

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

Rick Messer, et al.,	:	Case No. 25CA4117
Plaintiffs-Appellants,	:	<u>DECISION AND</u>
v.	:	<u>JUDGMENT ENTRY</u>
Jacqueline Lucero, et al.,	:	
Defendants-Appellees.	:	RELEASED 8/25/2026

APPEARANCES:

Alexander W. Cloonan, Coolidge Wall Co., L.P.A., Dayton, Ohio, and Michael P. McNamee, McNamee Law Group, LLC, Beavercreek, Ohio, for appellants.

John R. Haas, Ruggiero Salyer Haas LPA, Portsmouth, Ohio, for appellees Jacqueline and Frank Lucero.

Hess, J.

{¶1} Rick and Lisa Messer appeal from a judgment of the Scioto County Court of Common Pleas in favor of Jacqueline and Frank Lucero on claims the Messers made regarding issues with a home they purchased from the Luceros, including the absence of a concrete floor in the crawlspace. The Messers present seven assignments of error asserting that the trial court erred when it (1) determined that the Messers failed to show that the existence of a concrete floor was material to the transaction; (2) determined that the Messers failed to show that the Luceros knew the difference between an LSM floor and a concrete floor; (3) determined that the Messers failed to show that the Luceros had motive or intent to defraud as it pertained to the alleged concrete floor; (4) determined

that the Messers failed to show that they justifiably relied on the Luceros' representations as it pertained to the fraudulent misrepresentation claim; (5) determined that the Messers failed to show the existence of an LSM floor instead of a concrete floor was the cause of the moisture problems in the home; (6) determined that the Messers failed to show that they justifiably relied upon the Luceros' representations as it pertained to the negligent misrepresentation claim; and (7) granted the Luceros' motion for summary judgment as related to issues that the Luceros did not raise in their motion. For the reasons which follow, we overrule the fourth, sixth, and seventh assignments of error and affirm the trial court's judgment. This decision renders moot the first, second, third, and fifth assignments of error, so we need not address them.

I. FACTS AND PROCEDURAL HISTORY

A. Pleadings

{¶2} In September 2022, the Messers filed a complaint against the Luceros and Allen Fields which alleged the following. The Luceros were the owners of real property which they sold to the Messers. Fields was the sole proprietor of an unincorporated real estate brokerage firm doing business under the registered trade name "Gateway Property Exchange," which represented the Luceros during the sale. The defendants represented that the home's crawlspace had a concrete floor. After the sale, the Messers discovered there was no concrete barrier in the crawlspace, and as a result, excessive mold infected the property, and the mold was drawn throughout the property because the HVAC unit was exposed to the crawlspace. They also discovered other problems with the home, including, but not limited to, inoperable toilets, faulty plumbing, insufficient ventilation, improperly installed insulation, cupped hardwood flooring, bubbled linoleum, and septic

issues. They asserted claims for fraud, negligent misrepresentation, breach of contract, unjust enrichment, and promissory estoppel. The Luceros filed a third-party complaint against Distel Construction, Inc., Norman Swarey, and Chris Schneider.

B. Summary Judgment Proceedings

{¶3} The Luceros, Fields, Distel Construction, Inc., and Schneider filed summary judgment motions, and the Messers filed a motion for partial summary judgment. The Messers' motion sought summary judgment against the Luceros on the fraud claims against them. The fact section of the motion identified several issues with the home, including the absence of a concrete floor in the crawlspace, the impossibility of finishing the loft area, mold, and "wood beams which were cut too short, rotted wood, bubbling linoleum floors, cupped hardwood floors, separated floorboards, misplaced pipes, cracks in walls, doors which will not close, insulation which was installed upside down, and other negligent workmanship which stemmed from the construction of the home." In the law and argument section of the motion, the Messers asserted that for purposes of the motion, they alleged that the Luceros "committed fraud by: (a) misrepresenting the existence of a concrete floor in the crawlspace of the home; (b) misrepresenting the ability to finish the upstairs loft area; and (c) misrepresenting and grossly exaggerating the quality and condition of the allegedly new home." The only representations the Messers took issue with, aside from those specific to the crawlspace floor and ability to finish the loft area, were general representations by Mrs. Lucero that the home was "a custom, well-built quality home."

{¶4} The Luceros' motion asserted that they were entitled to summary judgment "because there is no genuine issue of material fact as to whether they committed fraud

on plaintiffs.” The Luceros set forth the elements of fraud and then stated, “Plaintiffs’ claims involve the existence or non-existence of concrete in the crawlspace, the alleged loft/theater room area, the septic system, and the quality of the build.” After setting forth arguments in subsections dedicated to the crawlspace, theater room, and septic system, the Luceros stated, “While defendants take the position that plaintiffs’ claims must fail and they are entitled to judgment as a matter of law based purely on the law and argument above, defendants further assert that plaintiffs’ claims must fail under case law specifically related to the sale of real estate.” Subsequently, they raised the doctrine of caveat emptor, argued the Messers improperly relied on language in a form which was not a substitute for a buyers’ inspection, and asserted that the contract included an integration clause and that neither the contract, nor the addendum to it, “included any mention of the issues plaintiffs now assert.”

{¶15} In their memorandum in opposition, the Messers maintained that the Luceros’ motion “only addresses Plaintiffs’ claims for fraud.” The Messers asserted that the Luceros motion argued that “Plaintiffs are unable to demonstrate that the representations which Defendants made about the concrete in the crawlspace, existence of livable loft area, and/or septic system were fraudulent,” “that Plaintiffs’ claims fail under the doctrine of caveat emptor,” and that the purchase agreement and addendum “bars Plaintiffs’ claims.” The Messers asserted that each argument lacked merit. They maintained that the doctrine of caveat emptor did not apply in this case. They claimed “the defects complained of in this lawsuit were hardly open to observation.” After making arguments about the crawlspace floor and loft area not being open to observation, the Messers stated, “The same can be said about Ms. Lucero’s representations on the

alleged high quality of the home. Those defects were not open to observation or discoverable with a reasonable inspection. Accordingly, caveat emptor will not apply.” The Messers then asserted that the Luceros made numerous fraudulent misrepresentations to them, alleged the Luceros committed fraud in the same three ways listed in the Messers’ motion for partial summary judgment, and incorporated by reference the arguments made in that motion. The Messers then made additional arguments about the crawlspace, theatre room, septic system, and integration clause, and they asserted that they were entitled to summary judgment, not the Luceros.

