[Cite as *Varwig v. JA Doyle, L.L.C.*, 2023-Ohio-2251.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

David and Mary Varwig	Court of Appeals No. L-22-1035
Appellants	Trial Court No. CI0202002533
v.	
JA Doyle, LLC, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: June 27, 2023

* * * * *

{¶ 1} This matter is before the court on appellants', David and Mary Varwig, motion for reconsideration, which was filed on February 3, 2023.[1] For the following reasons, we grant appellants' application for reconsideration and reverse the judgment of the Lucas County Court of Common Pleas.

[1] When appellants originally filed their motion, several pages were missing. Appellants were notified of the issue, and filed an amended motion with the missing pages included on February 28, 2023.

{¶ 2} On January 25, 2023, we issued our decision in appellants' direct appeal, in which the majority held that appellants' claim for failure to build in a workmanlike manner based upon defective floor joists was subject to dismissal because there was "no evidence that the joists were hidden from revelation by an inspection reasonably available to appellants." *Varwig v. JA Doyle LLC*, 6th Dist. Lucas No. L-22-1035, 2023-Ohio-210, ¶ 26. Moreover, we held that appellants' claims for negligent design and negligent supervision were time-barred because they accrued more than four years before appellants filed their complaint. *Id.* at ¶ 33. Consequently, we affirmed the trial court's grant of summary judgment to appellees, JA Doyle, LLC, JA Doyle Corporation, and Josh Doyle, individually. *Id.* at ¶ 34.

{¶ 3} The majority's determination that the trial court properly dismissed appellants' claim for failure to build in a workmanlike manner on summary judgment garnered a dissent. The dissent disagreed with the manner in which the majority applied the Ohio Supreme Court's decisions in *Mitchem v. Johnson*, 7 Ohio St.2d 66, 218 N.E.2d 594 (1966), and *Jones v. Centex Homes*, 132 Ohio St.3d 1, 2012-Ohio-1001, 967 N.E.2d 1199, to the facts in this case.

{¶ 4} As to the majority's application of the *Mitchem* test, the dissent found the majority erroneously determined that, since the joists were exposed at the time of purchase, a visual inspection could have discovered the defective load-bearing capability of the joists prior to purchasing the home without any testing of the load-bearing capacity

of the joists. *Varwig* at ¶ 38 (Zmuda, J., dissenting). The dissent found that an inspection would not have revealed whether the floor joists were inadequate to support the weight of the floor above, because the load-bearing qualities of the joists had not yet manifest in any visible way and were thus "not observable until the tile flooring separated from the subfloor." *Id.*

{¶ 5} The dissent went on to reject the notion that appellants' hiring of an engineer to conduct a structural inspection after the flooring issue manifested meant that such an inspection was reasonably available to appellants prior to purchase. According to the dissent, the majority's reading of the *Mitchem* test would "compel prospective homebuyers to hire a host of specialized experts in the fields of structural and chemical engineering in order to protect their rights and preserve their ability to litigate claims against builders/contractors." *Id.* at ¶ 39 (Zmuda, J., dissenting).

{¶ 6} In sum, the dissent found: "The fact that the joists were visible does not account for the fact that the weight resting upon the joists and the load-capability of those joists was an unknown issue at the time of purchase" and therefore the load-bearing issue was not subject to proper analysis by means of sight alone. *Id.* at ¶ 42 (Zmuda, J., dissenting). In the dissent's view, there was a genuine issue of material fact as to whether the alleged defect involving the load-bearing capacity of the floor joists was hidden from revelation by an inspection reasonably available to appellants, as opposed to the majority's framing of the issue which only considered whether the joists were visible to

view without determining whether *Mitchem* required a structural analysis beyond mere viewing. *Id.* at ¶ 43 (Zmuda, J., dissenting).

{¶ 7} Following our decision in *Varwig*, appellants timely filed the present motion seeking reconsideration under App.R. 26(A)(1).

{¶ 8} When reviewing a motion for reconsideration, we must determine "whether the motion * * * calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278 (10th Dist.1981), syllabus.

{¶ 9} Concerning their claim for failure to build in a workmanlike manner, appellants contend we erroneously interpreted the test in *Mitchem* to require home inspectors to "calculate loads for floor joists, wind and snow loads of roof rafters and the ability of the foundation to carry the weight of [the] entire structure."

