[Cite as *Benko v. Smyk*, 2015-Ohio-1062.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

TERESA BENKO, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2013-L-133**
- vs -	:	
ROBERT SMYK,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 12 CV 002918.

Judgment: Affirmed.

Steven J. Miller and *David A. Kunselman,* Miller Goler Faeges Lapine, LLP, 1301 East Ninth Street, Suite 2700, Cleveland, OH 44114 (For Plaintiffs-Appellants).

Brandon D.R. Dynes and *Daniel T. Cronin,* Thrasher, Dinsmore & Dolan, 100 Seventh Avenue, Suite 150, Chardon, OH 44024 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiffs-appellants, Teresa Benko and Lenny Zemon, appeal the November 26, 2013 Order Granting Motion for Summary Judgment, issued by the Lake County Court of Common Pleas in favor of defendant-appellee, Robert Smyk. The issues before this court are whether a seller of residential property commits fraud by failing to disclose the existence of mold and/or the true source of water leakage; whether a buyer of residential property reasonably relies upon such representations when on notice about the conditions; and whether a seller violates an "additional

disclosure" provision based on pre-existing conditions. For the following reasons, we affirm the judgment of the court below.

{¶2} On November 7, 2012, Benko and Zemon filed a Complaint against Smyk arising out of a Residential Purchase Agreement. Under the Agreement, Benko and Zemon purchased from Smyk a single-family residence and real property located at 8700 Quail Circle, Kirtland, Ohio. Benko and Zemon raised claims for breach of contract (Count One) and fraudulent misrepresentation (Count Two), as well as for punitive damages and other relief. Benko and Zemon's claims were based on Smyk's "fail[ure] to disclose known material defects associated with the House – including, but not limited to, roofing problems, water intrusion problems, and plumbing problems – and failing to deliver the House/Property to Benko and Zemon in the condition agreed to in the Contract."

{¶3} On December 5, 2012, Smyk filed his Answer.

{¶4} On August 16, 2013, Smyk filed a Motion for Summary Judgment.

{¶5} On October 9, 2013, Benko and Zemon filed their Brief in Opposition to Defendant's Motion for Summary Judgment.

{¶6} On October 21, 2013, Smyk filed a Reply Brief in Support of Defendant's Motion for Summary Judgment.

{¶7} On November 26, 2013, the trial court issued an Order Granting Motion for Summary Judgment.

{¶8} On December 26, 2013, Benko and Zemon filed their Notice of Appeal.

{¶9} On appeal, Benko and Zemon raise the following assignments of error:

{¶10} "[1.] The trial court committed prejudicial error in granting Smyk a summary judgment dismissal of Benko's and Zemon's fraud cause of action."

{¶11} "[2.] The trial court committed prejudicial error in granting Smyk a summary judgment dismissal of Benko's and Zemon's cause of action for breach of contract."

{¶12} Smyk raises the following cross-assignment of error:

{¶13} "[1.] The trial court committed prejudicial error in granting Smyk a summary judgment dismissal of Benko's and Zemon's fraud cause of action, solely based on the finding Smyk had knowledge of the alleged problems with the Property, where the trial court had an alternatively adequate basis to grant Smyk a summary judgment dismissal of Benko's and Zemon's fraud cause of action based upon the lack of justifiable reliance."

{¶14} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" 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 that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under this standard, the reviewing court conducts "an independent review of the evidence before the trial court" and renders a decision de novo, i.e., as a matter of law and "without deference to the trial court's

decision." (Citation omitted.) *Novy v. Ferrara*, 11th Dist. Portage No. 2013-P-0063, 2014-Ohio-1776, ¶ 38.

{¶15} The first assignment of error concerns various fraud claims raised by Benko and Zemon.

{¶16} "The elements of an action in actual fraud are: (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." *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987).[1]

{¶17} In Ohio, "every person who intends to transfer any residential real property * * *, by sale, * * * shall complete * * * a property disclosure form * * * designed to permit the transferor to disclose material matters relating to the physical condition of the property to be transferred, including, but not limited to, * * * the condition of the structure of the property, including the roof, foundation, walls, and floors; * * * and any material defects in the property that are within the actual knowledge of the transferor." R.C. 5302.30(C) and (D)(1).

