IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

TMOTHY J. SCHAD, et al.	)	CASE NO. CV-12-781497
	)	
Plaintiffs	)	JUDGE PAMELA A. BARKER
	)	
v.	)	**Journal entry:**
	)	
JOHN A. ISAK, et al.	)	Opinion & Order on Defendants'
	)	Motion for Summary Judgment
Defendants	)	

This matter is before the Court on Defendants John and Marian Isaks' Motion For Summary Judgment ("Defendants' Motion"), and Plaintiffs Timothy and Melanie Schads' Brief in Opposition to Defendants' Motion for Summary Judgment ("Plaintiffs' Brief").

THE EVIDENCE AND PLEADINGS

This matter arises from the Schads' purchase of the Isaks' property and home located at 7050 Big Creek Parkway in Middleburg Heights, Ohio ("the property"), pursuant to a Residential Purchase Agreement dated December 6, 2010 ("the agreement"), with the transfer of the property occurring on April 29, 2011.[1] The Isaks were the original owners of the property, having completed construction of the home in 1974 and having moved into the home in July of that year.[2]

The agreement

The agreement contains the following relevant provisions:

> "Buyer(s) accepts [the property] in its "AS IS" PRESENT PHYSICAL CONDITION…."[3]
>
> "Buyer(s) acknowledges that it is Buyer's own duty to exercise reasonable care to inspect and make diligent inquiry of the Seller(s) or Buyer's inspectors regarding the

[1]Complaint, paragraphs 5, 8, 10; Answer, paragraphs 5, 8, 10; Defendants' Motion, at pages 1-2; Plaintiffs' Brief, at page 2; Exhibit "B" attached to Complaint and marked as Exhibit "B" for purposes of identification during Deposition of Plaintiff Timothy Schad, p. 19, lines 1-25; p. 20, lines 1-9; Exhibit "B".
[2]Complaint, par. 5; Answer par. 5; Defendants' Brief, at p. 1, Plaintiffs' Brief, at page 2; Deposition of Marian Isak, p. 6, lines 1-6.
[3] The agreement, p. 6, l. 6.

condition and systems of the property. Buyer(s) further acknowledges that the entire house was open for observation and that Buyer(s) had an unimpeded opportunity to inspect the entire house and did inspect said house."[4]

"Buyer(s) has examined the property and agrees that the property is being purchased in its "As Is" Present Physical Condition including any defects disclosed by the Seller(s) on the Ohio *Residential Property Disclosure Form*.... Seller(s) agrees to notify Buyer(s) in writing of any additional disclosure items that arise between the date of acceptance and the date of recording of the deed. Buyer(s) has not relied upon any representations, warranties or statements about the property...unless otherwise disclosed on this agreement or on the *Residential Property Disclosure Form*.[5]

The Residential Property Disclosure Form

On June 9, 2010, before the sale of the property, the Isaks completed a Residential Property Disclosure Form ("the Disclosure") and, on September 3, 2010, the Schads received a copy of the Disclosure.[6] In relevant part, the Disclosure provides that the Isaks, "based on [their] actual knowledge," denied knowing of:

(1) "any previous or current water leakage, water accumulation, excess moisture or other defects to the property including but not limited to any area below grade, basement or crawl space" *** or "any water or moisture related damage to floors, walls or ceilings as a result of flooding; moisture seepage; moisture condensation; ice damming; sewer overflow/backup; or leaking pipes, plumbing fixtures, or appliances";[7]

(2) "any previous or current fire or smoke damage to the property";[8]

(3) "any current problems or defects with the...Fireplace/chimney";[9]

(4) "any current problems or defects with the...Central Air conditioning";[10] and

(5) "any current problems or defects with the...Sump pump."[11]

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[4]The agreement, p. 3, lines 114-117.
[5]The agreement, p. 4, lines 166-172.
[6]Complaint, par. 7; Answer, par. 7; Ex. "A" attached to Complaint; Deposition of Timothy Schad, p. 20, l. 15; Defendants' Motion, at page 2; Plaintiffs' Brief, at page 2.
[7]The Disclosure, at Section D, page 2.
[8]The Disclosure, at Section E, page 2.
[9]The Disclosure, at Section F, page 2.
[10]The Disclosure, at Section F, page 2.
[11]The Disclosure, at Section F, page 2.