{¶6} The trial court issued a judgment entry resolving all the summary judgment motions. Although the Luceros broadly titled their motion as one for summary judgment, the court treated it as one for partial summary judgment on the fraud claims against them. The court granted in part and denied in part the Luceros’ motion and denied the Messers’ motion. The court explained that the doctrine of caveat emptor precludes recovery for a structural defect when “(1) the condition 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 seller.” The court dismissed the fraud claims as to mold/moisture, the foundation wall, flooring, HVAC, plumbing, and insulation. The court found that these issues “were all readily observable and discoverable,” that the Messers had “an unimpeded opportunity to inspect the premises,” and that they did not claim “any specific fraudulent misrepresentation or concealment as to these six claims.” The court found that to the extent they argued “general, or vague, statements about the quality of the home,” they offered no evidence that “these statements are false, known to be false or reasonable to be relied upon[.]” The court also

dismissed the fraud claims as to septic issues. The court found there were issues of material fact in dispute as to the fraud claims as to the crawlspace floor and attic area, so they would proceed to trial. The court also granted the summary judgment motions of Fields, Distel Construction, Inc., and Schneider and dismissed the claims against them.

C. Stipulation

{¶17} Prior to the bench trial, the Messers and Luceros stipulated that on October 2, 2019, the Luceros entered a contract with Exsell Realty Group LLC. An Exsell agent worked with the Luceros to list the property for sale through the Multiple Listing Service, which caused the listing to be posted on various websites, such as Zillow. All information about the property in the listing was provided by and approved by the Luceros. The listing stated, “Crawl space has a concrete floor and lighting.”

D. Witness Testimony

{¶18} Although several witnesses testified at trial on a range of topics, we will primarily summarize testimony pertinent to our analysis below.

1. Testimony of Lisa Messer

{¶19} Mrs. Messer testified that in October 2020, she learned about the home via a Zillow listing which stated that the crawlspace “has a concrete floor and lighting.” The same month, the Messers visited the property for about 20 minutes with an Exsell realtor and Mrs. Lucero. Mrs. Lucero said that Mr. Lucero built the home and “was going on about how well of a built house it was, the quality of everything.” The realtor and Mrs. Lucero never said Mrs. Messer could not look at anything in the home, but the Messers did not look in the crawlspace during this visit.

{¶10} On December 8, 2020, the Messers visited the property a second time with the Luceros for about 20 minutes. The Luceros told them about “all the extra things they did and the quality of it, the upgrades of the house.” Mr. Lucero said the crawlspace had a concrete floor and lighting. Having a concrete floor in the crawlspace was important to Mrs. Messer “[b]ecause it provided a vapor barrier.” She testified, “Anytime you put a concrete slab down, you have to have the vapor barrier underneath it.” The Luceros did not prevent her from looking at anything during the second visit, but the Messers again did not look in the crawlspace. Mrs. Messer believed what the Luceros said about the different areas of the home because Mr. Lucero “was the builder of the house.” When the Messers asked questions, he was fast to answer, used construction terms, and “seemed really knowledgeable.” She has no construction or engineering experience and had no reason to not believe what he said.

{¶11} Subsequently, the Luceros hired Phyllis Pertuset from Gateway as their realtor, and the Messers made a verbal offer which was accepted. On December 29, 2020, the Messers visited the property a third time for about 20 minutes to meet with Pertuset to “sign the papers.” During the visit, Pertuset talked about the crawlspace having a concrete floor and lighting. Mr. Messer went outside, and when he came back, indicated he had “just seen sand” in the crawlspace. The Messers went outside together for Mrs. Messer to look. The crawlspace door slides up and is “very heavy.” One must “kind of sit down on the ground and be able to like, use both hands and to like lift up to get it to latch,” which she is not strong enough to do herself. Mr. Messer did not know about the latch at the time and could only push the door “like so far.” He opened it to where she could peek about six to eight inches inside. She did not see concrete. She

saw a brown sandy material and “a little piece of plastic, maybe 3 by 3,” which was “like kind of pushed in the corner.” Mrs. Messer acknowledged there are lights in the crawlspace but testified that she did not know where they were. She testified that when the Messers went back inside, Pertuset “was like, yeah, it’s got a concrete floor” but said she would double check with the Luceros and “get back with you on that.”

{¶12} The Messers signed a purchase agreement and an addendum to it. They decided not to have any inspections. Mrs. Messer testified, “We believed everything we were told. It was brand new house [sic].” Mrs. Messer liked the Luceros. Mr. Messer worked with Mrs. Lucero’s brothers who lived nearby, Mrs. Messer’s stepdaughter and grandbaby had “been to their house,” and the Luceros were at her grandson’s first birthday party. She “had no reason not to believe them.”

{¶13} Later that day, Pertuset sent the Messers an email which stated, “Attached is your copy of everything you signed and now signed by the Sellers.” The email also stated, “And the sellers said there is [c]oncrete underneath that house Frank said when the builders were working under there, they just put plastic down to keep from getting dirty, so that is good.” In addition, the email stated, “Lisa at US Bank has everything she needs now to get things started and the appraisal ordered.” When asked if upon receiving this email, she was “comfortable in the representation about there being concrete underneath the house?” Mrs. Messer testified, “Yeah.” She testified that if Pertuset had come back and said the Luceros were wrong and there was no concrete underneath the house, “[w]e would’ve backed out of the deal” “[b]ecause then we wouldn’t have trusted them.”

