears to be at or slightly into the sand layer reported in the borings, and the depth of the sanitary sewers in the development is several feet into this sand layer and has created a pathway for this transference to occur;[38] 2.) the water intrusion into the Mayes' basement is due primarily to the lack of a proper seal between the basement floors and walls, the use of Form-A-Drain requires such joint sealing and NVR and MPW should have performed this task;[39] 3.) the configuration and installed height of the interior sump pump is a contributing factor to the water intrusion problem and the primary cause of the numerous pump failures, and NVR and MPC should have made the determination of the appropriate depth of the sump pit;[40] and 4.) the use of dampproofing was not appropriate for an application "where water issues have been reported since the start of the construction, as is the case here" and MPW

---

[38] Exhibit "3" attached to Plaintiffs' Motion and its Exhibit "1" at p. 4. Although Mr. Schaller also stated that "[h]igh groundwater in the Mayes' excavation was confirmed by Mr. Johnson", neither Mr. Schaller nor Plaintiffs have directed this Court to that portion of the record that supports this alleged confirmation by Mr. Johnson. As already noted, Mr. Johnson testified that he only recalled seeing excessive water in the sewers during Phase 1; he did not see, and to his recollection did not receive reports from any of his employees about them seeing, any excessive water in any of the sewer trenches in any of the other phases or in the Mayes' basement. (Johnson Deposition, p. 45, lines 11-24.) Indeed, Mr. Schaller did not delineate exactly what file data he reviewed and relied upon, at least in part, in forming his opinions. Attached as Figure 3 to Mr. Schaller's Affidavit is the North Central Engineering Ltd. Report of Subsurface Investigation directed to Republic Development LLC, dated May 29, 2001; presumably this is the subsurface investigation report identified as Buckey Exhibit 15. Mr. Buckey testified at page 36, lines 24-25 and p. 37, lines 1-5 of his deposition that this report would have been provided to the builder but he did not have any specific recollection as to whether or not it was. However, the Court notes although the exhibits associated with Plaintiff Kerrie Maye's deposition were filed with the Court, none of the exhibits associated with the other depositions taken in this matter were filed with this Court.

[39] *Id.* Mr. Schaller attached as Figure 2 to his Opinion, an unauthenticated copy of "[p]roduct literature and installation recommendations" for the Form-a-Drain product that was used for the footer forms; and the only reference to the use of sealing and caulking any "openings in the slab and foundations walls, such as *** floor-wall joints **to retard soil-gas entry**" is under the part of the literature titled "Radon Collection & Evacuation", at paragraph 6 under "For Passive Systems". (Emphasis added.)

[40] *Id.*

should have used a waterproofing treatment on the exterior walls "since high water conditions were noted in the development during the early steps in the construction."

NVR filed an Expert Report of John Malivuk but the information and opinions contained therein are not incorporated into an affidavit by Mr. Malivuk; therefore, the report does not constitute Rule 56(C) evidence for consideration by this Court. Moreover, even if Mr. Malivuk's report containing his opinions was incorporated into an affidavit, like Mr. Schaller's report, it does not contain information concerning Mr. Malivuk's education, background and experience that would allow this Court to determine whether or not he qualifies as an expert to render his opinions.

By virtue of the following provision contained in the Purchase Agreement, NVR gave Plaintiffs a Limited Warranty, to wit:

> **4. Limited Warranty.** Purchaser acknowledges that Purchaser has been afforded the opportunity to review Seller's limited warranty prior to execution of this Agreement, has received a copy of the warranty and agrees to accept this warranty as the sole warranty being given to Purchaser. **THIS LIMITED WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF FREEDOM FROM STRUCTURAL DEFECTS, WORKMANSHIP AND HABITABILITY, ALL OF WHICH PURCHASER HEREBY WAIVES.**[41]

Upon purchase of the property, Plaintiffs were provided with a Homeowners' Manual and the Homeowner Limited Warranty is set forth in the Homeowners' Manual, commencing at page 88.[42] NVR provided a one-year limited warranty on the basic home, a two-year limited warranty on mechanical systems and a ten-year limited warranty against major structural

---

[41] Paragraph 4 of the Purchase Agreement, Plaintiffs' Exhibit 2 attached to their Motion.
[42] Ryan Homes Affidavit, ¶12 and its Exhibit 3.

defects.[43] "The 'Warranty Date' is the first day the original Purchaser occupies the Home or settles on the Home, whichever is earlier."[44] Although the Deed was transferred to Plaintiffs on June 21, 2004, Plaintiffs first occupied the home when they moved into it during the July 4th weekend, 2004. The "major structural defect" warranty, the definition of "structural defect", exclusions from such coverage and additional limitations are accurately quoted by NVR at pages 13-15 of its Motion.

