[Cite as *Wiles v. Miller*, 2013-Ohio-3625.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Adam Wiles,	:	
Plaintiff-Appellant,	:	
		No. 12AP-989
v.	:	(C.P.C. No. 11CV 009152)
Richard J. Miller et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 22, 2013

Plymale & Dingus, LLC, *Ronald E. Plymale* and *Michael R. Guluzian*, for appellant.

Joyce V. Kimbler, for appellee Richard J. Miller.

Beau K. Rymers, for appellees R. Mitchell Daniels and Denise Daniels.

Andrew J. Kielkopf and *Leslie A. Albeit*, for appellee The Patio Room Factory, Inc.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, Adam Wiles ("appellant"), appeals from judgments of the Franklin County Court of Common Pleas granting motions for summary judgment filed by defendant-appellee, Richard J. Miller ("Miller"), and defendants-appellees, R. Mitchell Daniels and Denise R. Daniels ("the Daniels"), and a motion to dismiss filed by defendant-appellee, The Patio Room Factory, Inc. ("Patio Room"). Because we conclude that Miller and the Daniels were each entitled to judgment as a matter of law and that

appellant's complaint failed to state a claim upon which relief could be granted against Patio Room, we affirm.

{¶ 2} On February 21, 2010, appellant traveled with his fiancée to the home of her grandmother, Sandra Carpenter ("Carpenter"), located at 2300 Minnesota Avenue, Columbus, Ohio. Carpenter rented the home at 2300 Minnesota Avenue from Miller. Shortly after arriving at Carpenter's home, appellant went outside and sat under the carport adjacent to the house. While appellant was sitting under the carport, it became detached from the house and collapsed. Appellant suffered injuries as a result of the collapse, including fractured ribs, a fractured thoracic vertebrae, and paraplegia. The carport that collapsed onto appellant had been installed in March of 1999, after the prior carport was damaged by ice. At the time the carport was installed, the Daniels owned the property at 2300 Minnesota Avenue.

{¶ 3} In July 2011, appellant filed a lawsuit against Miller and the Daniels. During discovery, appellant learned that the Daniels contracted with Patio Room for installation of the carport. Appellant then filed a first amended complaint in December 2011, naming Miller, the Daniels, and Patio Room as defendants. Appellant later filed a second amended complaint, adding Susan Karsher as a defendant and alleging that she installed the carport under the direction and control of the Daniels or Patio Room.[1] Patio Room filed a motion to dismiss, asserting that the second amended complaint failed to state a claim upon which relief could be granted. Miller and the Daniels each filed motions for summary judgment, arguing that there were no genuine issues of material fact as to appellant's claims against them and that they were entitled to judgment as a matter of law. In separate judgments, the trial court granted the motions for summary judgment filed by Miller and the Daniels and granted the motion to dismiss filed by Patio Room.

{¶ 4} Appellant appeals from the trial court's judgments, assigning six errors for this court's review:

> 1. The trial court erred in adopting the Magistrate's Decision to stay discovery during the pendency of dispositive motions because it prevented the Appellant from obtaining and

[1] Appellant also filed a separate action against Susan Karshner, *Wiles v. Karshner*, Franklin Cty. C.P. No. 12-CV-1869. On appellant's motion, the trial court consolidated that action with the case giving rise to the present appeal. Although Karshner was a party to the proceedings below, she did not participate in the present appeal.

> introducing additional evidence necessary for his response to the Appellees['] dispositive motions.
>
> 2. The trial court erred in granting Appellee, Patio Room Factory's Motion to Dismiss because the Appellant has a valid cause of action against Patio Room Factory.
>
> 3. The trial court erred in granting Appellees Daniels' Motion for Summary Judgment because Appellees breached a duty owed to Appellant.
>
> 4. The trial court erred in granting Appellee Miller's Motion for Summary Judgment because there is a genuine issue of material fact as to whether Appellee had notice of the defective condition on the premises.
>
> 5. The trial court erred in granting Appellees Daniels' and Appellee Miller[']s motions for Summary Judgment because there are questions of fact as to the apportionment of fault for the defective condition of the premises.
>
> 6. R.C. 2305.131 is unconstitutional both facially and as applied.