{¶14} Evidence indicated the closing occurred on January 15, 2021. Mrs. Messer testified that a little over a month after moving in, she started to notice problems with the property. A few months after moving in, Mr. Messer talked to Mrs. Lucero about the crawlspace and said “now there’s a concrete floor in there. And she’s like, yeah. And he’s like, well, I don’t see it. So she’s like, well, let me check with Frank. So, she goes, I’ll get back with you.” On July 13, 2021, Mrs. Lucero sent a message stating, “Ok, Frank said yes it is full concrete floor, but the guys put some sand down, so they could crawl in there on something a bit softer than concrete. He said take a hammer and tap and you will see that it is concrete. Or a broom and sweep...” Mrs. Messer was asked if based on the “conversations that you collectively had before and after with the [Luceros] on the existence of a concrete floor, was it your understanding that it would have been beneath the sand or that it was the sand?” She testified, “The concrete floor was beneath the sand,” “[b]ecause Jacqueline stated that they put sand on top so the guys working down there could get around and it’d be softer on their knees.” Mrs. Messer testified that the representation that the concrete was beneath the sand was made “two times that I know of” and that she relied on the Luceros’ representations as to this fact. One of the two times she was referring to was presumably in the July 13, 2021 message. Mrs. Messer did not testify about when the second representation occurred.

{¶15} In February 2022, Mr. Messer went under the house to check some rattling pipes, and Mrs. Messer learned there was no concrete in the crawlspace; it was a brown sand-like substance. Mr. Messer dug down four inches looking for the concrete floor and did not see it. Then he pushed an approximately eight-inch screwdriver down and found no concrete. He found “mold all over the place” in the crawlspace. In March 2022, the

Messers sent Mrs. Lucero photos of the crawlspace and said it had no concrete floor. Mrs. Lucero responded in part, "Frank said he has no idea what would cause this. Frank said he saw Distels poured the concrete [sic], and even put concrete in the garage."

{¶16} Mrs. Messer learned a substance called LSM was used in the crawlspace. Other witnesses explained that LSM, or low-strength mortar, is not concrete; it is a cement-sand mix which is poured out of a concrete truck and sets up, but not as hard as concrete, and is diggable. Once LSM settles, it keeps its harder consistency for a while, but the top will deteriorate due to weather, and if LSM is placed in a muddy area, the area will be muddy again once it rains. One witness testified that after the footers were done, LSM was poured in the crawlspace because it was a "muddy mess," and Mr. Lucero wanted to do something to keep people from tracking mud everywhere, but the witness was unsure how the decision to use LSM was made.

2. Testimony of Rick Messer

{¶17} Mr. Messer testified that when he first read the property listing, the concrete crawlspace stood out to him; it meant that there was a vapor barrier and that anyone working in the crawlspace could use a creeper and "not get all dirty." When the Messers visited the property with the Luceros, Mr. Messer thought the Luceros were impressive, knowledgeable, and trustworthy. Mr. Lucero went on about the concrete floor and lighting in the crawlspace. Mr. Messer did not look himself because the Luceros "already said there was a concrete floor and lighting in there," he trusted them, and he had no reason to doubt them. Mr. Messer testified that he worked with Mrs. Lucero's two brothers, who were "super nice guys," and that his youngest daughter "has been to their house. I - -I don't know for what, but - -and they also know Mark Distel. My - - my daughter - -I don't

know if it's her daughter - -his daughter that hang out together or whatever, but she went to our grandson's birthday party." This contributed to his comfortableness with the Luceros.

{¶18} When the Messers first got to the property on December 29, 2020, Pertuset said the crawlspace had a "concrete floor and lighting, and you only see that in well-built houses." While Mrs. Messer and Pertuset talked, he went outside, lifted the crawlspace door, which swings in and up and was heavy, and peeked inside. He could see maybe 6 to 10 inches into the crawlspace. He did not see concrete. He saw what appeared to be a brown sandy material. He did not see plastic. He could not find the lights and did not think he asked anyone where the light switch was. He got Mrs. Messer to come outside, opened the crawlspace door "six to eight inches or so," and Mrs. Messer looked while standing up and then went back in the house.

{¶19} Mr. Messer told Pertuset "you know, I - -I don't really - -I don't know what I could see, but I didn't see any concrete." He testified that "she's like, there's concrete. She's like, but I'll doublecheck with the [Luceros]. I'm like, okay." When she checked with the Luceros, the response was "yes, there was concrete underneath there, so that's good." Even though Mr. Messer did not see the concrete, this response gave him comfort that it was there. He has no construction or engineering experience. When asked, "What was your understanding or thought process of where the concrete was?" he testified, "I was thinking maybe I - -it's like on in there or something. I - - you know, I don't know. I - - I don't pour concrete." When asked if he thought the concrete could have been underneath the material he observed, he testified, "It could have been." He denied ever telling Mrs. Lucero that he was going to bring contractors or inspectors to the house. He

chose not to do an inspection because it was a brand-new home, and the Luceros “talked it up. Everything in the listing was awesome.” In February 2022, he learned there was no concrete in the crawlspace. He would not have agreed to buy the home if he knew there was no concrete floor there.

3. Testimony of Frank Lucero

{¶20} Mr. Lucero testified that he has no prior construction experience and was not involved in the construction of the house, meaning he did not perform the physical work. He obtained blueprints and hired and paid people to perform the work. He acknowledged the blueprints called for a basement with a vapor barrier underneath a concrete slab and that he had the house built with a crawlspace instead. He told Mark Distel to “put some concrete” in the crawlspace “so the guys could walk on that while they were putting the floor joists [sic].” Mr. Lucero denied knowing anything about the Exsell listing stating that the crawlspace had a concrete floor. He testified, “I did tell them that we did put concrete there, because I told Mark . . . to put concrete in there.”

{¶21} When asked if he would agree today there is no concrete in the crawlspace, Mr. Lucero testified, “There is concrete.” When asked where it is, he said:

The concrete - -the concrete that Mark ordered, whatever it was, I called it slushy, because that's - -I didn't know what it was. You know, I don't pour concrete for nobody, so I don't know what it was, but I did tell Mark, put concrete there. And he ordered that slushy stuff and it came in a truck and it - -it came out of - -they poured it out and it did look like concrete to me. And they - - they just shoveled it off. It wasn't - - it didn't go from corner to corner, anything like that. They just shoveled it off in there.