Page 4 of the Disclosure includes the following advisement and acknowledgement:

"Potential purchasers are advised that the owner has no obligation to update this form but may do so according to Revised Code Section 5302.30(G)."

"I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THIS DISCLOSURE FORM AND UNDERSTAND THAT THE STATEMENTS ARE MADE BASED ON THE OWNERS ACTUAL KNOWLEDGE AS OF THE DATE SIGNED BY THE OWNER."

The Complaint

In their Complaint, the Schads allege that, after the title to the property was transferred to them and they moved into the home, the basement experienced significant water intrusion and they learned that the fireplace was not functional.[12] They also allege that the representations made by the Isaks in Sections D, E, and F of the Disclosure, quoted above, were false, and they assert three causes of action against the Isaks: (1) fraudulent misrepresentation; (2) negligent misrepresentation; and (3) breach of contract. The Schads seek compensation for damages associated with (1) moisture and water intrusion in the basement; (2) fire or smoke damage specifically as it relates to, or that arguably caused the fireplace/chimney problems or defects; (3) central air conditioning problems or defects; and (4) sump pump problems or defects.

The alleged damages

Moisture and water in the basement

Prior to the transfer of title, Mrs. Schad visited the property 3 to 4 times and Mr. Schad visited it twice.[13] During his visits, Mr. Schad went into every room, including the basement, and was not denied access to any part of the property.[14] According to Mr. Schad, part of the basement was paneled and there were cabinets and a sink in the basement kitchen.[15] Upon inspection of the two basement storage areas where, according to his deposition testimony, water later entered, Mr. Schad was partially able to

[12]Complaint, paragraphs 18 and 19.
[13]Schad Deposition, p. 11, l. 15; p. 12, l. 25; p. 16, lines 6-12; p. 17, line 18.
[14]Schad Deposition, p. 11, l. 15; p. 12, l. 25; p. 16, lines 6-12; p. 17, line 18.
[15]Schad Deposition, p. 14, lines 6-22.

get into those rooms and could see most of the interior of the wall area and he did not notice any moisture on the wall or on the floor.[16] He stated, however, that the wall in one of these rooms was almost all blocked by old appliances but Mr. Schad did not look behind them and did not ask whether the appliances could be moved.[17] Mrs. Isak testified that she did not know of anything stacked in this area of the basement other than a freezer, table, and meat grinder.[18]

Also before title transferred, the Schads had a professional inspection of the home completed by Herb Tippie of Safety First Home Inspections.[19] Upon his inspection of the property at that time, Mr. Tippie personally observed wall paneling and equipment in the basement of the home, including a table, meat grinder and refrigerator or freezer, some of which was stacked against one wall of the basement, which he testified prevented him from observing any defects from flooding and water damage.[20]

A review of Mr. Tippie's Affidavit demonstrates that it does **not** include (1) any testimony concerning whether or not he attempted to look behind, or made a request and/or was denied a request to move the equipment to look behind it; (2) any sworn testimony that he did or did not observe any evidence of flooding or water damage in the basement at the time of his inspection before the title transferred; (3) any sworn testimony that after the title transferred, he personally observed any evidence of and therefore, had personal knowledge of, "severe flooding and water damages in those areas of the basement" that according to his Affidavit testimony he "later learned" about, so as to comment upon or render an opinion as to the severity thereof and what "[a]ny reasonable homeowner

[16]Schad Deposition, p. 39, lines 1-18; p. 40, lines 6-15.
[17]Schad Deposition, p. 41, lines 9-15.
[18]Isak deposition, p. 10, lines 16-25, p. 11, lines 1-3.