{¶ 5} We begin our analysis with appellant's fourth assignment of error, which relates to his claims against Miller, who owned the property at the time that the carport collapsed. Next, we will consider appellant's third assignment of error, which relates to his claims against the Daniels, who owned the property at the time the carport was installed. We will then turn to appellant's fifth assignment of error, which relates to his claims against both Miller and the Daniels. Then we will consider appellant's second and sixth assignments of error, which relate to his claims against Patio Room and assertions related to the relevant statute of repose. Finally, we will consider appellant's first assignment of error, which addresses an order from the magistrate providing for a stay of discovery.

{¶ 6} In his fourth assignment of error, appellant asserts that the trial court erred by granting summary judgment in favor of Miller because there was a genuine issue of material fact regarding whether Miller had notice of a defective condition in the carport. Appellant asserted claims against Miller for negligence, nuisance, breach of a covenant (or warranty) of habitability, and violations of duties under the landlord-tenant law. Each of these claims involved a common allegation that Miller knew or should have known of a

defective condition in the carport and was liable for failing to repair the defective condition.

{¶ 7} We review a grant of summary judgment de novo. *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, ¶ 16 (10th Dist.), citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9 (internal citations omitted). Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) 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." *Capella III* at ¶ 16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6. Therefore, we undertake an independent review to determine whether Miller was entitled to judgment as a matter of law on appellant's claims against him.

{¶ 8} Under Ohio's landlord-tenant law, a landlord is required to, inter alia, comply with the requirements of all applicable building and housing codes and to make all repairs necessary to keep the premises in a fit and habitable condition. R.C. 5321.04(A)(1) and (2). With respect to the duty to make repairs, the Supreme Court of Ohio has explained that "it must be shown that the landlord received notice of the defective condition of the rental premises, that the landlord knew of the defect, or that the tenant had made reasonable, but unsuccessful, attempts to notify the landlord." *Shroades v. Rental Homes, Inc.*, 68 Ohio St.2d 20, 25-26 (1981). The Supreme Court later clarified this holding by stating that "[a] landlord's violation of the duties imposed by R.C. 5321.04(A)(1) or 5321.04(A)(2) constitutes negligence *per se*, but a landlord will be excused from liability under either section if he neither knew nor should have known of the factual circumstances that caused the violation." *Sikora v. Wenzel*, 88 Ohio St.3d 493 (2000), syllabus. Thus, a claimant must demonstrate that the landlord had actual or constructive notice of a defect. *Id.* at 495. Although appellant was not a tenant of the property at 2300 Minnesota Avenue, he was a guest of Carpenter, who was the tenant. As the Supreme Court has noted, the landlord-tenant law does "not distinguish between the

duties a landlord owes to a tenant and the duties a landlord owes to other persons lawfully upon the leased premises." *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St.3d 414, 419 (1994).

{¶ 9} In addition to his statutory landlord-tenant law claim, appellant asserted a common law negligence claim against Miller, arguing that Miller knew or should have known that there was a dangerous condition in the attachment of the carport to the house and acted negligently by failing to repair the dangerous condition. Appellant also claimed that the condition of the carport constituted a private nuisance. The type of nuisance claim appellant asserted in this case is based in negligence and, therefore, the allegations of nuisance and negligence merge for purposes of our analysis. *See Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1362, 2002-Ohio-4499, ¶ 21. In order to demonstrate that Miller was negligent, appellant must establish that Miller had notice of a problem with the carport because he could not have violated a duty to repair it if he did not know that a repair was needed. *See, e.g., Hill v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 12AP-265, 2012-Ohio-5304, ¶ 12-15 (in negligence action, claimaint failed to establish that the department of corrections had actual or constructive notice that an electrical box cover had been removed). The issue of notice is also implicit in appellant's claim for breach of the warranty of habitability. *See, e.g., Chapman v. Titleist Club, LLC*, 6th Dist. No. WD-06-038, 2006-Ohio-6460, ¶ 24 ("Chapman failed to comply with the notice requirement imposed upon a tenant seeking to recover pursuant to a claim of breach of warranty of habitability.").