He testified that it came out of a cement truck. When asked, “And you know that that was concrete that was poured in? he testified, “I don't know if it was or not,” but “it looked like concrete to me.” When asked, “So, you're not prepared today to admit that it is not

concrete in there?” he testified, “No, it - -for me it’s concrete.” When asked about calling the material “slush,” he testified, “Yeah. That’s what I - - it looked like to me when they poured it. It was real slushy.” When asked if he would agree there was not a concrete floor, he testified, “It was - - I never said it was - -I never told anybody it was [a] concrete floor. I said we poured concrete down there.”

{¶22} When asked about his wife’s message indicating that he said the crawlspace had a “full concrete floor,” that guys put sand on it to make it softer, and that the Messers should tap with a hammer or sweep, Mr. Lucero testified that he did not think he said it was a full concrete floor. It was not a full concrete floor. He did not recall if he told his wife that guys put sand in the crawlspace because he was “in bad shape” at the time. He did recall making the hammer comment. When asked about the broom comment, he testified, “Oh, yeah. If somebody was in there bringing in stuff and - - because I don’t know what those guys were doing, the plumbers. And if they’re bringing in stuff and putting - - and putting sand underneath that or whatever.” The last time he looked in the crawlspace was when “they poured - -put in the trusses, the floor - -the floor joists.”

4. Testimony of Jacqueline Lucero

{¶23} Mrs. Lucero testified she has no construction experience and had no idea what LSM was until this case came about. When asked, “[A]s we sit here today you - - you don’t know what material is in [the crawlspace]?” she testified, “It was concrete.” She testified that she knew this because she stood on it. Then she conceded that she did not know for a fact whether it was concrete or LSM. She testified that “the concrete truck backed up, put the side out, and the stuff came out.” They needed it to dry thoroughly,

so plastic was put over it “to keep the snow from spitting on it,” and one to three days later, she stood on it when they were taking the plastic off. She did not pay much attention to what it looked like then but testified that it was grey in color and that concrete is kind of grey in color. When asked if she understood today that there was not in fact a “full concrete floor” in the crawlspace, she testified, “I still thought - it was concrete to me. I saw concrete down there.” She testified, “I don’t know where the concrete is now. I couldn’t tell you, because I haven’t been back there.” When asked if she was suggesting the concrete was removed, she testified, “Anything’s possible.” When asked if there was ever sand in the crawlspace, she testified, “There was.” She did not know how it got there. She testified that she asked Mr. Lucero, “and he’s the one that said they could have put it back there for - to crawl on, to make it a little softer than the - the concrete that was jagged and - because the snow and stuff had started hitting it, and we were trying to keep that dry and have it dry up by putting plastic over it.”

{¶24} Mrs. Lucero testified that she was in the crawlspace after it was enclosed. She testified that before the Messers bought the house, Mr. Messer said he wanted to bring contractor friends to look in the crawlspace and she

said, look I don’t want somebody messing up the door, because somebody had already taken the ceiling in the master bedroom, had broken that and that had to be replaced. We don’t know who did it, but I didn’t want that fancy, nice little door that Noran Swarey¹ built to be messed up without somebody knowing how to latch it up. He was told all about that. . . . And where the lights were and where the switches were.

She got in the crawlspace herself to latch open the door, which “wasn’t heavy.” She did not testify to seeing anyone enter the crawlspace after she did this.

¹ The transcript indicates Mrs. Lucero referred to “Noran” Swarey, but third-party defendant Swarey’s first name is “Norman.”

5. Testimony of Phyllis Pertuset

{¶25} Pertuset testified that during her initial conversation with the Luceros, she thought they mentioned the crawlspace floor was concrete. At some point, Mrs. Lucero mentioned standing on the floor, but Pertuset could not recall when that comment was made. Pertuset met the Messers at the home once on December 29, 2020. When asked if she remembered a discussion with the Messers about the existence or nonexistence of a concrete floor in the crawlspace during this meeting, she testified, “Not that day. I know they sent an email or - -and asked me, and then I told them I would ask - -ask the sellers.” Later, she recalled telling the Messers it was her understanding there was a concrete floor but that she would check with the Luceros.

E. Verdict

{¶26} The trial court dismissed the Messers’ complaint and the third-party complaint against Swarey. Relevant to this appeal, after explaining the doctrine of caveat emptor the court found it was undisputed that the crawlspace was “open to observation and discoverable to a reasonable inspection” and that the Messers had the opportunity to inspect it before entering the purchase contract. Thus, to prevail on their fraudulent misrepresentation claims, they had to show fraud by the Luceros but “failed to meet their burden in several respects.” The court stated:

Plaintiffs have failed to show that the existence of a concrete floor in the crawlspace was material to the transaction. They have testified that this was an important factor to them in purchasing the home; however, they have failed to show that the existence of a LSM, or mortar floor, instead of a concrete floor was the cause of their moisture problems in the home. Plaintiffs have also failed to show that [Defendants] knew the difference between the two types of floors, or that they had some motive or intent to defraud based on this difference. Plaintiffs have referenced the post-closing comments about moving the sand to tap the concrete with a hammer as proof of intent to defraud, however, this evidence supports Defendants[']

contention that they believed the LSM was the same as concrete. [Defendants] testified about the LSM being delivered in a concrete truck. Most importantly, Plaintiffs have failed to show they were justified in relying on these representations. Plaintiffs had the opportunity to enter the crawlspace to inspect prior to signing the contract and found sand. They then declined to inspect further and entered into the purchase contract. They were not justified in relying upon [Defendants'] representations given their own findings when physically inspecting the property.