1. Appellate courts have, on occasion, distinguished between fraudulent misrepresentation, fraudulent inducement, and fraudulent concealment. *Buchanan v. Improved Properties, LLC*, 3rd Dist. Allen No. 1-13-38, 2014-Ohio-263, ¶ 14-16. The elements of actual fraud, as set forth by the Ohio Supreme Court in *Gaines*, encompass these factual variations.

{¶18} The trial court granted summary judgment as to all fraud claims based on "the plaintiffs' [failure] to show that the defendant had knowledge of the problems they encountered, or that he recklessly disregarded them."

{¶19} Benko and Zemon argue that the trial court erred in granting summary judgment as to their fraud claims, as there existed "genuine issues of material fact about [Smyk's] knowledge of serious, ongoing problems with the House and Property." Appellants' brief at 14.

{¶20} Benko and Zemon presented the following evidence in support of their fraud claims to the trial court.

{¶21} On August 11, 2010, Lino Desapri and his wife sold the residence and property at 8700 Quail Circle to Smyk and his (now ex-) wife. Prior to the purchase, Smyk had a home inspection performed, which was subsequently made available to Benko and Zemon. This inspection (dated July 23, 2010), identified two issues with toilets as follows:

Master:	Seller to replace defective toilet
First Floor Hall:	Toilet loose at floor, new seal recommended

With respect to the condition of the roof, the inspection noted: "Some gutter covers have fallen in allowing tree debris to accumulate." The inspection also noted that there was, on the property, an underground "oil storage tank abandoned and filled with sand."

{¶22} In September 2010, the main water line to the sink in the basement bathroom broke. Smyk hired ServPro of Parma to restore the basement. In the course of its work, ServPro found mold in the basement, which was photographed. A notation in ServPro's service sheet reported: "clean mold under 10 sq ft. (4 sq ft.)." ServPro

provided Smyk with a standardized Mold Notice, stating: “Please be advised that during our initial visit to your property we determined mold may be present. We recommend that you contact your insurance adjuster and/or indoor environmental professional as soon as possible to determine the best course of action for your particular situation.”

{¶23} In December 2010, Smyk experienced a water leak in the dining room over a bay window. At the time, Smyk had home warranty services with Home Security of America (“HSA”), which covered “roof leaks,” but excluded “damage done by ice.” HSA sent a warranty service dispatch to ProRoof LLC, a roofing contractor, requesting service for the Quail Circle residence. Edward Crann, ProRoof’s managing member, inspected the roof and “found that the shingles above the dining room bay window were failing and leaking due to normal wear and tear.” ProRoof gave Smyk a proposal for repair work consisting of the replacement of roof shingles over the bay window for about two feet up an adjoining mansard wall, and the installation of an ice guard. The proposal further noted “the possibility that the shingles on the mansard [roof] could also be leaking.” ProRoof performed the work contained in the proposal on May 27, 2011.

{¶24} In March 2011, Smyk listed the Quail Circle residence and property for sale.

{¶25} On May 25, 2011, real estate agent, Denise DeGennaro, showed Benko and Zemon the Quail Circle property. Smyk provided them with a Residential Property Disclosure Form (prepared March 5, 2011). On the form, Smyk reported a “leak over dining room” that was “repaired,” but otherwise denied “any current leaks or material problems with the roof.” Smyk reported the disconnection of a hot water pipe, which

ServPro dried out, and replacing drywall, carpeting, and flooring ("everything redone"). Smyk denied the existence of any "underground storage tanks/wells" on the property.

{¶26} On June 5, 2011, Benko and Zemon entered into a Residential Purchase Agreement with Smyk to purchase the Quail Circle residence and property.

{¶27} In various emails sent to DeGennaro, Smyk, through his real estate agent, Marianne Drenik, provided further details about the "basement water damage" and the "bay window leak":

> I want to be clear that the water in the basement was CLEAN water. This was not a flood of sewage backup, water seeping into the house or any sort of dirty water. The hot water supply line under the bathroom sink in the basement gave way and we did not realize that until there was about an inch or two of water in the basement. * * * We had all the flooring (tile and carpet and pad) removed so there was nothing dried and left there that can cause issues. The walls were drilled and dried for the small amount of absorption that occurred as the water wicked into the base of the drywall and Servpro performed their standard drying and cleaning to eliminate an[y] possibility of mold.
>
> * * *
>
> [The leak in the dining room] occurred just before Christmas of last year [2010] and the roofing contractor verified it was simply an ice dam from the crazy winter we had and was abnormal. There was light staining on a tiny area of the drop section of the ceiling that