{¶ 10} We begin our analysis of the fourth assignment of error by addressing an evidentiary issue. In his memorandum in opposition to Miller's motion for summary judgment, appellant cited a report prepared by James Nickoli, who was hired to investigate the cause of the carport collapse. Civ.R. 56(C) provides in relevant part that summary judgment may be granted if the court concludes 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 based on its consideration of "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." However, appellant did not provide an affidavit from Nickoli establishing the authenticity of the report, nor any deposition testimony from

Nickoli that would authenticate the report.[2] Accordingly, the trial court properly declined to consider the Nickoli report in ruling on Miller's motion for summary judgment.

{¶ 11} Miller asserted that he was entitled to summary judgment because he had no notice of any problem with the carport prior to the collapse and, therefore, could not have violated any duty to repair it. Miller presented an affidavit attesting that he did not own the property when the carport was constructed and was not present when it was constructed. He attested that he conducted annual inspections of the property and that, prior to the collapse, he never discovered any problems with the carport. Miller further stated that neither Carpenter, nor any other tenant, ever notified him of any problems with the carport. Miller also relied on an affidavit from Carpenter, in which she asserted that, prior to the collapse of the carport, she was not aware of any defects associated with it and never reported a problem with the carport to Miller.

{¶ 12} Appellant's memorandum in opposition to Miller's motion for summary judgment did not allege that Miller had actual notice of a defective condition in the carport prior to the collapse. Rather, appellant asserted that Miller had constructive notice of a defective condition. Appellant argued that, because Miller was a landscape architect and owned multiple rental properties, he had superior knowledge of building and construction. Appellant also claimed that, based on this superior knowledge, Miller had sufficient time and opportunity to discover the defective condition during his annual inspections of the property. Appellant also argued that Miller failed to take reasonable steps to determine whether the carport was constructed according to code, including failing to ascertain whether a building permit had been obtained for the construction of the carport.

{¶ 13} In a similar case, we affirmed summary judgment in favor of a landlord, concluding that the landlord was not required to hire a professional inspector to satisfy his duties under the landlord-tenant law and that there was no genuine issue of material fact that the landlord knew or should have known of a defect prior to the accident. *Lilly v. Bradford Invest. Co.*, 10th Dist. No. 06AP-1227, 2007-Ohio-2791, ¶ 29-31. In *Lilly*, the

[2] In his memorandum contra Miller's motion for summary judgment, appellant indicated that he planned to submit a supplementary affidavit from Nickoli establishing the authenticity of the report. However, there is no evidence that appellant provided an affidavit from Nickoli prior to the trial court's ruling on Miller's motion for summary judgment, or at any time thereafter.

plaintiff, Juanita Lilly ("Lilly"), was injured when a stair tread collapsed while she was walking down the basement stairs of her rented home. *Id.* at ¶ 2. Lilly filed multiple claims, including negligence and violations of statutory duties under the landlord-tenant law. The landlord testified that he had walked through the property before renting it to the plaintiff and that, during that process, he looked at and walked up and down the staircase. The landlord indicated that he did not see any problem with the staircase. *Id*. at ¶ 5-6. Lilly and her husband testified that they did not notice any problems with the stairs prior to the accident and that they had not reported any problems with the stairs to the landlord prior to the accident. *Id*. at ¶ 10-11. In response to the landlord's motion for summary judgment, Lilly presented an affidavit from a construction consultant who concluded that the staircase had previously separated and been improperly repaired and that a professional home inspection of the property would have identified and disclosed the improper repair. *Id.* at ¶ 13. The trial court granted summary judgment in favor of the landlord. *Id*. at ¶ 14-16.

{¶ 14} On appeal, this court rejected Lilly's claim that the landlord had a duty under the landlord-tenant law to hire a professional home inspector to discover defects in the property. *Id*. at ¶ 29. We noted that the landlord testified that he was able to look at properties and make necessary repairs and that he saw no defect in the staircase prior to the accident. Further, we noted that both Lilly and her husband testified that they had not provided the landlord with any notice of a defect in the staircase prior to the accident. *Id.* at ¶ 30. Accordingly, there was no genuine issue of material fact as to whether the landlord knew or should have known of a defect in the staircase prior to the accident, and the landlord was entitled to judgment as a matter of law. *Id.* at ¶ 31.