{¶27} In holding that the Messers failed to prove their negligent misrepresentation claims as to the crawlspace, the court stated:

This Court has discussed above that [Plaintiffs] were not justified in relying on the representations of [Defendants] as to the concrete/LSM on the floor of the crawlspace They saw the sandy like substance in the crawlspace, instead of concrete, and chose not to investigate further, waiving further inspection.

And because the court found the Messers did not justifiably rely on the Luceros' representations, the court found that it did not need to address whether caveat emptor applied to the negligent misrepresentation claims.

II. ASSIGNMENTS OF ERROR

{¶28} The Messers present seven assignments of error:

First Assignment of Error: The Trial Court erred when it determined that the Messers failed to show that the existence of a concrete floor was material to the transaction.

Second Assignment of Error: The Trial Court erred when it determined that the Messers failed to show that the Luceros knew the difference between an LSM floor and a concrete floor.

Third Assignment of Error: The Trial Court erred when it determined that the Messers failed to show that the Luceros had motive or intent to defraud as it pertained to the alleged concrete floor.

Fourth Assignment of Error: The Trial Court erred when it determined that the Messers failed to show that they justifiably relied upon the Luceros' representations as it pertained to the fraudulent misrepresentation claim.

Fifth Assignment of Error: The Trial Court erred when it determined that the Messers failed to show that the existence of an LSM floor instead of a concrete floor was the cause of the moisture problems in the home.

Sixth Assignment of Error: The Trial Court erred when it determined that the Messers failed to show that they justifiably relied upon the Luceros' representations as it pertained to the negligent misrepresentation claim.

Seventh Assignment of Error: The Trial Court erred in granting the Luceros' motion for summary judgment as related to issues that the Luceros did not raise in their motion.

III. FRAUDULENT AND NEGLIGENT MISREPRESENTATION CLAIMS

{¶29} In the first, second, third, fourth, and fifth assignments of error, the Messers challenge the trial court's determinations regarding their fraudulent misrepresentation claims, and in the sixth assignment of error, they challenge the trial court's determination regarding their negligent misrepresentation claims.

A. Standard of Review

{¶30} The Messers contend the trial court misapplied the law to the facts and acted against the manifest weight of the evidence. "Generally, we review an issue regarding whether a trial court misconstrued or misapplied the law de novo." *State v. Raines*, 2024-Ohio-3236, ¶ 63 (4th Dist.), citing *State v. Gavin*, 2022-Ohio-1287, ¶ 12 (4th Dist.). In evaluating whether a judgment is against the weight of the evidence, an appellate court

weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed.

Moreover, when reviewing the evidence under this standard, we are aware that the weight and credibility of the evidence are to be determined by the trier of fact; we thus defer to the trier of fact on these issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice

inflections, and to use these observations to weigh their credibility. The trier of fact is free [to] believe all, part, or none of any witness's testimony.

Ultimately, a reviewing court should find a trial court's decision is against the manifest weight of the evidence only in the exceptional case in which the evidence weighs heavily against the decision.

(Citations omitted.) *Wootten v. Culp*, 2017-Ohio-665, ¶ 19-21 (4th Dist.).

B. Elements of Claims

{¶31} To establish a fraudulent misrepresentation claim, a plaintiff must prove: (1) a representation; (2) material to the transaction at hand; (3) 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; (4) with the intent to mislead another into relying upon it; (5) justifiable reliance upon the representation; and (6) a resulting injury proximately caused by the reliance. See *Hubbard Family Trust v. TNT Land Holdings, LLC*, 2014-Ohio-772, ¶ 22 (4th Dist.), citing *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69 (1986), paragraph two of the syllabus. The Supreme Court of Ohio has stated:

The elements of negligent misrepresentation are as follows: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is 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."

(Emphasis in original.) *Delman v. Cleveland Heights*, 41 Ohio St.3d 1, 4 (1989), quoting 3 Restatement of the Law 2d, Torts, § 552(1), at 126-127 (1965). Initially, we consider the justifiable reliance element both types of claims share, which is addressed in the fourth and sixth assignments of error.

C. Messers' Position

{¶32} In their fourth assignment of error, the Messers contend the trial court erred when it determined they failed to show that they justifiably relied on the Luceros' representations as it pertained to the fraudulent misrepresentation claims. They claim the court's reasoning is not supported by the facts or Ohio law. The Messers maintain that they were "absolutely justified" in relying on the Luceros' representations about the concrete floor. They claim the representations were made after the Luceros "touted the high quality of the home." The Messers assert that they lacked construction experience, so when they had questions, they asked the Luceros who "responded immediately and with confidence." They assert that like the buyers in *Brewer v. Brothers*, 82 Ohio App.3d 148 (12th Dist. 1992), and *Mancini v. Gorick*, 41 Ohio App.3d 373 (9th Dist. 1987), they relied on the Luceros as the ones who built the home and thus had superior knowledge over them. The Messers also claim that they knew the Luceros through family and testified that their interactions and "budding relationship" with the Luceros contributed to the trust built between the parties.

{¶33} The Messers claim that the trial court misapplied the law because it seemed intent on requiring them to trust their own eyes and not rely on the Luceros' representations when they saw what appeared to be sand in the crawlspace. They quote *Klasa v. Rogers*, 2004-Ohio-4490, ¶ 24 (8th Dist.), for the position that once a buyer is alerted to a possible defect in a home, the buyer must either "(1) make further inquiry of the owner, who is under a duty not to engage in fraud, or (2) seek the advice of someone with sufficient knowledge to appraise the defect." They assert that when they looked in the crawlspace and saw no concrete, they chose the first option and asked the Luceros,

via Pertuset, whether the crawlspace had a concrete floor. They assert that the Luceros had a duty to tell them the truth and not provide misleading impressions but did neither. They claim that once the Luceros responded that there was concrete, any duty they had to inspect the property terminated immediately. They assert that “this is not a situation where the misrepresentation was clear and obvious” because the crawlspace was “beneath the home in the dark” and was not an “easily accessible area,” so it was appropriate for them to inquire of the Luceros, who had a duty to tell the truth. And based on all the circumstances, the Messers claim they justifiably relied on the Luceros’ representations about the crawlspace.