> alerted me to the fact we had anything going on. I took care of the repair of the ceiling myself in February [2011]. I am actually meeting the roofer out there today to get them going on the repair as all the rain this spring has kept them from being able to come out. As they mentioned the leak was the ice dam and not a failure of the roof and with all the rain and snow we had through all of 2011 the leak has not reappeared. As an added precaution, even though there is no actual leak, the plan is to pull off all the shingles on the bay, lay down Ice Guard which will prevent the liklihod [sic] of further ice dam reoccurrence in the future and replace with new shingles.

{¶28} In another email, Drenik reported: "Homeowner [Smyk] was told 15 ye[ar]s old on 30 year shingle."

{¶29} In another email responsive to questions raised about the roof and toilet issues identified in the Desapri inspection report, Smyk reported: "Basically everything was addressed by the owner prior to us taking ownership."

{¶30} On June 11, June 16, and July 25, 2011, Benko and Zemon inspected the Quail Circle residence, variously accompanied by DeGennaro, Ron Gerome (house inspector), and Dean Angle (of Chimney Cricket, Inc.).

{¶31} During their visits to the Quail Circle residence, Benko and Zemon noted: "the ceilings in the basement of the house and first floor dining room appeared to have been freshly painted, the basement appeared to have been entirely redone (except for the west wall and portions of the ceiling of the mechanical room, but those areas looked

stain-free)"; "the carpets throughout the home appeared to have been recently replaced"; there was no "visible evidence of water leaking, pooling, or staining, mold, or other signs of water infiltration [or] plumbing issues"; and there were not "any loose, broken, or flyaway shingles on the roof or anything else that suggested that there was a roofing problem."

{¶32} The housing inspector, Gerome's, report was consistent with Benko and Zemon's observations of the residence prior to purchase.

{¶33} On August 6, 2011, Benko and Zemon took possession of the Quail Circle residence.

{¶34} Within two weeks of moving into the residence, Benko and Zemon noticed water stains on the basement ceiling underneath the first-floor bathroom. Jason Shumney, a plumber, investigated and determined that the source of the leak was the first floor toilet. Shumney noted that the flange, t-bolts, and concrete around the flange were thoroughly rusted and/or crumbling apart, allowing "water and sewage" to leak onto the basement ceiling. Shumney also noted that a "thick bead of pure silicon" had been applied around the base of the toilet, where normally plumbers caulk would have been applied. Shumney concluded, based on the corrosion to the metal ring of the flange and t-bolts, that the toilet would have been leaking during Smyk's ownership of the residence.

{¶35} In September 2011, Benko and Zemon began noticing water pooling in the basement under the west wall window.

{¶36} In October 2011, Benko and Zemon observed that roof shingles "were sliding, breaking, and flying off the roof into the yard." At the same time, water began

staining the dining room ceiling. Chris Shumney, a roofer, investigated and determined that portions of the roof, particularly in the area of the dining room, had structural defects which allowed water to leak into the residence. In particular, Shumney noted that shingles had been replaced and/or improperly attached to the roof. Shumney concluded that these defects existed during Smyk's ownership of the residence.

{¶37} In November 2011, Benko and Zemon noticed water stains in the ceiling of the basement bathroom and in an adjacent room.

{¶38} James E. Roby of SteriTec Systems (a home restoration company) inspected the home and found mold in the "storage area" of the basement and the "common wall in the bathroom," and determined that the origin of the moisture was the upstairs bathroom. Roby described the mold as a pre-existing condition of the home prior to its purchase by Benko and Zemon.

{¶39} Construing this evidence most strongly in favor of Benko and Zemon, there exists a genuine issue of material fact as to whether Smyk's representations regarding the condition of the Quail Circle residence were made falsely, either knowingly or recklessly.