{¶ 15} In this case, Miller presented evidence demonstrating that he had no actual notice of any defect in the carport, and appellant did not submit any evidence to rebut this assertion. Therefore, we consider whether there was any genuine issue of material fact as to whether Miller had constructive notice of any defect in the carport—i.e., whether he should have known that there was some defect. Appellant argued that Miller should have discovered the alleged defect in the carport based on his knowledge of and exposure to construction practices, his experience as an owner of multiple rental properties, and the fact that he conducted annual inspections of the property. However, appellant did not

present any cognizable evidence demonstrating that there was any visible evidence of a defect prior to the day of the collapse that could have been observed through inspection. In his own deposition, appellant testified that, immediately prior to the collapse, when he was sitting under the carport he saw light coming through. However, appellant also testified that he had never noticed a problem with the carport prior to the day of the collapse. With respect to appellant's argument that Miller failed to take reasonable steps to determine whether a building permit was issued for the carport, we conclude that knowledge that there was no building permit would not per se constitute constructive notice of a defect in the carport. The carport could have been properly constructed even absent a building permit. Moreover, as explained in our analysis of appellant's third assignment of error, the lack of a building permit was not the proximate cause of the collapse of the carport. Thus, similar to our decision in *Lilly*, we conclude that the record failed to establish a genuine issue of material fact that Miller knew or should have known of a problem with the carport prior to the collapse. Due to the absence of a genuine issue of material fact, Miller was entitled to judgment as a matter of law, and the trial court properly granted summary judgment in his favor.

{¶ 16} Accordingly, we overrule appellant's fourth assignment of error.

{¶ 17} Next, we turn to appellant's third assignment of error, in which appellant argues that the trial court erred by granting the Daniels' motion for summary judgment because the Daniels breached a duty owed to appellant. The Daniels did not have a landlord-tenant relationship with Carpenter or appellant and did not own the property at the time that the carport collapsed. However, appellant argues that, because the Daniels owned the property and used it as a rental property at the time the carport was replaced, they owed a nondelegable duty of reasonable care to future buyers and users of the property.

{¶ 18} Appellant asserted claims for negligence and nuisance against the Daniels; as explained above, those claims merge for purposes of analysis in this appeal because the nuisance claim relies on a finding of negligence. Appellant first argues that the Daniels violated their statutory duty under R.C. 5321.04(A)(2) to make all repairs and do what is reasonably necessary to keep the premises in a fit and habitable condition. Appellant asserts the Daniels violated this duty by failing to ensure that the carport was properly

constructed. The trial court granted the Daniels' motion for summary judgment based on a conclusion that the Daniels did not owe appellant a duty that would enable a finding of negligence or nuisance.

{¶ 19} Appellant argues that his case is analogous to two decisions from other courts of appeals that held former property owners liable for injuries occurring after they had sold the respective properties. In *Robinson v. C & L Assoc., L.L.C.*, 188 Ohio App.3d 649, 2010-Ohio-3118 (2d Dist.), the Second District Court of Appeals held that a landlord's sale of a property did not extinguish all of its duties to make repairs under the landlord-tenant law. *Id*. at ¶ 33. The Eighth District Court of Appeals also ruled that a former property owner could be held liable in negligence for the collapse of a staircase that occurred after he sold the property. *VanAtta v. Akers*, 8th Dist. No. 82361, 2003-Ohio-6615, ¶ 43. Despite appellant's argument, we conclude that each of these cases is distinguishable from the present appeal.

{¶ 20} In *Robinson*, the injured party, Teressa Robinson ("Robinson"), leased an apartment in April 2006 from C & L Associates ("C&L"). *Robinson* at ¶ 2. On multiple occasions between May and November 2006, Robinson notified the apartment complex manager and the maintenance manager about problems with the oven door in her apartment and received assurances that it would be repaired. *Id*. at ¶ 3. In late October 2006, C&L sold the apartment complex to another company. Five days after the sale, Robinson was injured when she fell while trying to open the oven door. *Id*. at ¶ 4. The trial court granted summary judgment in favor of C&L on Robinson's claims for negligence and nuisance, but the Second District Court of Appeals reversed, holding that the sale of the property did not relieve C&L of its prior obligation to make repairs under the landlord-tenant law. *Id*. at ¶ 33.