[19]Schad deposition, p. 22, line 5; Affidavit of Herb Tippie attached to Plaintiffs' Brief as Exhibit "B" (hereinafter "Tippie Affidavit"); Defendants' Motion, at page 2; Plaintiffs' Brief, at page 2.
[20]Tippie Affidavit, at paragraph 8.

would have known";[21] or (4) any sworn testimony that he did or not did not test or inspect the air conditioning system or the sump pump or inquire of Defendants regarding them.[22]

Within a week or a week and a half after they moved into the home in early May 2011, the Schads noticed water in the basement; it continued to come in until they had the foundation dug and waterproofed.[23] During her deposition, Mrs. Isak admitted that on one occasion, when the sump pump failed due to a power failure, the home had had moisture in the basement but other than that one instance, the Isaks never had any moisture in the basement.[24] Mr. Schad testified, however, that Mrs. Isak had admitted to her that either her daughter or daughter-in-law had noticed some moisture in one of the rooms in the basement at the time the Isaks were moving their property out of the home. [25] Mrs. Isak did not remember ever discussing the matter of moisture or wetness in the basement with the Schads after the Schads had moved into the home or telling them that her daughter-in-law had noticed there was water in the basement.[26]

The Schads point to a January 11, 2012 letter they received from John Isak, attached as Exhibit "E" to their Brief, and marked and identified as Exhibit "X" during the deposition of Mr. Schad.[27] In that letter, Mr. Isak wrote in relevant part: "They had storms in Ohio and a very wet spring 2011 and it damaged the foundation. Foundation was in water too long. Insurance Should Cover."

The fireplace/chimney

At the time that Mr. Schad toured the home and at the time that Mr. Tippie inspected it, the fireplace was filled or stacked with bricks that served to cover the inside of the fireplace and a portable

[21]Tippie Affidavit, at paragraph 12. Indeed, even if this opinion was based upon his personal inspection/knowledge post-title transfer and his own findings of severe flooding and water damages, it does not reveal that Defendants actually knew of any water problems in the home. *See Osinski v. Kornja*, 8th Dist. No. 72129 (Feb. 18, 1998), 1998 Ohio App. LEXIS 594, at *9.
[22]Mr. Schad did testify that the air conditioner was not tested during the inspection because of the temperature. (Schad deposition, page 58, lines 9-12.)
[23]Schad Deposition, page 42, lines 7-21, p 46, lines 13-14, p. 47, lines 24-25, p. 48, lines 1-4.
[24]Isak deposition, p. 9, lines 15-25, p. 10, lines 1-9, p. 11, lines 9-13.
[25]Schad deposition, p. 50, lines 4-7, 16-25, page 51, lines 1-6.
[26]Isak deposition, p. 21, lines 6-14.
[27]Schad deposition, p. 76, lines 14-25.

wood-burning stove was placed in front of the stack of bricks.[28] Mrs. Isak testified that the bricks in the fireplace were not mortared together,[29] but Mr. Tippie testified that "[i]t would have been unreasonable and unduly time consuming to deconstruct the wood burning stove and stack of bricks from the fireplace"; so instead of inspecting it, he "asked the Isaks about the chimney."[30] According to both Mr. Schad and Mr. Tippie, each had inquired of Mr. and/or Mrs. Isak as to whether the chimney was functional or in good working order, and each was advised that it was.[31]

Consistent with the representation contained in the Disclosure, Mrs. Isak testified at her deposition that there never had been a fire in the chimney nor had she had problems with the chimney.[32] Mr. Schad, however, testified that during a conversation with Mrs. Isak in 2011 she confirmed that there had been a fire in the chimney about ten years prior.[33] And in the joint Affidavit of John and Marian Isak attached to Defendants' Motion, they testified that the chimney fire was actually "some flame caused by the use of a powder product"; that it was 27 years ago; that Mr. Isak used a powder product to clean his chimney that resulted in a noise and then flame at the top of the chimney; and that immediately thereafter, Mr. Isak checked on it and found the flu to be clean and undamaged.

Mr. Schad testified that prior to attempting to use the fireplace, he took the bricks out of it and found or saw a minimum of six inches of soot built up in the fireplace and that he had American Chimney come out to the home to clean and inspect it.[34] The Receipt/Invoice dated 11/7/11 associated with the inspection was identified and marked at Mr. Schad's deposition as Exhibit "O."[35] Indeed, The

[28]Schad deposition, p. 25, line. 9; Tippie Affidavit, at paragraphs 3 and 4; Isak deposition, p. 15, lines 12-25, p. 16, lines 1-9.
[29]Isak deposition, p. 16, lines 6-9,
[30]Tippie Affidavit, at paragraph 5.
[31]Schad deposition, page 28, lines 21-25, page 29, lines 1-24; Tippie Affidavit, at paragraph 6.