{¶34} In their sixth assignment of error, the Messers contend the trial court erred when it determined they failed to show that they justifiably relied on the Luceros’ representations as it pertained to the negligent misrepresentation claims. In their argument, the Messers incorporate by reference the arguments made under their fourth assignment of error.²

D. Analysis

{¶35} “Generally, the “question of justifiable reliance is one of fact and requires an inquiry into the relationship between the parties.”” *Bender v. Logan*, 2016-Ohio-5317, ¶ 53 (4th Dist.), quoting *Mar Jul, L.L.C. v. Hurst*, 2013-Ohio-479, ¶ 61 (4th Dist.), quoting *Crown Property Dev., Inc. v. Omega Oil Co.*, 113 Ohio App.3d 647, 657 (12th Dist.1996). The court “must consider the nature of the transaction, the form and materiality of the representation, the relationship of the parties and their respective means and knowledge,

² The Messers also make an argument as to why their negligent misrepresentation claims are not barred, but this argument is not pertinent to the trial court’s rationale for rejecting their claims or to the assignment of error, which focus solely on the issue of justifiable reliance.

as well as other circumstances.” *Hubbard*, 2014-Ohio-772, at ¶ 30 (4th Dist.), citing *Farris Disposal, Inc. v. Leipply’s Gasthaus, Inc.*, 2005-Ohio-6737, ¶ 18 (9th Dist.), quoting *Radice Partners, Ltd. v. Angerman*, 1991 WL 6138 (9th Dist. Jan. 16, 1991). “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.* at ¶ 33, quoting *Trepp, LLC v. Lighthouse Commercial Mtge., Inc.*, 2010-Ohio-1820, ¶ 21 (10th Dist.), citing *Lepera v. Fuson*, 83 Ohio App.3d 17, 26 (1st Dist.1992).

{¶36} The trial court did not err when it determined that the Messers failed to show justifiable reliance for purposes of the fraudulent and negligent misrepresentation claims. Initially, the Messers had no apparent reason to doubt the veracity of representations that the crawlspace had a concrete floor because they did not look in the crawlspace. But during their third visit to the home, they looked in the crawlspace and saw a sandy material, not concrete. The Messers raised the issue with the Luceros’ agent, who said the floor was concrete but then implied she had no personal knowledge of the matter, telling the Messers that she would double-check with the Luceros.

{¶37} In their appellate brief, the Messers claim that when they signed the purchase agreement on December 29, 2020, they trusted and relied on the Luceros’ response to the inquiry, i.e., that there “is [c]oncrete underneath that house,” which was given via email from the Luceros’ agent that same day. But the parts of the record the Messers cite do not indicate that they received the response before signing the purchase agreement. For instance, in one of those parts of the record, Mrs. Messer agreed with the statement that upon receiving the email, she was “comfortable in the representation

about there being concrete underneath the house” and testified that if the agent had come back and said there was no concrete underneath the house, the Messers “would’ve back out of the deal.” But she did not testify that the Messers signed the purchase agreement after receiving the email, and other evidence indicates that the Messers signed the agreement before receiving it. The email itself states that the agent attached to it a copy of everything the Messers signed, which was “now signed by the Sellers,” and that “Lisa at US Bank has everything she needs now to get things started and the appraisal ordered.” And there is evidence that about 15 minutes after sending the email, the agent sent Mrs. Lucero the signed contract and other documents and said, “I have sent everything to US Bank and to the [Messers] so things are underway!”

{¶38} But even if the Messers relied on the Luceros’ response by not backing out of the deal before closing, and even one interprets the response that there “is [c]oncrete underneath that house” to mean that the crawlspace had a concrete floor, the trial court could conclude that the Messers’ reliance on that response was not justifiable. The Messers accurately quote case law stating that (1) “[w]here a distinct and definite representation is made by the seller of real estate, the buyer is entitled to rely upon it,” *Klasa*, 2004-Ohio-4490, at ¶ 25 (8th Dist.); (2) “if a distinct and definite representation is made by the vendor of real estate, the vendee is entitled to rely upon it and not make additional inquiry,” and “[i]t is up to the vendor, when asked, to reveal all,” *Alpern v. Purcell*, 1981 WL 4437, *2 (11th Dist. Feb. 2, 1981); and (3) “the buyer’s duty to inspect terminates when the seller or its agent responds to the buyer’s inquiry as to a specific condition, thereby precluding application of the doctrine of caveat emptor,” *Brewer*, 82 Ohio App.3d at 153 (12th Dist.). They also accurately quote *Klasa*’s statement about a

buyer who is aware of a possible problem having a duty to either make further inquiry of the owner, who has a duty to not engage in fraud, or seek advice from someone with sufficient knowledge to appraise the defect. However, the suggestion that these statements necessitate a conclusion that the Messers' reliance on the Luceros' response was justifiable as a matter of law is not well taken.

{¶39} In *Klasa*, a seller said there was a slight basement dampness problem on one wall with heavy rain, nothing indicated there was a more serious problem when the buyer viewed the basement pre-sale because the walls had been painted and the problem occurred only when it rained, the buyer had a more serious water problem after moving in, and the appellate court held the buyer was not sufficiently alerted to a possible defect requiring further inquiry and affirmed a finding of fraud. *Klasa* at ¶ 3-4, 14, 19, 24, 26. In *Alpern*, the sellers said the basement had no serious water seepage problem, the buyers could not find a defect when they inspected it pre-sale because the walls had been painted and the weather was dry, the buyers had serious water problems post-sale, and the appellate court affirmed a finding of fraud. *Alpern* at *1, 3. And in *Brewer*, one of the sellers who was a builder and rewired the home's electrical system said the buyer had nothing to worry regarding the electrical work, so the buyer chose not to have an electrical inspection done. *Brewer* at 150. The buyer discovered extensive problems with the work post-sale, and two electricians testified that the defects were not open to observation and could not have been discovered by the average layperson. *Brewer* at 150, 153. The appellate court held that the buyer had a right to rely on the representation because the seller had superior knowledge of the electrical system and that when the representation was made, the buyer's duty to inspect terminated, so the trial court erred when it found

the defect was waived due to an inspection addendum to the contract. *Id.* at 152-154. Thus, in all three cases, the buyers had no reason to doubt the veracity of the sellers' representations until after the sale, so the buyers did not make any additional inquiries of the sellers, and the appellate courts had no occasion to address whether the buyers justifiably relied on any representations the sellers made in response to such inquiries.