The Warranty includes notification requirements, specifically the Purchaser must send immediate written notice to NVR of any alleged defect immediately after it is discovered and prior to the expiration of the Warranty; if NVR does not respond within 30 days, the Purchaser must send a copy of the notice to corporate headquarters; and thirty days after the date of contacting corporate headquarters, the dispute must be submitted to binding arbitration by filing a demand for arbitration.[45] Again, Plaintiffs did not notify NVR of any water intrusion problem, i.e., flooding, that could arguably qualify as a "major structural defect", prior to the filing of this lawsuit.[46]

The Amended Complaint

In their Amended Complaint, Plaintiffs have alleged seven causes of action against NVR and three causes of action against MPW. In Count 1, Plaintiffs allege that NVR and MPW were negligent: in performing their services through, negligently or recklessly failing to discover or disclose, and/or intentionally concealing the existence of, a water table and/or high concentration of water under Plaintiffs' Lot 92 and the potential dangers associated therewith,

---

[43] *Id.*, p. 89, ¶¶3-5 of Exhibit 3.
[44] *Id.*, p. 89, ¶2 of Exhibit 3.
[45] *Id.*, Section 11, pp. 92-94 of Exhibit 3.
[46] Deposition of Kerrie Maye, p. 77, lines 6-17.

and in constructing Plaintiffs' residence on a water table and/or area with a high concentration of ground water that would make it unsuitable for residential construction; and in failing to implement necessary measures to prevent excessive flooding. In Count 2, Plaintiffs allege that NVR and MPW had actual or constructive knowledge of the water table and/or high concentration of water under Plaintiffs' Lot 92 and dangers and problems associated therewith, but fraudulently and actively concealed and failed to disclose this information both before and after Plaintiffs purchased the property.

In Count 3, Plaintiffs allege that NVR supplied false information to Plaintiffs regarding Lot 92 including the existence of the water table and/or high concentration of groundwater beneath it, the fitness of the foundation and the cause of Plaintiffs' flooding, upon which they justifiably relied. In Count 4, Plaintiffs allege that NVR breached the major structural defects warranty. In Count 5, Plaintiffs allege that NVR breached its contractual duties owed to them by negligently and/or recklessly failing to discover and/or knowingly concealing relevant and material facts to include the existence of the water table and/or high concentration of groundwater and the potential dangers associated therewith without taking appropriate preventative measures. In Count 6, Plaintiffs allege that NVR violated the Consumer Sales Practices Act. In Count 7, Plaintiffs allege Loss of Enjoyment as to both NVR and MPW.

Summary Judgment Standard

Civ. R. 56(C) provides in relevant part as follows:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the

> evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that: '*** (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***.'" *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific facts showing that there is a genuine issue for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

"Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials which directly negate its opponent's claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge 'that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. See, also,

Hodgkinson v. Dunlop Tire & Rubber Corp. (1987), 38 Ohio App.3d 101, 526 N.E.2d 89." *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

Discussion

In *Kishmarton v. William Bailey Construction, Inc.*, 93 Ohio St.3d 226 (2001) the Supreme Court of Ohio, at paragraphs 1 and 2 of the syllabus, held as follows:

> 1. Where the vendee and builder-vendor enter into an agreement for the future construction of a residence, the vendee's claim for breach of an implied duty to construct the house in a workmanlike manner arises *ex contractu*.
>
> 2. When vendee's claim for breach of an implied duty to construct a house in a workmanlike manner is successful, recovery for emotional distress damages will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional distress was a particularly likely result. (Restatement of the Law 2d, Contracts [1981], Section 353, adopted and followed.}

In reaching its first holding in *Kishmarton*, the Court discussed its prior decision in *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 23 Ohio Op.3d 346, 433 N.E.2d 147, explaining as follows:

> In *Velotta* ***, we held that "an action by a vendee against the builder-vendor of a *completed residence* for damages proximately caused by failure to construct in a workmanlike manner using ordinary care – *a duty imposed by law*—is an action in tort***." (Emphasis *sic*.) We specifically did not address the nature of an action by a vendee against the builder-vendor for breach of a contract to build a residence in the future. [Citation omitted.] Today, we close the loop by answering the first certified question and holding that such actions arise *ex contractu*.
>
> Doing so does little more than acknowledge the obvious. In *Velotta*, the consideration for the purchase price was the structure, a finished product. In this case, "the consideration is the services *** [to] be performed by the contractor. *** While the contractor is still required to perform the services in a workmanlike manner, the quality of the product will be governed by the language of the contract itself." *Vistein v. Keeney* (1990), 71 Ohio App.3d 92, 105, 593 N.E.2d 52, 61.