[32]Marian Isak deposition, p. 9, lines 3-14, p. 32, lines 15-22.
[33]Schad deposition, p. 74, lines 1-12.
[34]Schad Deposition, page 69, lines 1-11, page 67, lines 13-24.
[35]Schad deposition, p. 67, lines 9-16.

Schads submit that Exhibit "O" supports their assertion that the chimney had cracked and broken flues resulting from a chimney fire.[36]

However, the "comments" section of that Exhibit, which incorporates the findings of the inspector, constitutes hearsay as does Mr. Schad's testimony concerning what the inspector told him about the chimney.[37] Accordingly, the only competent evidence before this Court to determine whether the Isaks are entitled to summary judgment on the Schads' claim associated with the fireplace/chimney is the sworn testimony of Mr. Schad, Mrs. Isak, and Mr. Tippie, based upon their personal knowledge and as noted above.

The air-conditioning unit

As for the air conditioning unit, Mr. Schad testified that when the weather got warm enough they actually turned it on, but it would just blow; it was cool but not cold air, and then it became lukewarm.[38] Mrs. Isak testified that she thought they had someone come out to check on the heating and the cooling unit in the summer of 2010, before they moved. They were advised to put Freon into the cooling unit, but they did not do so because it worked efficiently through the fall of 2010 when they no longer needed it.[39]

The Schads secured the services of Arco which, as Mr. Schad understood, placed coolant in the unit on May 21, 2011.[40] Arco returned on June 10, 2011 to inspect for any leaks and according to Mr. Schad, Arco advised him that there were multiple leaks in all the lines.[41] During his deposition, Mr. Schad identified the invoices he received from Arco associated with these two service visits as Exhibits "U" and "V."[42] Afterward, Plaintiffs had Conserv-Air come out on July 7, at which time an inspection of

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[36]Plaintiffs' Brief, at page 3.

[38]Schad deposition, p. 58, lines 9-23.
[39]Isak deposition, page 25, lines 18-25, p. 26, lines 1-25, p. 27, lines 1-11).
[40]Schad deposition, p. 60, lines 24-15, p. 61, lines 1-19.
[41]Schad deposition, p. 62, 1-10.
[42]Schad deposition, p. 59, lines 2-7, p. 62, lines 14-19.

the air conditioning unit was performed; on July 26, Conserv-Air came back out and serviced the air conditioner.[43] During his deposition, Mr. Schad identified the invoice he received from Conserv-Air associated with the July 26, 2011 service visit as Exhibit "S."[44]

The information set forth on these three deposition exhibits as to the findings upon inspection and testing, as well as what Mr. Schad testified he was told by the Arco and Conserv-Air, constitute hearsay. Accordingly, the only competent evidence before this Court to determine whether the Isaks are entitled to summary judgment on the Schads' claim regarding the air-conditioning unit is the testimony of Mr. Schad and Mrs. Isak, based upon their personal knowledge and as noted above.

The sump pump

As for the sump pump, the Schads became aware of issues with the sump pump "when [they] had the big storm that initially that they thought [they] were getting the water from, but the large storm that knocked out the power for approximately a day, they realized that they didn't have a backup on the sump pump."[45] The Schads then had the sump pump inspected by Plumbing911 and were told that one line to the pump was blocked and broken, that it lacked the gravel base that keeps debris from entering it, and that the pump did not have back-up power.[46]

Mr. Schad identified the invoices received from Plumbing911 associated with diagnostics and services related to the sump pump, as Exhibits "Q" and "R."[47] However, the information set forth in these deposition exhibits concerning the findings associated with the inspection and work is hearsay, as is the testimony of Mr. Schad concerning what Plumbing911 personnel told him. Accordingly, the only competent evidence before this Court to determine whether the Isaks are entitled to summary judgment on the Schads' claim regarding the sump pump is the testimony of Mr. Schad and Mrs. Isak,

[43]Schad deposition, p. 63, lines 23-25, p. 64, line 1, p. 65, lines 4-19.
[44]Schad deposition, p. 64, lines 24=25, p. 65, lines 1-5.
[45]Schad deposition, p. 52, lines 16-22.
[46]Schad deposition, p. 51, lines 8-25, p. 52, lines 1-13, p. 53, lines 1-13.
[47]Schad deposition, 53, lines 15-25, p. 54, lines 1-12.

based upon their personal knowledge and as noted above. Moreover, the Court notes that in Plaintiffs' Brief, there is no argument presented, facts recounted, or evidence submitted to attempt to demonstrate that the Isaks knew of any defect with the sump pump at the time the Disclosure was completed or prior to the recording of the deed.[48]

THE LAW

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.*, 44 Ohio App.3d 71, 72-73 (9th Dist. 1988).

