COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

ROBERT LANCE RINGHAND, et. al.	**:**	
Plaintiffs	**:**	
vs.	**:**	**CASE NO. 2011 CVH 01130**
CLEMENTINE CHANEY	**:**	
Defendant/Third-Party Plaintiff	**:**	**Judge McBride**
vs.	**:**	
FOREMOST INSURANCE GROUP, et al.	**:**	**DECISION/ENTRY**
Third-Party Defendants	**:**	
	:	

Graydon Head & Ritchey LLP, Robin D. Miller, attorney for the plaintiffs Robert Lance Ringhand and Lindsey Marie Ringhand,7759 University Drive, Suite A, West Chester, Ohio 45069.

Durkee & Uhle, LLC, Richard B. Uhle, Jr., attorney for the defendant/third-party plaintiff Clementine Chaney, 285 E. Main Street, Batavia, Ohio 45103.

Rendigs, Fry, Kiely & Dennis, LLP, John F. McLaughlin, attorney for the third-party defendant Foremost Insurance Group, 600 Vine Street, Suite 2650, Cincinnati, Ohio 45202-2474.

Strauss Troy, Charles C. Ashdown, attorney for the third-party defendant Comey & Shepherd Realtors, The Federal Reserve Building, 150 East Fourth Street, Fourth Floor, Cincinnati, Ohio 45202-4018.

Arnzen, Molloy & Storm, P.S.C., Aaron A. VanderLaan, attorney for the third-party defendant Huff Realty, Inc., 600 Greenup Street, Covington, Kentucky 41011.

This cause is before the court for consideration of motions for summary judgment filed by the defendant Clementine Chaney and the third-party defendants Foremost Insurance (hereinafter referred to as "Foremost"), Comey & Shepherd Realtors, and Huff Realty, Inc. (hereinafter referred to as "Huff Realty").

The court scheduled and held a hearing on the motions for summary judgment on December 17, 2012. At the conclusion of that hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[1]

[1] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[2] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[3]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[4]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[5] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[6]

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[2] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

[3] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

[4] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.

[5] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

[6] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[7] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[8]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[9] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[10] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[11]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[12] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[13] The duty of a party resisting a motion for summary judgment is

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[7] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[8] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[9] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[10] Id.
[11] Id.
[12] Id.
[13] Id.

more than that of resisting the allegations in the motion.[14] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[15]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[16] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[17]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[18]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[19]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if

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[14] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[15] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[16] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[17] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.
[18] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[19] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[20] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[21] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[22]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[23]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a

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[20] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.
[21] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[22] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[23] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.

trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[24]

FACTS OF THE CASE

In viewing all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party to each motion, the court makes the following findings of fact:

In November 2009, the defendant Clementine Chaney suffered a broken hip and began to reside in an assisted living facility.[25] David Chaney had a power of attorney for his mother Clementine Chaney and eventually decided that Clementine's house, which was sitting empty, needed to be sold.[26] David Chaney hired realtor Barbara Klein to list the property.[27] After a short negotiation period, plaintiffs Robert and Lindsey Ringhand entered into a purchase contract for the property at 1852 Lindale Nicholsville Road, New Richmond, Clermont County, Ohio, on January 18, 2011.[28] David Chaney, who was in Florida for the winter, signed the purchase contract on behalf of his mother and faxed it back to Barbara Klein.[29]

Approximately a week and a half prior to the date of closing, David Chaney's daughter called him in Florida and informed him that the house had been broken into and that it sustained "a lot of damage," including damage to the furnace and the

[24] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.
[25] Deposition of Joseph Chaney at pg. 9 and Deposition of David Chaney at pg. 12.
[26] David Chaney Depo. at pg. 19.
[27] Id. at pg. 22.
[28] Deposition of Barbara Klein at pg. 20.
[29] Id. at pg. 22 and David Chaney Depo. at pg. 22.

removal of copper pipes and the outside air conditioning unit.[30] David's daughter also informed him that the water was running and the oil tank had been damaged.[31] At that time, David Chaney was aware that whatever amount of oil was in the tank had spilled in the basement.[32] Approximately two weeks prior to the break-in, 100 gallons of oil was ordered and put into the oil tank at the home and David Chaney knew at least one week prior to closing that whatever was left out of this 100 gallons is what spilled on the floor.[33]