{¶ 21} One key distinction between *Robinson* and the present case is that there was never any landlord-tenant relationship between the Daniels and Carpenter, of whom appellant was a social guest when the carport collapsed. The Daniels sold the property to Miller in 1999, and Carpenter began renting the property from Miller in 2005. By contrast, the tenant in *Robinson* initially rented her apartment from C&L. Another important difference is the fact that the injury in *Robinson* occurred less than a week after C&L sold the property; while, in this case, the Daniels sold the property more than ten

years before the carport collapsed. Finally, in *Robinson*, there was clear evidence that C&L had notice of the defective condition that ultimately caused Robinson's injuries. In the present case, there was no evidence demonstrating that the Daniels had any notice of a problem with the carport. In his deposition, R. Mitchell Daniels testified that, up to the time he sold the property, he was never aware of any problem with the attachment of the carport to the house. Thus, there were key factual differences between *Robinson* and the present appeal.

{¶ 22} In *VanAtta*, the former property owner constructed the staircase that subsequently collapsed. *VanAtta* at ¶ 12. The Eighth District Court of Appeals ruled that, because the former owner had taken on an extensive building project on his own, he put himself in the position of a contractor. *Id*. at ¶ 41. Thus, the court held he could be liable in negligence as a contractor, not based on his position as a former owner of the property. *Id*. at ¶ 41-42. The court was careful to specify that it did not intend for all improvement or repair projects undertaken by homeowners to subject them to liability. *Id*. at ¶ 41. By contrast, in the present case, the Daniels contracted with the Patio Room for installation of the new carport, and the Daniels did not perform any of the work themselves.

{¶ 23} The Daniels argue that this case is more analogous to the Eighth District Court of Appeals' decision in *Steele v. McNatt*, 102 Ohio App.3d 558 (8th Dist.1995). In *Steele*, tenants brought an action for wrongful death of their son and personal injury to their daughter caused by a fire at their rental home. *Id.* at 560. The tenants argued that both the former owner of the property and the owner at the time of the fire were liable in negligence for failure to install smoke detectors. *Id*. at 562. The Eighth District Court of Appeals held that the former owners of the property were divested of all rights and obligations to the property on the date it was transferred to the new owners. Because the former owners did not hold title to or control over the property on the day of the fire, they could not be held liable for the injuries resulting from the fire. *Id*. Relying on *Steele*, the Daniels assert that because they sold the property prior to the carport collapse they had no duty to appellant. Under the circumstances in this case, because the Daniels sold the property more than ten years prior to the carport collapse and because there was no evidence that they had any notice of a problem with the carport when it was installed or at

any time prior to the sale, we conclude that the Daniels did not violate any duty to appellant under R.C. 5321.04(A)(2).

{¶ 24} Appellant also argues that the Daniels violated their statutory duty under R.C. 5321.04(A)(1) to comply with all applicable building codes by ensuring that a building permit was obtained for construction of the carport. A landlord's violation of a duty imposed under R.C. 5321.04(A)(1) constitutes negligence per se, but the landlord will be excused from liability if he neither knew, nor should have known of the circumstances that caused the violation. *Sikora* at syllabus. R. Mitchell Daniels testified in his deposition that he did not know if a building permit was issued for the installation of the carport. Appellant did not present any evidence that the Daniels had actual notice of whether a building permit was issued but appears to argue that he had constructive notice of the lack of a permit because he did not obtain one and because he did not inquire whether the Patio Room obtained a building permit.

{¶ 25} Even where negligence per se is established, however, a plaintiff still must prove proximate cause. *Sikora* at 496, citing *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998). Assuming for purposes of analysis that the Daniels failed to comply with applicable building codes by failing to obtain a building permit or ensuring that Patio Room obtained a building permit and that they had actual or constructive notice of the failure to obtain a building permit, appellant must still demonstrate that the failure to obtain a building permit was the proximate cause of his injuries. Other courts of appeal have determined that the failure to obtain a building permit under similar circumstances was not the proximate cause of subsequent injuries. *See, e.g., Fox v. Weimerskirch*, 3d Dist. No. 5-95-14 (Nov. 29, 1995) ("[E]ven assuming defendant was negligent *per se* in failing to properly obtain a building permit, plaintiff has not established that such negligence was the proximate cause of plaintiffs' injury."); *Gottfried v. Bacon*, 3d Dist. No. 16-87-32 (Oct. 10, 1989) ("[A] failure to obtain a building permit, if such failure occurred, could not possibly be the proximate cause of the plaintiff's injury."). Similarly, in this case, even if we were to conclude that the Daniels violated a statutory duty by not obtaining or ensuring that a building permit was obtained, the failure to secure a permit was not the proximate cause of the collapse of the carport.