[48]Indeed, during his deposition, and in response to the question of whether or not he had any indication that the Isaks were aware of the problems with the sump pump, Mr. Schad testified: "I don't know if they were aware of them or not. The one neighbor, as we were looking at our property, to the right of us, I don't know if it was Steven, but had been over to the house and removed the pump a couple times. So I don't know if there was an issue with it or not so I can't tell you whether there was or not prior." (Schad deposition, p. 57, lines 6-13.)

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 Co.,* 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 47 (1978). 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.* 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*, 44 Ohio App.3d at 72-73.

The law applicable in an action by a purchaser for a structural defect in real estate

In *Layman v. Binns*, 35 Ohio St.3d 176, 519 N.E.2d 642 (1988), syllabus, the Ohio Supreme Court held:

> The doctrine of caveat emptor precludes recovery in an action by the purchaser for a structural defect in real estate where (1) the condition complained of is open to observation or discoverable upon reasonable inspection, (2) the purchaser had the unimpeded opportunity to examine the premises, and (3) there is no fraud on the part of the vendor.

The *Layman* Court additionally held that a residential property seller "has a duty to disclose material facts which are latent [and] not readily observable or discoverable through a purchaser's reasonable inspection." *Id.* at 178.

Recently, the Eighth District Court of Appeals explained as follows:

> Caveat emptor does not apply, however, when the decision to purchase has been induced by fraudulent misrepresentations. To prove fraud, a plaintiff must show:
>
> (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that

> knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance. *Burr v. Stark Cty. Bd. Of Commrs.*, 23 Ohio St.3d 69, 491 N.E.2d 1101 (1986*),* paragraph two of the syllabus.
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> Read together, [*Layman* and *Burr*] hold that there is no duty to warn of or disclose 'patent' defects; that is, defects that are readily observable. However, when defects are 'latent' or not readily observable or discoverable through a purchaser's reasonable inspection, the seller has a duty to disclose the defect if material to the sale. *Layman*, at 178. In other words, a seller has no duty to disclose that which a buyer can see or discover through reasonable inspection; however, if the seller is aware of defects that may be hidden from a buyer's reasonable inspection, there is a duty to disclose.
>
> Ohio also enforces "as is" clauses in home purchase agreements. In contract law, an "as is" clause essentially disclaims any warranties made by the seller. As applied to home purchases, the agreement to purchase "as is" means that a buyer agrees to make her or his own appraisal of the bargain and to accept the risk that she or he may be wrong. *Tipton v. Nuzum*, 84 Ohio App.3d 33, 39, 616 N.E.2d 265 (9th Dist.1992). An "as is" clause in a home purchase agreement, will not, however, prevent recovery on a seller's fraudulent misrepresentation or information concealment. *Brewer v. Brothers*, 82 Ohio App.3d 148, 151, 611 N.E.2d 492 (12th Dist.1992).

Kern v. Buehrer, 8th Dist. No. 97836, 2012-Ohio-4057, ¶3-5

Moreover, according to the Eighth District Court of Appeals, R.C. 5302.30, requiring the execution of a residential property disclosure form and the disclosure of "any material defect in the property that is within the actual knowledge of the transferor," "simply codifies the common law doctrine of *caveat emptor* by requiring homeowners to disclose all known latent defects." *Belluardo v. Blankenship*, 8th Dist. No. 72601 (June 4, 1998), 1998 Ohio App. LEXIS 2409, at *10-11.