Kishmarton, supra, 93 Ohio St.3d 226, 228-229.

In *Jones v. Centex Homes*, 132 Ohio St.3d 1, 2012-Ohio-1001, 967 N.E.2d 1199, the Ohio Supreme Court held at the syllabus, as follows: "A home builder's duty to construct a house in a workmanlike manner using ordinary care is a duty imposed by law, and a home buyer's right to enforce that duty cannot be waived. (*Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 433 N.E.2d 147 (1982), paragraph one of the syllabus, and *Mitchem v. Johnson*, 7 Ohio St.2d 66, 218 N.E.2d 594 (1966), paragraph three of the syllabus, clarified and followed.)" But in *Jones*, as in *Velotta* and *Mitchem*, the homes that were the subject of the claims against the builder-vendor were completed structures, albeit newly constructed homes.

Since Plaintiffs, as vendees, and NVR, as the builder-vendor entered into a contract for the future construction of a residence, the duty to construct the house in a workmanlike manner arises from the purchase agreement or contract as an implied bargain. *Kishmarton, id.* ¶1 of the Syllabus. And, since it cannot be waived, the waiver of the implied warranty of workmanship contained in paragraph 4 of the Purchase Agreement is invalid. *See, Jones*, at Syllabus. The conclusion that the duty to construct the house in a workmanlike manner arises from the contract is important for two reasons as relates to the pending summary judgment motions of Plaintiffs and NVR.

First, the fifteen year statute of limitations applicable to written contracts set forth in R.C. 2305.06 applies to Plaintiffs' claim against NVR for breach of contract set forth in Count 5 of their Amended Complaint; and not the four-year statute of limitations set forth in O.R.C.

2305.09 as NVR argues; meaning that Plaintiffs' claim for breach of contract, to include the implied duty to construct Plaintiffs' home in a workmanlike manner, is not time-barred.[47]

Second, in general where a contract action exists against a breaching party, a tort claim based upon the same underlying actions cannot coexist with the contract action, unless the breaching party also breached a duty owed independent of the contract. *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 151, 684 N.E.2d 1261; *Evans Landscaping, Inc. v. Stenger*, 2011-Ohio-6033, ¶16, 969 N.E.2d 1264 (1st Dist.). A comparison of Plaintiffs' allegations against NVR contained Count 1 with those contained in Count 5 – which includes restating and re-alleging all previous paragraphs of the Amended Complaint – leads this Court to conclude that the negligence cause of action and breach of contract cause of action are based upon the same underlying actions, and the duties that Plaintiffs claim in Count 1 that NVR breached are not independent of the contract. Therefore, as to Count 1 only, NVR's Motion for Summary Judgment in its favor and against Plaintiffs is **GRANTED**.

Unlike NVR, MPW was not a party to a contract with Plaintiffs; its contract was with NVR. Therefore, MPW's duty to Plaintiffs to perform its services in a workmanlike manner sounds in tort and arises *ex delicto*, and therefore, the four-year statute of limitations set forth in O.R.C. 2305.09 applies to Plaintiffs' negligence cause of action against MPW set forth in Count 1. However, when negligence does not immediately result in damages, a cause of action for damages arising from negligent construction does not accrue until actual injury or damage

---

[47] Even if, as NVR argues and Plaintiffs do not dispute, the four-year statute of limitations set forth in R.C. 2305.09 applies, for the reasons stated later in this Opinion, Plaintiffs' claims would not be time-barred due to the application of the discovery rule. Moreover, the statute of repose, R.C. 2305.131, is not applicable because the original complaint naming NVR as a defendant was filed within 10 years of the completion of the contract. And, the Eighth District Court of Appeals has held that R.C. 2305.131 applies only to tort claims and does not bar claims that arise *ex contractu*. *Furlan v. Troiano Homes, Inc.*, C.A. No. 49430 (8th Dist. 1985), 1985 Ohio App. LEXIS 7350.

ensues. *See, Velotta*, at paragraphs 1 and 2 of the syllabus; *Collins v. Sotka*, 81 Ohio St.3d 506 (1988); and *Harris v. Liston*, 86 Ohio St.3d 203, 207 (Ohio 1999). The evidence demonstrates that although Plaintiffs noticed some minor seepage and water markings on the basement floor in 2005, this did not result in any flooding in the basement or damage. Indeed, when NVR was notified of the minor seepage and markings, its representative assured Plaintiffs that this was normal and Plaintiffs justifiably relied thereupon. *See Kibbel v. Dierksheide*, 6th Dist. No. S-86-13, 1986 Ohio App. LEXIS 8693, *15. Accordingly, this Court concludes that the discovery rule applies, meaning that the negligence claim first accrued at the time of the first flooding event on February 28, 2011. Since the Amended Complaint that included MPW as a defendant was filed on September 14, 2012, Plaintiffs' negligence cause of action against MPW is not time-barred.