{¶ 10} At the outset, appellees argue that appellants cannot base their reconsideration request upon this issue because they did not raise it as an assignment of error in their brief on direct appeal. Appellees are misguided in this respect. While it is true that appellants did not expressly raise the *Mitchem* test in their appellate brief, it is also clear the majority in *Varwig* examined *Mitchem* at length and used the test articulated in *Mitchem* to come to its conclusion that the trial court properly granted summary judgment to appellees on appellant's claim for breach of duty to build in a

workmanlike manner. The focus of the present motion is the appropriateness of our analysis in *Varwig*, which included our examination and application of *Mitchem*. Thus, we find that this issue is properly before us on reconsideration, and we will proceed to address it accordingly.

{¶ 11} In *Mitchem*, the plaintiffs' home, which they purchased from the builder before construction was completed, suffered water damage because it was built in a low portion of a lot with surface-water problems and without a foundation drainage system. *Mitchem* at 67. Consequently, plaintiffs brought suit against the builder, seeking damages in the amount of $3,800. *Id.* Ultimately, the matter proceeded to a jury trial that led to a verdict in favor of plaintiffs in the amount of $2,258.95. *Id.* at 68.

{¶ 12} The builder appealed, and this court reversed and remanded the matter to the trial court for a new trial because we found that the trial court erred in providing the jury with the following special written instruction:

> "'I instruct you that, as a matter of law, when parties purchase a home from a builder and construction is not yet completed, the law implies certain conditions and warranties in that contract of sale. Among these conditions and warranties, it is an implied term of the sale that the builder will complete the house in such a way that it will be reasonably fit for its intended use and that the work would be done in a reasonably efficient and workmanlike manner.'"

Id. In particular, we found that Ohio law does not impose an implied requirement that builders complete construction of a home so that it will be reasonably fit for its intended use.

{¶ 13} Thereafter, the Ohio Supreme Court accepted the case as a certified conflict question as to "whether an implied warranty, in favor of the vendee of an uncompleted structure that it will, when finished, be suitable for the purpose intended, should be imposed upon the vendor who constructed and who undertook to complete it as a part of the executed contract for the purchase and sale of the real estate." *Id.* at 68-69. The Ohio Supreme Court ultimately agreed with this court that the trial court erred in instructing the jury that there is an implied term of the sale that the builder will complete the house in such a way that it will be reasonably fit for its intended use. *Id.* at 73. Additionally, the court indicated that the trial court properly instructed the jury as to the existence of an implied duty to build in a workmanlike manner. *Id.*

{¶ 14} In paragraph three of the syllabus in *Mitchem*, the court identified the duty imposed upon a builder-vendor to construct a real-property structure in a workmanlike manner and to "employ such care and skill in the choice of materials and work as will be commensurate with the gravity of the risk involved in protecting the structure against faults and hazards, including those inherent in its site." *Id.* at paragraph three of the syllabus. Further, the court held that a vendor is answerable to a vendee for damages resulting from the vendor's violation of its duty that proximately causes "a defect hidden

from revelation by an inspection reasonably available to the vendee." *Id.* Notably, the court in *Mitchem* did not explain what constitutes a hidden defect or an inspection reasonably available to the vendee.

{¶ 15} Construing *Mitchem's* articulation of the duty to build in a workmanlike manner to the facts of this case, the majority's analysis in *Varwig* identified the two salient questions as "(1) whether there existed some potential inspection that would have revealed the size of the joists, their construction, and the absence of bracing; and (2) whether such an inspection was reasonably available to appellants." *Id.* at ¶ 25. The majority answered both questions in the affirmative, and held:

> The purported defects of which appellants complain were plainly open to be seen; no inspection at all was necessary to reveal these conditions, even if appellants did not appreciate their significance. Moreover, appellants admitted that they obtained a structural inspection that purported to reveal the issues after they purchased the residence, thereby demonstrating that such an inspection was, in actual fact, reasonably available to them.

Id.

{¶ 16} On reconsideration, appellant argues that the foregoing analysis under *Mitchem* is obviously erroneous. Upon consideration of appellants' argument, we agree. To be precise, we find an obvious error in our determination that appellants' claim for failure to build in a workmanlike manner was subject to dismissal on summary judgment.

The majority's analytical framework in *Varwig* misinterpreted the essence of appellants' claim for failure to build in a workmanlike manner, imposed a burden on home buyers not recognized by *Mitchem*, and confused the nature of the inspection which would have revealed the alleged inadequacy of the load-bearing capacity of the floor joists.

{¶ 17} The defect in the floor joists articulated by appellants was not *merely* the size of the joists and the absence of bracing per se. Taken in a light most favorable to appellants, the evidence in the record could lead one to conclude that there was nothing *visibly* defective with the floor joists at the time of appellants' purchase of the home. Further, it is undisputed that anyone could have observed the physical characteristics of the joists by glancing at the joists from the basement. Indeed, the joists were exposed at the time of appellants' purchase of the home.