{¶40} In particular, Smyk represented that, following the water line break in the basement, work was done "to eliminate an[y] possibility of mold." This statement denies the fact that, while the work was being done to eliminate the possibility of mold occurring, existing mold was found in the basement. The trial court reasoned that the pre-printed Mold Notice signed by Smyk "merely said that [mold] may be present." This is true with respect to the Mold Notice. However, ServPro's Job Diary affirmatively states that "mold [was] found," and the Service Sheet includes among the tasks

undertaken "clean mold under 10 sq ft. (4sq ft.)." Most significantly of all, ServPro photographed the mold, thereby demonstrating its visibility. Smyk declined having ServPro perform further work with the mold and, at the time of sale, the ceiling and certain walls had been repainted and no mold was visible. The inference that Smyk lied about and/or tried to conceal the existence of mold is reasonable.

{¶41} The fact that mold already existed in the residence in September 2010 also gives rise to the inference that Smyk knew, or should have known, that there was an ongoing issue with the first floor toilet leaking. That the toilet was loose and/or needed a new seal was disclosed to Smyk when he purchased the residence. Smyk claimed that Desapri had taken care of the problem, although it was later shown that, at most, Desapri had inexpertly applied a sealer around the base of the toilet.[2] The mold that was found when the water line broke was obviously caused by some other source of moisture, which Benko and Zemon identified as the first floor toilet.

{¶42} Smyk also represented that the roof leak over the bay window was caused by an ice dam, despite evidence that the roofing contractor's determination was that the roof was beginning to fail as a result of "normal wear and tear." Smyk's claim that he was only advised that the leak was caused by an ice dam is suspect in light of the actual work performed, which included replacing the shingles on the bay window as well as a portion of the mansard roof, and the fact that his home warranty servicer would not have covered the work had the damage been caused by an ice dam. Regardless, conflicting evidence must be construed most strongly in Benko and Zemon's favor.

2. There is, in fact, no affirmative evidence as to who applied the sealer.

{¶43} Finally, Smyk misrepresented that there were not any "underground storage tanks/wells" on the property, although Desapri identified an abandoned gas tank in the inspection report created when Smyk purchased the residence.

{¶44} The parties argue at length whether the expert affidavits submitted by Benko and Zemon are competent to raise a genuine issue of material fact as to Smyk's knowledge of these defective conditions. *See, e.g., Waleszewski v. Angstadt*, 11th Dist. Lake No. 2002-L-113, 2004-Ohio-335, ¶ 16 ("[w]hile the expert's opinion did not prove that the Angstadts had knowledge of the seepage in the basement, it did contradict the Angstadts' sworn statements * * * [and] established that there was a genuine issue of material fact on this issue").

{¶45} In the present case, the trial court disregarded Benko and Zemon's expert opinion testimony on Smyk's knowledge as innuendo and conjecture. In this respect, we agree with the trial court. At best, Benko and Zemon's expert reports demonstrated that the issues with the roof, the toilet, and mold existed during Smyk's ownership of the residence. They provided little probative evidence that he was actually aware of the conditions. Smyk's possible knowledge, however, is demonstrated by the other evidence discussed above. Accordingly, we find that summary judgment should not have been granted for this reason. *Compare Kimball v. Duy*, 11th Dist. Lake No. 2002-L-046, 2002-Ohio-7279, ¶ 28 ("a genuine issue of material fact exists as to whether Carl applied white paint in an attempt to conceal the repairs from prospective buyers").

{¶46} The trial court provided further justification for the dismissal of Benko and Zemon's fraudulent misrepresentation claims with respect to the mold and oil tank in

that these claims were not pled in the Complaint, but only raised in their Brief in Opposition to Defendant's Motion for Summary Judgment.

{¶47} "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Civ.R. 9(B). In order to satisfy the particularity requirement, the plaintiff must plead "the time, place and content of the false representation; the fact represented; the identification of the individual giving the false representation; and the nature of what was obtained or given as a consequence of the fraud." (Citation omitted.) *Monroe v. Forum Health*, 11th Dist. Trumbull No. 2012-T-0026, 2012-Ohio-6133, ¶ 56.

{¶48} Benko and Zemon urge this court to follow *Okocha v. Fehrenbacher*, 101 Ohio App.3d 309, 655 N.E.2d 744 (8th Dist.1995). In *Okocha*, the court of appeals appears to have allowed a party to cure a defectively pled fraud claim by means of an affidavit attached to her brief in opposition to a motion for summary judgment. The court noted that the affidavit "included the time and place of each [fraudulent] statement as well as the identity of the defendant who made each statement * * * sufficient * * * to enable him to prepare his defense." *Id.* at 320-321.