Consistent with the above analysis and conclusion, the arguments by NVR and MPW that the four-year statute of limitations set forth in R.C. 2305.09 bars Plaintiffs' Fraudulent Concealment/Nondisclosure claims against them contained in Count 2 of the Amended Complaint and NVR's argument that it bars Plaintiffs' claim for Negligent Misrepresentation set forth in Count 3, are also without merit. And, this Court rejects NVR's final statute of limitations argument, i.e., that the two year statute of limitations bars Plaintiffs' cause of action for Violation Of The Consumer Sales Practices Act set forth in Count 6. The Amended Complaint seeks rescission of the contract and therefore, the discovery rule also applies to the CSPA claim, meaning that it is not absolutely barred by the two-year statute of limitations; instead the determination as to whether or not Plaintiffs sought rescission within a reasonable period of time rests with the fact-finder based upon the evidence adduced at trial. *Bales v. Isaac*, 2nd

Dist. No. 2003-CA-99, 2004-Ohio-4677, ¶15; *Nations Credit v. Pheanis*, 102 Ohio App.3d 71, 76 (2nd Dist. 1995); *Cypher v. Bill Swad Leasing Co.*, 36 Ohio App.3d 200, 202 (10th Dist. 1987).

However, just because none of Plaintiffs' claims are time-barred by the applicable statutes of limitations does not mean that Plaintiffs have met their burden establishing that there are no genuine issues of material fact warranting summary judgment in their favor on their claims against NVR and MPC. Indeed, they have not met this burden. Plaintiffs have not directed this Court to any evidence demonstrating that either NVR or MPW had actual knowledge that Lot 92 was unsuitable for construction of Plaintiffs' home because it was located above a water table and/or a high concentration of groundwater; and the evidence submitted indicates that there are genuine issues of material fact as to whether or not NVR or MPW had constructive knowledge (Count 2). It follows then, that there are genuine issues of material fact as to whether or not NVR supplied false information to Plaintiffs before and/or after the construction of their home (Count 3) or that NVR violated the Consumer Sales Practices Act (Count 6).

As to the negligence cause of action that remains against MPW under Count 1, and the breach of contract cause of action against NVR set forth in Count 5 (together the breach of their respective duties, whether in tort or under the contract, to perform their construction services in a workmanlike manner), and as already explained, the Affidavit with exhibits and report containing the opinions of Mr. Schaller attached thereto and submitted by Plaintiffs is not sufficient to prove that Plaintiffs are entitled to summary judgment on these claims. Moreover, NVR and MPC have submitted evidence that the flooding events that Plaintiffs have

experienced in their basement may have been caused by something or someone other than their actions or inactions.

As to Plaintiffs' breach of the "major structural defects" warranty contained in Count 4 of Plaintiffs' Amended Complaint, even if Plaintiffs can prove that the flooding that they have experienced in their basement is as a result of a "major structural defect" as that term is defined and used in the Warranty and even though any alleged "major structural defect" appeared within ten (10) years after Plaintiffs occupied the home, the following remains. Plaintiffs did not comply with the notice and arbitration provisions or conditions of that Warranty. Therefore, Plaintiffs are not entitled to summary judgment on this Count; quite the contrary, NVR is entitled to summary judgment in its favor and against Plaintiffs on this Count. Accordingly, summary judgment is **GRANTED** in favor of NVR and against Plaintiffs on **Count 4** of their Amended Complaint.

As to Count 7, Plaintiffs are correct that loss of enjoyment damages are recoverable if Plaintiffs' claim for breach of an implied duty under the contract to construct their house in a workmanlike manner against NVR (Count 5) and their claim for breach of the duty imposed by law upon MPW (Count 1) are successful; but loss of enjoyment is not a separate cause of action. Moreover, even if Plaintiffs are successful in these claims against NVR and MPC so as to allow recovery for loss of enjoyment, such recovery will be excluded unless the breaches caused bodily harm or they are of such a kind that serious emotional distress was a particularly likely result. *Kishmarton*, *supra*, at ¶2 of the Syllabus. In or with their Motion, Plaintiffs have not argued, much less presented any evidence, that they have sustained bodily harm or serious emotional distress. Accordingly, Plaintiffs' motion for summary judgment against NVR and

MPW on Count 7 is denied; and to the contrary, the motions for summary judgment by NVR and MPW against Plaintiffs on Count 7 are **GRANTED**.