{¶ 18} The floor joists at issue in this case were not inherently defective according to appellants. Rather, appellants specifically allege that the joists were defective as to this specific application, where the floor above them was heavier than they were designed to support. *See* Complaint at ¶ 12 ("Upon information and belief the floor joists are undersized *for the amount of weight they are carrying*.") (Emphasis added). In other words, the joists were not visibly defective; they were defective as applied.

{¶ 19} The trial court, in its February 24, 2022 opinion and journal entry granting appellees' motion for summary judgment does not analyze appellants' argument in any detail. Rather, the trial court summarily disposes of appellants' argument after noting

that the floor joists were visible to appellants' property inspector prior to appellants' purchase of the home and that appellants "admit they hired a structural engineer who was able to determine the structural causes noted above." What the trial court's analysis fails to recognize and fully appreciate, however, is that the joist defects claimed by appellants were not discoverable merely because the joists themselves were visible.

{¶ 20} Here, the defective nature of the joists was only discoverable upon a detailed investigation from a structural engineer. Based upon the structural engineer report authored by appellees' own structural engineer and attached to appellants' memorandum in opposition to summary judgment, it is clear that a determination of the load-bearing capacity of the floor joists required more than a mere visual inspection. Indeed, in reaching his conclusion, appellees' structural engineer had to first engage in multiple mathematical calculations that, according to the engineer, "were performed to determine the adequacy of the floor framing system to support the porcelain tiles and to meet the Residential Code of Ohio and the Tile Council of North America recommendations for strength and deflection limits."

{¶ 21} Thus, the real question before us in this case is whether there existed some potential inspection that would have revealed that the size of the joists, their construction, and the absence of bracing, were appropriate for the weight they were supporting, and whether such an inspection would fit the definition of a "reasonably available inspection" pursuant to *Mitchem*, thereby requiring prospective homebuyers to obtain such an

inspection. We did not resolve that question in *Varwig*. Instead, we focused on the fact that the floor joists were visible to appellants and the home inspector prior to appellants' purchase of the home. While this may be true, it does not address the relevant issue raised by appellants.

{¶ 22} Our review of *Mitchem* and its progeny lend no support for the notion that a "reasonably available inspection" includes an inspection from a structural engineer as to the load-bearing capability of visible floor joists. In holding that appellants' claim for failure to build in a workmanlike manner was barred because the floor joists were visible and open to inspection and a structural engineer's inspection was available, the majority in *Varwig* presumed that a structural engineer's inspection was within the definition of a "reasonably available inspection." Because the majority failed to interpret the proper scope of a "reasonably available inspection" in *Mitchem*, it reached the wrong conclusion and committed an obvious error requiring our reconsideration.

{¶ 23} Upon reconsideration, we find that the record supports appellant's contention that a question of fact exists as to whether any reasonably available inspection (which does not include a structural engineer's inspection) could have revealed the fact that the floor joists were inadequate in their load-bearing capacity prior to their purchase of the home. Therefore, appellees' motion for summary judgment should have been denied by the trial court. Consequently, upon reconsideration, we find appellants' second assignment of error well-taken.

{¶ 24} In their motion, appellants also argue that our decision affirming the trial court's grant of summary judgment as to their claims for negligent design and failure to build in a workmanlike manner misapplied "the facts or the law or both." As to their claim for negligent design, appellants argue that we should reconsider our determination that their claim for negligent design was time-barred. Notably, appellants do not point to an obvious error in our resolution of this issue, nor do they raise an issue for our consideration that was either not considered at all or was not fully considered by this court in *Varwig*. Consequently, we find no basis to reconsider our decision as to appellants' claim for negligent design.

{¶ 25} In light of the foregoing, we hereby reverse the judgment of the Lucas County Court of Common Pleas as to appellants' claim for failure to build in a workmanlike manner. This matter is remanded to the trial court for further proceedings on that claim. The costs of this appeal are assessed to appellees.

{¶ 26} It is so ordered.

Judgment reversed,
and remanded.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Christine E. Mayle, J. _____

JUDGE

Gene A. Zmuda, J.
CONCUR. _____

JUDGE

Myron C. Duhart, P.J.
DISSENTS AND WRITES
SEPARATELY.

DUHART, J.

{¶ 27} Because I disagree with the majority's conclusion that reconsideration is proper in this case, and because I disagree with the majority's conclusion that summary judgment is improper with respect to appellants' claim for breach of duty to build in a workmanlike manner, I must respectfully dissent.