In the context of a case involving the sale and purchase of a home that included a cause of action for negligent misrepresentation, the Sixth District Court of Appeals explained:

> A cause of action for negligent misrepresentation is defined by the following scenario:
>
> 'One who, in the course of his business, profession, or employment, or any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, [and is therefore] subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.' *Crown Property Development, Inc. v. Omega Oil Co.* (1996), 113 Ohio App.3d 647, 656, 681 N.E.2d 1343, quoting *Haddon View Invest. Co. Coopers & Lybrand* (1982), 70 Ohio St.2d 154, 436 N.E.2d 212.

> The essential elements for negligent misrepresentation are false information and justifiable reliance. *Id.*, citing *Zuber v. Department of Ins.* (1986), 34 Ohio App.3d 42, 45, 516 N.E.2d 244. 'Reliance is justified if the representation does not appear unreasonable on its face and if, *under the circumstances*, there is no apparent reason to doubt the veracity of the representation.' *Id.*, citing *Lepera v. Fuson* (1992), 83 Ohio App.3d 17, 26, 613 N.E.2d 1060 (emphasis added).

Abbott v. Loss Realty Group, 6th Dist. No. L-05-1107, 2005-Ohio-5876, ¶21-23.

Thus, the overlapping, essential elements of claims for fraudulent misrepresentation and negligent misrepresentation are false information and justifiable reliance. And, succinctly stated, the issue presented here is whether the Schads have submitted evidence which, construed in a light most favorable to them, creates a genuine issue of material fact about whether the doctrine of caveat emptor and the "as is" clause should not bar their claims. In other words, if the Schads have submitted facts to show the disclosure statements to be false, they could constitute affirmative fraudulent or negligent misrepresentations concerning latent defect(s) and, therefore, the doctrine of caveat emptor and the "as is" clause in the purchase agreement may not apply. *Duman v. Campbell*, 8th Dist. No. 79858, 2002-Ohio-2253, ¶29 (involving causes of action for fraudulent misrepresentations, negligent misrepresentations, and breach of contract associated with the sale and purchase of real estate).

The evidence and law as applied to the basement moisture/water problems.

The evidence presented demonstrates that there were objects in the corner of the basement or in one of the storage rooms – whether appliances as Mr. Schad testified, or a freezer or refrigerator, table, and meat grinder as Mrs. Isak and Mr. Tippie testified, that prevented Mr. Schad from seeing and Mr. Tippie from inspecting most of the wall where water entered within a week or so after the Schads moved into the home. Mr. Schad testified that he did not ask that the items in that corner be moved, and Mr. Tippie's affidavit does not include any testimony indicating whether he had asked to move or have moved the items to allow his inspection of that area.

The Isaks offered no evidence concerning whether Mr. Tippie asked them to move or have these items moved to allow further inspection, but they did direct the Court's attention to the agreement, specifically lines 115-117, whereby the Schads acknowledged that the entire home was open for observation and that the Schads had an unimpeded opportunity to inspect the entire house and did inspect it. But even if, or assuming, that evidence of a water problem was open to observation or discoverable upon reasonable inspection and that the Schads had the unimpeded opportunity to inspect the part of the basement where the water later entered, the following remains: the Schads have set forth specific facts showing there are genuine issues for trial, i.e., whether the affirmative representation in the Disclosure that there had never been a latent defect of moisture in the basement was true and, if not, the Isaks' intent, or failure to exercise care, in communicating this information and the Schads' reliance thereon.

Admittedly, in the context of the basement water/moisture claim there is no evidence presented by Plaintiffs that they, either personally or through their inspector, Mr. Tippie, orally inquired of the Isaks regarding any basement water or moisture problems pre-title transfer. However, as of the date they executed the Disclosure, the Isaks represented that they knew of no prior water leakage, water accumulation, excess moisture, flooding damage, or moisture seepage or condensation. Yet, in her deposition Mrs. Isak admitted to at least one occasion of moisture in the basement prior to execution of the Disclosure and in Mr. Isak's letter he referred to foundation damage in the spring of 2011. Moreover, Mr. Schad testified that Mrs. Isak had relayed that her daughter-in-law had told her she observed moisture in the basement while they were packing up the Isaks' possessions to move. Mr. Schad testified to significant water damage in that area of the basement from within a week or so after the Schads moved in until the foundation was dug up and waterproofed. This evidence creates an issue of material fact about the veracity of the Isaks' disclosure and their intent, or failure to exercise

reasonable care, in communicating the information and Plaintiffs' reliance thereon. *See Kern v. Buehrer*, *supra*, at ¶14; *Duman v. Campbell*, *supra*, at ¶26-27.