{¶40} Again, justifiable reliance is generally a question of fact. *Bender*, 2016-Ohio-5317, at ¶ 53 (4th Dist.). And again, “[r]eliance 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.” *Hubbard*, 2014-Ohio-772, at ¶ 33 (4th Dist.), quoting *Trepp, LLC*, 2010-Ohio-1820, ¶ 21 (10th Dist.). Conversely, reliance is not justified if the representation appears unreasonable on its face or if, under the circumstances, there is apparent reason to doubt its veracity.

{¶41} In this case, the Messers had apparent reason to doubt the veracity of the Luceros' response. At the time of the sale, the Messers may have felt they had a “budding” personal relationship with the Luceros, but evidence suggests the relationship was still primarily that of buyers and sellers, with communications mainly focused on the sale of the home. The Luceros' response to the Messers' inquiry, even if interpreted to mean that the crawlspace had a concrete floor, did nothing more than repeat the same representations the Luceros made before the Messers looked in the crawlspace. The response did not offer any explanation as to why the Messers saw sand, not concrete, when they looked in the crawlspace. And there was no evidence presented at trial that

prior to closing, the Luceros offered any explanation for the sand or represented that the concrete floor was underneath it.³

{¶42} The Messers' belief that the Luceros possessed superior information about the crawlspace floor did not allow them to disregard the unexplained sand. The Messers direct our attention to the following statement of law: "Where the means of obtaining the information in question were not equal, the representations of the person believed to possess superior information may be relied upon." *Andrew v. Power Marketing Direct, Inc.*, 2012-Ohio-4371, ¶ 62 (10th Dist.), quoting *Fort Washington Resources, Inc. v. Tannen*, 858 F.Supp. 455, 460 (E.D.Pa. 1994). But "[a]n individual has no right to rely on a representation when the actual facts are equally open to both parties." *Mar Jul, L.L.C.*, 2013-Ohio-479, at ¶ 63 (4th Dist.), quoting *Takis L.L.C. v. C.D. Morelock Props., Inc.*, 2008-Ohio-6676, ¶ 30 (10th Dist.).

{¶43} The fact that the crawlspace floor was not concrete was equally open to the Messers and the Luceros. Even if the crawlspace was dark when the Messers looked inside it and was not easily accessible, the fact remains that it was accessible. The Messers assert that Mrs. Lucero's July 13, 2021 comments about the sand "prove that the concrete floor would have been concealed and latent." But these post-closing comments do not change the fact that the floor, and the fact that it was not concrete, was open to observation. And even during their cursory glance into the crawlspace, the

³ We observe that in the Luceros' appellate brief, they claim they told the Messers to sweep the sand aside on December 29, 2020, based on some testimony Mr. Messer gave. But the Messers' counsel objected to this testimony, explaining that he believed there was no conversation about sweeping "at that visit," and Mr. Messer testified, "No, there wasn't." And as the Messers point out, evidence indicates the sweeping comment was made after closing.

Messers, despite being laypersons, could tell that the portion of the floor in view was sandy, not concrete.

{¶44} Contrary to what the Messers suggest, they are not similar to the buyers in *Brewer* and *Mancini* in their reliance on the Luceros as the ones who built the home. That the alleged defect in this case was open to observation and discoverable by the Messers as laypersons distinguishes the alleged defect in this case from the electrical work in *Brewer*. In *Mancini*, one of the sellers was the architect and general contractor of the home when it was built, and the buyer claimed he did not have an inspection because he relied on this professional expertise in believing the house was constructed in a workmanlike manner, free of latent defects. *Mancini*, 41 Ohio App.3d at 373, 375 (9th Dist.). When the buyer tried to resell the home, an inspector hired by a potential buyer discovered the rafters supporting the roof were an improper size and not adequately supported, and the potential buyer did not buy the home. *Id.* at 373. The appellate court reversed a grant of summary judgment to the sellers, explaining that a claim of fraudulent concealment will overcome an “as is” clause in a contract, that a duty to speak may arise when one party imposes confidence in other because of that person’s position, and the other party knows of this confidence, and that there was a question of fact as to whether the confidence in what the seller/architect implied was reasonable and sufficient to nullify an “as is” clause in the contract. *Id.* at 373-375. *Mancini* did not hold that there was in fact justifiable reliance, and in any event, while the rafters in *Mancini* were possibly open to observation, it is not evident that a layperson would be able to tell from looking at them that they were an improper size and not adequately supported, whereas here, the alleged defect was discoverable by the Messers as laypersons.

{¶45} Based on the foregoing, we conclude the trial court did not err when it determined that the Messers failed to show that they justifiably relied on the Luceros' representations. The court did not misapply the law, and its determination was not against the manifest weight of the evidence. Accordingly, we overrule the fourth and sixth assignments of error. Because justifiable reliance is a necessary element of fraudulent misrepresentation, this decision renders moot the first, second, third, and fifth assignments of error, which challenge the trial court's determinations regarding other elements of fraudulent misrepresentation as to the crawlspace floor. Therefore, we need not address them. App.R. 12(A)(1)(c).