{¶ 28} As indicated above, appellants seek reconsideration of this court's holding that their claim for breach of duty to build in a workmanlike manner was barred because the defect pleaded was open to inspection reasonably available to appellants. Yet, on appeal, appellants' only assignments of error relating to their claim for breach of the duty to build in a workmanlike manner were: (1) that the trial court erred in concluding that

the claim was time-barred (which this court found well-taken); and (2) that the trial court misapplied the doctrine of caveat emptor in concluding that the claim was barred as a matter of law (which the court dismissed as meritless).

{¶ 29} Although appellants neglected to address *Mitchem* and *Jones* in their initial brief, focusing instead on the doctrine of caveat emptor, appellees addressed *Mitchem* at length in their opposition brief and, further, articulated the inapplicability of the doctrine of caveat emptor. For whatever reason, whether strategic or otherwise, appellants chose not to file a reply brief to address the very arguments that they now raise regarding this court's application of *Mitchem* and *Jones* to the facts of this case.

{¶ 30} The law is clear that a motion for reconsideration is not to be used as an opportunity to raise new arguments that were not made in earlier proceedings. *See Waller v. Waller*, 7th Dist. Jefferson No. 04-JE-27, 2005-Ohio-5362, ¶ 3. Thus, on this basis alone, I would deny appellants' motion for reconsideration.

{¶ 31} As to the merits of appellants' claim for breach of duty to build in a workmanlike manner, I remind the majority of the holding of the Supreme Court of Ohio in *Mitchem v. Johnson*, 7 Ohio St.2d 66, 218 N.E.2d 594 (1966), which provides:

> A duty is imposed by law upon a builder-vendor of a real-property structure to construct the same in a workmanlike manner and to employ such care and skill in the choice of materials and work as will be commensurate with the gravity of the risk involved in protecting the

> structure against faults and hazards, including those inherent in its site. *If the violation of that duty proximately causes a defect hidden from revelation by an inspection reasonably available to the vendee, the vendor is answerable to the vendee for the resulting damages.*

Id. at paragraph three of the syllabus.

{¶ 32} In their complaint, appellants expressly allege that the defect is in the size of the joists and in the absence of bracing in the joists. Thus, the questions to be asked in this case are: (1) whether there existed some potential inspection that would have revealed the size of, and lack of bracing in, the joists; and (2) whether such an inspection was reasonably available to appellants.

{¶ 33} In this case, where: (1) there is no dispute that the joists, their construction, the absence of bridging, and the fact that the joists underlaid a tile floor were all open and readily observable, and, in fact, were observed by appellants, by their inspector, and by their contractor; and (2) appellants admitted that they obtained a structural inspection that purported to reveal the issues after they purchased the residence, thereby demonstrating that such an inspection was, in actual fact, reasonably available to them, the answer to both questions is decidedly yes.

{¶ 34} The majority herein mischaracterizes our initial determination as stating that "since the joists were exposed at the time of purchase, a visual inspection could have discovered the defective load-bearing capability of the joists prior to purchasing the home

without any testing of the load-bearing capacity of the joists." Instead, we found that the joists and their construction were visible and that appellants admitted that they were able to obtain a structural inspection that purported to reveal the alleged defects in the property. We additionally noted that appellants had failed to provide any evidence competent under Civ.R. 56(C) that the structural inspection that they obtained after purchasing the home was not reasonably available to them prior to the sale.

{¶ 35} The majority now states that although the floor joists *were not inherently defective,*" they "were defective *as to this specific application,* where the floor above them was heavier than they were designed to support." (Emphasis added.) In reading beyond the allegations contained in the complaint, which clearly assert that the defect was in the size of the joists and in the absence of bracing in the joists, and in concluding that "a question of facts exists as to whether any reasonably available inspection (*which does not include a structural engineer's inspection*) could have revealed the fact that the floor joists were inadequate in their load-bearing capacity prior to the purchase of [appellants'] home," the majority essentially, and inappropriately, renders builders insurers of the structures they build, forever. (Emphasis added.) *See Varwig v. J.A. Doyle LLC* , 6th Dist. Lucas No. L-22-1035, ¶ 22. As indicated in our original decision, "while all builders must adhere to the duty to build in a workmanlike manner, the builder is not liable to a subsequent vendee unless the vendee demonstrates that the defect at issue was hidden from an inspection reasonably available to the buyer." *Id.*

{¶ 36} For all of the foregoing reasons, I would deny appellants' motion for reconsideration.