{¶49} We decline to follow *Okocha*. Civil Rule 9(B) governs "averments of fraud," meaning "an assertion or allegation in a pleading." *Black's Law Dictionary* 146 (8th Ed.2004). A response to a motion for summary judgment is not recognized as a pleading under Ohio's Civil Rules. Civ.R. 7(A). Thus, "[a] party cannot avoid Civ.R. 9(B)'s pleading requirements for a fraud claim simply by presenting additional or more specific arguments sometime after its pleadings are filed." *Schroeder v. Henness*, 2nd Dist. Miami No. 2012 CA 18, 2013-Ohio-2767, ¶ 32.

{¶50} We now address Smyk's cross-assignment of error, which intends to defend the trial court's Order on the grounds that Benko and Zemon failed to demonstrate reasonable reliance upon his alleged misrepresentation regarding the roof.

{¶51} As an initial matter, Benko and Zemon maintain that the cross-assignment of error is not properly before us, since Smyk did not file a notice of cross appeal. We disagree. A notice of cross appeal is only necessary when "[a] person who intends to defend a judgment or order * * * also seeks to change the judgment or order." App.R. 3(C)(1). In the present case, the trial court's Order Granting Motion for Summary Judgment did not address the issue of reasonable reliance. As any determination by this court on the reliance issue will not vary/change the underlying Order, Smyk was "not required to file a notice of cross appeal or to raise a cross-assignment of error." App.R. 3(C)(2); *compare* Local App.R. 16(C)(4)(b) ("if appellee is defending a judgment or order appealed by an appellant on a ground other than that relied on by the trial court, but does not wish to change the judgment or order, the basis for the alternative defense shall be set forth separately in a cross-assignment of error in the Appellee's Brief").

{¶52} With respect to the leak in the dining room, Smyk represented that it was caused by "an ice dam from the crazy winter * * * and was abnormal." The roofer determined that the leak was due to "normal wear and tear" and shingles beyond the area of the bay window could also be leaking. While Smyk misrepresented the ultimate cause of the leak, he did not conceal either the fact of a leak or its immediate cause, i.e., the roof. Moreover, Smyk accurately reported that the roofer would be replacing

the shingles over the bay window, in addition to installing an ice guard. Benko and Zemon were duly notified that an issue existed with the roof.

{¶53} The age and condition of a roof is not a latent defect. Benko and Zemon were not hindered from inspecting the roof.[3] Smyk's misrepresentation should not have prevented or discouraged them from ascertaining the roof's general condition, including the amount of "normal wear and tear" it had undergone. Thus, there is no connection between Smyk's misrepresentation and Benko and Zemon's failure to ascertain the actual condition of the roof. *Bencivenni v. Dietz*, 11th Dist. Lake No. 2012-L-127, 2013-Ohio-4549, ¶ 51 ("[w]hile the source of the water seepage may be questioned, [the plaintiffs] were aware that this was a problem that could warrant additional inspection and future repairs"); *Yuricek v. Dye*, 11th Dist. Trumbull No. 99-T-0093, 2000 Ohio App. LEXIS 5931, 15 (Dec. 15, 2000) ("[a]ware of a possible problem, the buyer has a duty to either to (1) make further inquiry of the owner [* * *], or (2) seek the advice of someone with sufficient knowledge to appraise the defect") (citation omitted).

{¶54} The cross-assignment of error is with merit.

{¶55} In their second assignment of error, Benko and Zemon argue the trial court erred in dismissing the cause of action for breach of contract.

{¶56} This court has held, and the trial court relied on the holding, that the presence of an "as is" clause in a real estate purchase agreement bars a claim for breach of contract. *Tutolo v. Young*, 11th Dist. Lake No. 2010-L-118, 2012-Ohio-121, ¶ 52.

3. We note that Zemon testified that, during the inspection conducted by Signature Home Inspection, the inspector did not have a ladder that allowed him "to completely walk the roof." In all respects, the roof was reported to be in "acceptable" condition. These failures cannot be attributed to Smyk.