In summary, then, upon consideration of the briefing relative to Plaintiffs' Motion For Summary Judgment in their favor and against NVR and MPC, Count 1 remains as to MPW, Count 2 remains as to both NVR and MPW, and Counts 3, 5 and 6 remain as to NVR. Now, the issue is whether or not NVR and/or MPW are entitled to summary judgment in their favor and against Plaintiffs' on these remaining claims.

As to NVR's motion for summary judgment on the remaining claims against it, for the same reason that this Court is denying Plaintiffs' Motion for Summary Judgment against NVR on Counts 2, 3, 5 and 6, i.e., there are genuine issues of material fact that remain for trial, NVR's Motion for Summary Judgment on these remaining claims is **DENIED**. At trial, Plaintiffs and NVR can proffer testimony and/or evidence to attempt to qualify Messrs. Schaller and Malivuk as experts and if so qualified, have them testify to their respective opinions and factual bases for same.

As to MPC's motion for summary judgment, and to counter Mr. Schaller's opinion that the joint between the walls and floor should have been sealed or caulked, MPC has submitted an Affidavit of Michael Johnson which includes testimony concerning industry standards associated with joint sealing. Although it is clear from his deposition and affidavit testimony that, as an employee of MPC, he worked as an account representative for NVR, there is insufficient evidence presented for this Court to deem him an expert for purposes of establishing industry standard. Like Plaintiffs and NVR vis-à-vis their respective proposed

expert and if so qualified, have him testify to his opinions and industry standards, and the factual bases for same.

MPW has correctly cited Ohio case law for the following proposition: a construction contractor who merely follows the designs and specifications of another may not be held liable in a negligence action for alleged defects where the plans are not so obviously defective and dangerous that no reasonable person would follow them. *See Jackson v. City of Franklin, supra*; and *Staley v. Bogner Construction Co., supra*. *See, also, Farr v. Safe-Way Barricades, Inc.*, 6th Dist. No. L-97-1258, 1998 Ohio App. LEXIS 2618 (where the Court, citing and relying upon *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31, 303 N.E.2d 81, explained that "[a] plaintiff may establish a defendant's failure to exercise ordinary care by demonstrating that the defendant knew or should have known of an alleged hazard and failed to remove it or warn the plaintiff of its existence"); and *Schuster v. Kokosing Construction Co., Inc.*, 2010-Ohio-1459, 2010 Ohio App. LEXIS 1192 (5th Dist.).

But, for purposes of urging this Court to grant summary judgment in its favor, MPW has failed to establish through Mr. Johnson's Affidavit, or by directing this Court to evidence in the record, the following: that MPW satisfactorily followed, and satisfactorily completed the work in accordance with the designs, plans and specifications provided to it by NVR (as distinguished from testifying that the foundation plans did not call for joint sealing); and/or that the plans and specifications provided by NVR were standard for the type of project involved; and/or that they were not so obviously defective and dangerous that no reasonable person would follow them. Indeed, although Mr. Johnson testified that he questioned NVR concerning the use of dampproofing instead of waterproofing, and used it for the very reason that NVR directed him

to do so, this undisputed testimony begs the following question. Would a reasonable person or contractor have used it, or at least should MPW have warned Plaintiffs of the potential problems associated with its use?

Mr. Johnson testified in his deposition that he knew of excessive water problems in the sanitary and storm sewers in Phase I of the development and although personally he did not notice any excess water during the excavation of Plaintiffs' basement, and could not recall any reports from MPC employees of excess water in other phases or at Plaintiffs' property, Kerrie Maye testified to seeing water in the hole excavated for the basement. Thus, whether or not MPC had constructive knowledge of the high water table or concentration of water making Plaintiffs' Lot 92 unsuitable for residential construction is a question of fact for the jury; and if MPW had such constructive knowledge, the following questions remain. Would a reasonable contractor have completed the foundation as called for by the plans, and should MPW have warned Plaintiffs of the potential water problems on Plaintiffs' Lot 92? Therefore, there are genuine issues of material fact that remain for trial with regard to MPC's Motion for Summary Judgment on Counts 1 and 2, and therefore, MPC's Motion for Summary Judgment on these Counts is **DENIED**.

IT IS SO ORDERED.

Pamela A. Barker 11-25-13

JUDGE PAMELA A. BARKER **DATED**