Indeed, although the Disclosure contained an advisement that, pursuant to R.C. 5302.30(G), the Isaks could, but were not obligated to, update the Disclosure, by virtue of the language of the agreement contained at lines 169-172, they promised or agreed to provide, in writing, additional disclosure items that arose between the date of acceptance and the date of recording of the deed. The letter from Mr. Isak and the testimony of Mr. Schad that Mrs. Isak had stated that her daughter-in-law had seen moisture in the basement while packing, demonstrate or is some evidence to show that, prior to the recording of the deed, the Isaks knew of foundation damage and moisture in the basement. Therefore, genuine issues of material fact exist as to whether the Defendants breached their contract or agreement with Plaintiffs. Accordingly, as it relates to Plaintiffs' claim for damages associated with the basement water/moisture problems, Defendants' Motion for Summary Judgment is **DENIED**.

The evidence and law as it relates to the chimney/fireplace

With regard to the chimney/ fireplace, Mr. Tippie testified that it would have been unreasonable and unduly time consuming to expect him to remove the stove from in front of, and the bricks situated inside, the fireplace to inspect it. Thus, despite the Schads' acknowledgement in the agreement that the entire home was open to observation, they had an unimpeded opportunity to inspect the entire house, and they did inspect it, the Schads claim that the condition of the fireplace was not open to inspection or discoverable upon reasonable inspection and that is why both Mr. Tippie and Mr. Schad asked the Isaks whether it was in good working order or functional. According to them, they were advised that it was in good working order, consistent with what the Isaks had affirmatively represented in the Disclosure. Indeed, in the Disclosure the Isaks represented, and during her deposition Mrs. Isak testified, that there had never been any fire in or smoke damage to the property generally, or current problems or defects with the fireplace/chimney specifically. Yet, Mr. Schad's testimony concerning Mrs.

Isak's admission of a chimney fire ten years prior and the Affidavit of the Isaks which indicates otherwise, create genuine issues of material fact as to the veracity of these representations, and the Isaks' intent, or failure to exercise due care, in communicating this information and Plaintiffs' reliance thereon. *See Kern v. Buehrer*, *supra*, at ¶14; *Duman v. Campbell*, *supra*, at ¶29. Accordingly, Defendants' Motion for Summary Judgment as it relates to the fireplace/chimney is DENIED.

The evidence and law as it applies to the air conditioning unit

In the Disclosure, the Isaks represented that, to their knowledge, there were no current problems or defects with the central air conditioning unit. Mr. Schad did not have the unit inspected because of the temperature, in effect arguing that it was not subject to reasonable inspection. Mrs. Isak, however, admitted in her deposition that she had had the unit checked sometime during the summer of 2010 and understood that it needed Freon. Yet, the Isaks did not have any service performed on the unit. Accordingly, if the air-conditioning unit was checked before the Disclosure was executed, there are genuine issues of material fact as to the veracity of the representation that there were no current problems or defects with the unit, and the Isaks' intent, or failure to exercise due care, in communicating the information, and Plaintiffs' reliance thereon. *Id.* If the unit was checked after the Disclosure and agreement were executed, then there remain genuine issues of material fact regarding whether the Isaks breached the agreement by failing to notify the Schads in writing that the unit needed servicing. Accordingly, Defendants' Motion for Summary Judgment as it relates to the air-conditioning unit is **DENIED**.

The evidence and law as applied to the sump pump

With regard to the sump pump, however, no evidence presented demonstrates that any genuine issues of material fact exist that would preclude the grant of summary judgment in favor of the Isaks. In other words, the Isaks have testified that they knew of no problems with the sump pump, consistent with the Disclosure, and the Schads have not presented or directed this Court to any

competent evidence to the contrary. Accordingly, Defendants' Motion for Summary Judgment as it relates to the sump pump is **GRANTED**.

IT IS SO ORDERED.

_____
Judge Pamela A. Barker

Date:_____