IV. SUMMARY JUDGMENT

{¶46} In their seventh assignment of error, the Messers contend the trial court erred in granting the Luceros' motion for summary judgment as related to issues that the Luceros did not raise in their motion. They assert that the court granted the Luceros summary judgment on their claims regarding mold/moisture, the foundation wall, flooring, HVAC, plumbing, and insulation even though the Luceros did not move for summary judgment on any of these specific issues. The Messers maintain that granting summary judgment on a basis not raised deprives the party opposing summary judgment of any opportunity to respond and constitutes reversible error. They claim that even though the Luceros' motion "was not labeled or argued as a 'partial' motion for summary judgment, the motion was confined to three areas: the crawlspace, the theater room, and the septic system." The Messers assert that when they responded to the motion, "they focused on those issues only." And though they claimed there were damages caused by moisture, like the mold and flooring issues, "those were outside the scope of the Luceros' motion."

So the court's "attempt to address these issues *sua sponte* was done without legal authority."

{¶47} "We review a trial court's decision on a motion for summary judgment de novo." *Troon Mgt., Ltd. v. Adams Family Trust*, 2023-Ohio-3489, ¶ 19 (4th Dist.), citing *Harter v. Chillicothe Long-Term Care, Inc.*, 2012-Ohio-2464, ¶ 12 (4th Dist.). "We afford no deference to the trial court's decision but rather conduct an independent review to determine whether summary judgment is appropriate." *Id.*, citing *Harter* at ¶ 12. "A summary judgment is appropriate only when: (1) there is no genuine issue of material fact; (2) reasonable minds can come to but one conclusion when viewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to judgment as a matter of law." *Id.*, quoting *Hawk v. Menasha Packaging*, 2008-Ohio-483, ¶ 6 (4th Dist.).

{¶48} In this case, the only ground on which the Messers challenge the summary judgment decision is that the trial court *sua sponte* granted summary judgment to the Luceros on issues for which they did not move for summary judgment. "It is reversible error to award summary judgment on grounds not specified in the motion for summary judgment." *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 2009-Ohio-1523, ¶ 27, quoting *Patterson v. Ahmed*, 2008-Ohio-362, ¶ 14 (6th Dist.). "A party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." *Troon Mgt., Ltd.* at ¶ 29, quoting *Mitseff v. Wheeler*, 38 Ohio St.3d 112 (1988), syllabus. "By relying on an unargued ground as a basis for awarding summary judgment, a court denies the nonmoving party that opportunity." *Id.*, citing *Sawicki* at ¶ 27. However,

we have rejected the contention that a trial court erred by ruling on an issue not raised in a summary judgment motion where the nonmoving party raised and argued the issue in their opposition memorandum because we did not agree that they were deprived of an opportunity to submit evidence regarding the issue. *Addison Holdings, LLC v. Fox, Byrd & Co., P.C.*, 2022-Ohio-4784, ¶ 96 (4th Dist.).

{¶49} The trial court did not err in granting the Luceros' summary judgment regarding the Messers' fraud claims as to mold/moisture, the foundation wall, flooring, HVAC, plumbing, and insulation. The motion indicated it applied to the fraud claims against the Luceros in their entirety, broadly arguing that the Luceros were entitled to summary judgment "because there is no genuine issue of material fact as to whether they committed fraud on plaintiffs." As the Messers concede in their reply brief, the Luceros moved for summary judgment on the existence or non-existence of concrete in the crawlspace, the alleged loft/theatre room area, the septic system, and the quality of the build. Although the Luceros' motion does not explicitly state that they sought judgment on the issues of mold/moisture, the foundation wall, flooring, HVAC, plumbing, and insulation, to the extent those issues were independent of the more specific issues identified in the motion, they fall under the general category of the quality of the build.⁴

{¶50} Treatment of these issues as falling within the general category of quality of the build is consistent with the Messers own motion for partial summary judgment, which pertained to the fraud claims against the Luceros in their entirety. The fact section of the motion identified multiple problems with the home, but the only representations the

⁴ During trial, the court indicated that it would still consider evidence of moisture damage as part of the claims related to the crawlspace floor if the Messers showed a nexus between the damage and the lack of a concrete floor.

Messers took issue with were ones specific to the crawlspace floor and ability to finish the loft area and general representations by Mrs. Lucero that the home was “a custom, well-built quality home.” And the motion only set forth three ways the Luceros committed fraud: “(a) misrepresenting the existence of a concrete floor in the crawlspace of the home; (b) misrepresenting the ability to finish the upstairs loft area; and (c) misrepresenting and grossly exaggerating the quality and condition of the allegedly new home.” Thus, the Messers themselves lumped issues unrelated to the crawlspace floor and ability to finish the upstairs loft area into a single, general category encompassing misrepresentations regarding the quality and condition of the home.

{¶51} The Luceros’ motion did not contain a specific subsection dedicated to the quality of the build, but it is evident from the Messers’ memorandum in opposition that they interpreted the Luceros’ motion as seeking summary judgment on the fraud claims in their entirety, including any issues related to the quality of the build. In arguing about the inapplicability of the doctrine of caveat emptor, the Messers generally asserted that “the defects complained of in this lawsuit were hardly open to observation.” They later made a specific argument about defects related to Ms. Lucero’s representations on the “alleged high quality of the home,” asserting that “[t]hose defects were not open to observation or discoverable with a reasonable inspection.” In addition, the Messers alleged the Luceros committed fraud in the same three ways set forth in the motion for partial summary judgment, which again, pertained to the fraud claims in their entirety, and the Messers incorporated by reference the arguments made in that motion into their memorandum in opposition.

{¶52} Given these circumstances, we conclude that the trial court did not err by granting the Luceros' motion for summary judgment as related to issues that they did not raise in their motion. The court properly treated the Luceros' motion as seeking summary judgment on the fraud claims against them in their entirety. But even if it did not, the Messers raised and argued the entirety of the fraud claims in their response, so they were not deprived of an opportunity to submit evidence regarding the mold/moisture, the foundation wall, flooring, HVAC, plumbing, and insulation issues. And because the Messers do not challenge the merits of the summary judgment decision, we need not address them. Accordingly, we overrule the seventh assignment of error.

V. CONCLUSION

{¶53} We overrule the fourth, sixth, and seventh assignments of error, and affirm the trial court's judgment. The first, second, third, and fifth assignments of error are moot.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that appellants shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 22, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.