{¶ 26} Appellant suggests that obtaining a permit would have resulted in a review of the construction plan for the carport and an inspection to ensure that it was properly constructed. Appellant submitted an affidavit from a City of Columbus building official attesting that a building permit was required prior to the erection of a new carport or replacement of an attached carport. The official did not, however, attest that a post-construction inspection would have been required. Moreover, appellant presented no evidence that a post-construction inspection would have revealed any defect in the carport.

{¶ 27} Accordingly, we overrule appellant's third assignment of error.

{¶ 28} In his fifth assignment of error, appellant argues that the issue of apportionment of liability between Miller and the Daniels for the defective condition in the carport was a question of fact and, therefore, summary judgment was improper. In our analysis of appellant's third and fourth assignments of error, we conclude that the trial court properly granted summary judgment in favor of both Miller and the Daniels because there were no genuine issues of material fact as to appellant's claims against them. Generally, a finding of liability is a prerequisite for apportionment of liability. *See, e.g., O'Connell v. Chesapeake & Ohio RR. Co.*, 58 Ohio St.3d 226, 235 (1991) (in adopting the "same juror" rule for determining which jurors may participate in determining the apportionment of liability, explaining that "the determination of causal negligence on the part of one party [is] a precondition to apportioning comparative fault to that party"). Because the trial court properly granted summary judgment in favor of both Miller and the Daniels, they were not liable, and there was no issue as to apportionment of liability between them.

{¶ 29} Accordingly, we overrule appellant's fifth assignment of error.

{¶ 30} Next, we turn to appellant's second and sixth assignments of error, which are related because appellant makes various assertions related to the applicable statute of repose. In his second assignment of error, appellant asserts that the trial court erred by granting Patio Room's motion to dismiss. In his sixth assignment of error, appellant argues that the relevant statute of repose is unconstitutional. We will consider each of these assignments of error in turn.

{¶ 31} Appellant asserted a claim against Patio Room for fraud, arguing that Patio Room made false representations regarding the installation and construction of the carport and compliance with applicable building codes. Patio Room filed a motion to dismiss, claiming that appellant failed to state a claim upon which relief could be granted. The trial court granted Patio Room's motion to dismiss, concluding that appellant could not maintain an action for fraud based on alleged misrepresentations made to a third party.

{¶ 32} Appellant argues that the trial court should have treated Patio Room's motion to dismiss as a motion for judgment on the pleadings because Patio Room answered appellant's complaint before filing the motion to dismiss. "A Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion to dismiss, and the same standard of review is applied, both at the trial and appellate levels." *Rushford v. Caines*, 10th Dist. No. 00AP-1072 (Mar. 30, 2001). *See also Mulk v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-211, 2011-Ohio-5850, ¶ 6 ("We review a trial court's grant of judgment on the pleadings de novo. 'A motion for judgment on the pleadings is to be granted when, after viewing the allegations and reasonable inferences therefrom in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law.' "(internal citation omitted); *Arnold v. Ohio Adult Parole Auth.*, 10th Dist. No. 11AP-120, 2011-Ohio-4928, ¶ 6 ("We review de novo a trial court's dismissal of a case for failure to state a claim upon which relief could be granted. In considering a motion to dismiss for failure to state a claim, '[t]he court must presume all factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-moving party.' The court may only dismiss a case under Civ.R. 12(B)(6) when it 'appear[s] beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.' ") (internal citations omitted). Even if appellant is correct that the motion to dismiss should have been characterized as a motion for judgment on the pleadings, he suffered no prejudice, and we apply a de novo standard in reviewing the trial court's decision.

{¶ 33} Under Ohio law, a plaintiff must prove the following elements to establish a fraud claim: (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) the representation was material to the transaction, (3) the representation was

made falsely, with knowledge of its falsity, or with such disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) the representation was made with the intent of misleading another into relying on it, (5) justifiable reliance on the representation or concealment, and (6) an injury proximately caused by the reliance. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475 (1998). "The elements of fraud must be directed against the alleged victim." *Moses v. Sterling Commerce Am., Inc.*, 10th Dist. No. 02AP-161, 2002-Ohio-4327, ¶ 21. "A plaintiff fails to state a valid cause of action for fraud when he alleges that a third party relied on misrepresentations made by a defendant and that he suffered injury from that third party's reliance." *Id*.