{¶57} The June 5, 2011 Residential Purchase Agreement entered into by the parties provides:

> **CONDITION OF THE PROPERTY:** Buyer 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 on the Ohio *Residential Property Disclosure Form or Identified by any inspections requested by either party or any other* forms or addenda made a part of this agreement. Seller agrees to notify Buyer in writing of any additional disclosure items that arise between the date of acceptance and the date of recording of the deed. Buyer has not relied upon any representations, warranties, or statements about the property (including but not limited to condition or use) unless otherwise disclosed on this agreement or on the *Residential Property Disclosure Form*.

{¶58} Benko and Zemon contend that Smyk breached his contractual obligation to notify them of "additional disclosures" with respect to "the leaking roof, leaking plumbing, leaking foundation, and spreading mold incursion that were ongoing during that period." We disagree.

{¶59} The "additional disclosure" clause applies to conditions "that arise" after the acceptance of the Residential Property Disclosure Form. The conditions cited by Benko and Zemon have all been alleged or demonstrated to have existed during Smyk's ownership of the Quail Circle residence. They do not properly constitute "additional disclosures."

{¶60} Finally, we find the case of *Abroms v. Synergy Bldg. Sys.*, 2nd Dist. Montgomery No. 23944, 2011-Ohio-2180, to be factually distinguishable. In *Abroms*, the court of appeals held that an "as is" clause did not preclude claims for "breach of a separate and distinct term in the purchase contract which allegedly required [the defendant] to correct the window leakage" and for breach "by performing [the said] repairs negligently." *Id.* at ¶ 32. In the present case, the "additional disclosure" clause is not separate and distinct from the "as is" agreement and the duty to disclose defects on the Residential Property Disclosure Form.

{¶61} We further note that the strict application of this provision in the Purchase Agreement actually precludes all claims of fraud except those based on disclosures made on the Residential Property Disclosure Form, inasmuch as Benko and Zemon, as the buyers, have disclaimed reliance "upon any representations, warranties, or statements about the property * * * unless otherwise disclosed on this agreement or on the *Residential Property Disclosure Form*."

{¶62} The second assignment of error is without merit.

{¶63} For the foregoing reasons, the Order of the Lake County Court of Common Pleas, granting summary judgment in favor of Smyk, is affirmed. Costs to be taxed against appellants.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶64} Because I believe summary judgment is disfavored in this case, I respectfully dissent.

{¶65} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66 * * * (1993). Summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant 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 the evidence in the non-moving party's favor, that conclusion favors the movant. *See, e.g*., Civ.R. 56(C).

{¶66} "When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 121 * * * (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359 * * * (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfork Southern Corp*., 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, 'whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-252 * * * (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105 * * *

(1996)." *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6. (Parallel citations omitted.)

{¶67} Throughout the proceedings in this case, the trial court weighed the evidence in detail and did not interpret the facts as alleged in favor of the non-moving party. This writer notes that it is not up to the trial court to decide credibility in a summary judgment exercise. However, that is exactly what the court did. The court supported its dismissal of appellants' causes of action by inappropriately weighing and evaluating competing evidence, which is improper under the summary judgment standard. Instead of construing the evidence most strongly in favor of appellants, as the court was required to do, it did the exact opposite.

{¶68} In addition, this writer notes that Ohio is a notice-pleading, not a fact pleading, state. *Monroe v. Forum Health,* 11th Dist. Trumbull No. 2012-T-0026, 2012-Ohio-6133, ¶55. Thus, a plaintiff is not required to prove his or her case at the pleading stage. Civ.R. 8(A)(1) requires that a complaint include only "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." However, Civ.R. 9(B) provides that claims for fraud or mistake "shall be stated with particularity."

{¶69} Here, appellee never asserted that appellants failed to plead with particularity their intent to introduce evidence of fraud based on concealment and misrepresentations related to mold. Rather, the trial court improperly asserted this issue sua sponte and used a far too strict application of Civ.R. 9(B) instead of allowing appellants to amend under Civ.R. 15.

{¶70} Civ.R. 15(A) provides that a party may amend its pleading with the opposing party's written consent or the court's leave. "The court shall freely give leave when justice so requires." Civ.R. 15(A). Civ.R. 15(B) also allows pleadings to be constructively amended to conform to evidence. Civ.R. 15(B) allows an amendment to a pleading to be made at any time, even after judgment, and the rule is to be liberally construed in an effort to decide cases on their merits.

{¶71} Based on the facts presented, I believe this matter warrants a trial. For the foregoing reasons, I respectfully dissent.