{¶ 34} In the second amended complaint, appellant asserted that the carport was installed when the Daniels owned the property, sometime between October 31, 1996 and August 26, 1999. He claimed that Patio Room made certain representations about the carport and that, if those representations had not been made, the Daniels would have either declined to have the carport installed by Patio Room or would have insisted on changes in the installation of the carport. Appellant asserted that he was injured when the carport collapsed on February 21, 2010. Appellant did not claim that Patio Room made any representations about the carport directly to him or that he was in any way a party to the transaction between the Daniels and Patio Room. Presuming that all factual allegations in the second amended complaint are true, and construing all reasonable inferences arising from the complaint in appellant's favor, it is clear that appellant's fraud claim against Patio Room is based on alleged misrepresentations made by Patio Room to the Daniels. Therefore, appellant has failed to state a valid claim for fraud. *See Moses* at ¶ 21.

{¶ 35} Appellant claims that the trial court erred in granting Patio Room's motion to dismiss because his fraud claim is not based on the common law definition of fraud. Appellant appears to argue that R.C. 2305.131(C), a section of the statute of repose providing a limitations period for claims for damages based on a defective and unsafe condition of an improvement to real property, creates a statutory fraud claim that allows an injured party to recover for injuries sustained arising from reliance on a false representation that was made to a third party.

{¶ 36} R.C. 2305.131(A) provides that no cause of action to recover for injuries or damages that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performed services for the improvement to the property or a person who furnished the design, planning, supervision of construction, or construction of the improvement later than ten years from the date of substantial completion of the improvement. R.C. 2305.131(C) creates an exception to this general rule and states that the ten-year limitation is not available as an affirmative defense if the defendant "engage[d] in fraud in regard to furnishing the design, planning, supervision of construction, or construction of an improvement to real property or in regard to any relevant fact or other information that pertains to the act or omission constituting the alleged basis of the bodily injury, injury to real or personal property, or wrongful death or to the defective and unsafe condition of the improvement to real property." Appellant argues that nothing in the language of R.C. 2305.131(C) limits the use of this exception to cases where the representation was made directly to the party asserting the fraud claim and that, therefore, the General Assembly recognized a class of fraud claims that could be based on a misrepresentation made to a third party.

{¶ 37} Initially, we note that the ten-year limitation under R.C. 2305.131 is an affirmative defense. Although the Patio Room asserted the statute of limitations and the statute of repose as defenses in its answer to the second amended complaint, the trial court did not rely on the statute of limitations or the statute of repose in granting the motion to dismiss. The Supreme Court of Ohio has stated that "[i]t is not to be presumed that the General Assembly intended to modify a common law rule further or otherwise than the act expressly declares, or clearly and unmistakenly imports." *State v. Vorys*, 56 Ohio St.2d 107, 112 (1978). *See also Ferrari v. Ferrari*, 11th Dist. No. 93-L-058, fn. 3 (Dec. 17, 1993) ("The legislature will not be presumed or held to have intended the repeal or modification of a well settled rule of common law then in force, unless the language employed by it clearly imports such intention."). It is well-established law in Ohio that a fraud claim may not be based on a misrepresentation made to a third party. *See, e.g.*, *Moses* at ¶ 21; *McWreath v. Cortland Bank*, 11th Dist. No. 2010-T-0023, 2012-Ohio-3013, ¶ 63 ("Under Ohio law, a claim in fraud cannot be predicated upon statements or representations made to a third party."); *Lisboa v. Tramer*, 8th Dist. No. 97526, 2012-

Ohio-1549, ¶ 32 (quoting *Moses*); *Baddour v. Fox*, 5th Dist. No. 03CA-77, 2004-Ohio-3059, ¶ 41 ("A party is unable to maintain an action for fraud where the fraudulent representations were not made directly to him to induce him to act on them in matters affecting his own interests."); *Marbley v. Metaldyne Co.*, 9th Dist. No. 21377, 2003-Ohio-2851, ¶ 26 ("[A] party is unable to maintain an action for fraud where the fraudulent representations were not made directly to him to induce him to act on them in matters affecting his own interests."). We find nothing in the language of R.C. 2305.131(C) indicating any intent on the part of the General Assembly to amend or otherwise modify the common law requirements for a fraud claim. Therefore, we conclude that Patio Room was entitled to judgment as a matter of law, and the trial court did not err by granting its motion to dismiss.

{¶ 38} Accordingly, we overrule appellant's second assignment of error.

{¶ 39} In his sixth assignment of error, appellant asserts that R.C. 2305.131 is unconstitutional on its face and as applied to his claim. However, the trial court did not rely on the ten-year limitation period under R.C. 2305.131 in granting Patio Room's motion to dismiss or the motions for summary judgment filed by Miller or the Daniels. "It is a well-established rule that courts will not decide constitutional questions unless absolutely necessary to dispose of the case before them." *Alexander Rand Alzheimer's Ctr. v. Ohio Certificate of Need Review Bd.*, 72 Ohio App.3d 161, 165 (10th Dist.1991). Consistent with this rule, we find it unnecessary to rule on the constitutionality of R.C. 2305.131.

{¶ 40} Accordingly, appellant's sixth assignment of error is overruled.

{¶ 41} Finally, we turn to appellant's first assignment of error, in which he asserts that the trial court erred by adopting the magistrate's decision to stay discovery while dispositive motions were pending. Appellant argues that this stay of discovery prevented him from obtaining and introducing additional evidence necessary to respond to the appellees' dispositive motions.

{¶ 42} "A trial court acts within its discretion when it grants a stay of discovery pending the resolution of a dispositive motion." *Thomson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-782, 2010-Ohio-416, ¶ 32. Generally, we review a trial court's adoption, denial, or modification of a magistrate's decision for an abuse of discretion.

Brunetto v. Curtis, 10th Dist. No. 10AP-799, 2011-Ohio-1610, ¶ 10. An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 43} The magistrate issued an initial pre-trial order requiring appellant to file an amended complaint within 25 days of the order. The order further specified that depositions would commence following the filing of the amended complaint. The order also required appellant to respond to the Daniels' motion for summary judgment by July 1, 2012. Following a status conference, the magistrate issued a second pre-trial order on May 14, 2012, finding that it was appropriate to stay discovery until the court was able to rule on pending dispositive motions. The same day, appellant filed a motion to reopen discovery, which the magistrate denied. Appellant filed objections to the second pre-trial order; the trial court overruled these objections and adopted the magistrate's decision denying the motion to reopen discovery.

{¶ 44} It appears that the magistrate's order staying discovery only affected appellant's response to the Daniels' motion for summary judgment. Appellant had already filed his memorandum in opposition to Miller's motion for summary judgment before the magistrate issued the second pre-trial order staying discovery. Although appellant filed his memorandum in opposition to Patio Room's motion to dismiss after the magistrate issued the second pre-trial order, courts have concluded that no additional discovery is needed for a court to rule on a motion to dismiss or a motion for judgment on the pleadings. *See State ex rel. Brantley v. Ghee*, 83 Ohio St.3d 521, 522 (1998) ("[N]o additional discovery was necessary for the court of appeals to resolve appellees' motion for judgment on the pleadings."); *Lindow v. N. Royalton*, 104 Ohio App.3d 152, 159 (8th Dist.1995) ("The completion of discovery is not relevant to the granting of a motion to dismiss."). Moreover, in his objections to the magistrate's second pre-trial order, appellant focused on the need for additional discovery to respond to the Daniels' motion for summary judgment.

{¶ 45} The trial court granted the Daniels' motion for summary judgment based on its conclusion that, as a matter of law, they did not owe appellant any legal duty that would support his claims for negligence and nuisance. In our analysis of the third assignment of error, we agreed with the trial court's conclusion. Because the Daniels, as

former owners of the property, did not owe any legal duty to appellant that would allow him to recover on his claims, no additional discovery would have changed the result of this analysis. Therefore, to the extent the magistrate may have erred by ordering a stay of discovery in the second pre-trial order, any error was ultimately harmless because the trial court denied appellant's claims against the Daniels as a matter of law.

{¶ 46} Accordingly, we overrule appellant's first assignment of error.

{¶ 47} For the foregoing reasons, we overrule appellant's six assignments of error and affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

TYACK and McCORMAC, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.