After getting the phone call from his daughter, David Chaney called his brother Joseph Chaney, informed him about the break-in and asked him to report the incident to the police, which Joseph did.[34] When he met the police officer at the house, Joseph Chaney smelled a strong odor of oil in the house.[35] The next day, David Chaney contacted Foremost to report the incident and ultimately, prior to closing, Foremost indicated that it would cover only $965.00 of the claimed damage, which was less than the $1,000.00 deductible on the policy.[36]

After speaking to Foremost the day after the break-in was discovered, David Chaney also contacted Barbara Klein.[37] According to David Chaney, he told Barbara Klein about the extent of the damage, including the oil and how much likely went onto the basement floor, and he expected that she would relate that information to the buyers.[38]

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[30] David Chaney Depo. at pgs. 25-26.
[31] Id. at pg. 27.
[32] Id. at pg. 29.
[33] Id. at pgs. 57-58.
[34] Id. at pg. 35 and Joseph Chaney Depo. at pgs. 12-14.
[35] Joseph Chaney Depo. at pg. 18.
[36] David Chaney Depo. at pgs. 36-37, 43, and 47-48.
[37] Id. at pg. 62-63.
[38] Id. at pgs. 63-67 and 70.

However, Barbara Klein denies being told anything about oil spilling in the basement until after the closing occurred.[39] Klein did go to the house that same day, where she noticed a strong smell of oil, and she testified that she told Sue Miller about this strong oil smell.[40] Sue Miller averred that she was unaware of any heating oil leak from the oil tank prior to the closing.[41]

David Chaney suggested to Barbara Klein that the closing would have to be delayed.[42] Klein related this suggestion to Sue Miller, the realtor for the Ringhands.[43] Sue Miller informed the Ringhands about the break-in, that the air conditioner, copper pipes, and parts of the furnace were stolen, and that there was damage to some doors.[44] It was the Ringhands' understanding that these items were going to be fixed and replaced.[45]

Lindsey Ringhand testified that Sue Miller related to her that Barbara Klein stated "they're making it right and everything will be fixed and nothing should prevent us from closing."[46] The closing was not postponed but the parties decided to have a walkthrough on the day of closing.[47]

David Chaney hired a company and paid them approximately $6,000.00 to repair the damage to the furnace, air conditioning, and copper piping.[48] Additionally, David Chaney and Joseph Chaney discussed the best way to clean the basement floor, and

[39] Barbara Klein Depo. at pgs. 27-28, 82 and 104.
[40] Id. at pgs. 31 and 34-35.
[41] Miller Aff. at ¶¶ 7-8.
[42] Barbara Klein Depo. at pg. 29.
[43] Id. at 30 and Miller Aff. at ¶ 4.
[44] Deposition of Robert Ringhand at pgs. 15-16 and Deposition of Lindsey Ringhand at pgs. 12-13.
[45] Lindsey Ringhand Depo. at pgs. 13-14.
[46] Id. at pg. 44.
[47] Id. at pg. 14 and Klein Depo. at pgs. 30 and 35.
[48] David Chaney Depo. at pg. 53.

David Chaney had his son-in-law and grandson go to the house on the day of the closing and scrub the floor with detergent.[49]

On February 25, 2011, the scheduled date of the closing, the two Chaney relatives went to the house and scrubbed the floor as discussed.[50] When the Ringhands arrived at the house with Sue Miller, they observed a bonfire in the backyard where furniture was being burned and noticed that all the windows in the home were open.[51]

Lindsey Ringhand was on modified bed rest due to her pregnancy on the date of the closing, so she did not accompany Robert Ringhand to view the basement that day.[52] Sue Miller also did not go into the basement on the date of closing.[53]

While in the basement, Robert Ringhand asked the two men there what they were doing, and they said some oil had ended up on the floor and they were cleaning it up.[54] When Robert Ringhand asked where the oil came from, one of the men pointed to the corner where Robert observed a small kitchen skillet sitting under the filter for the heating oil.[55] Robert could smell some oil but did not see any on the floor.[56]

Lindsey Ringhand noticed a bit of an oil smell in the house but nothing so strong that it was alarming.[57] Barbara Klein was also at the house on the day of closing, where she asked the air conditioning repairman if he knew how much oil went through and he replied that he did not know but he thought a gallon or two.[58]

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[49] David Chaney Depo. at pgs. 55-57 and 59.
[50] Id. at pg. 59.
[51] Robert Ringhand Depo. at pg. 20 and Lindsey Ringhand Depo. at pg. 16.
[52] Lindsey Ringhand Depo. at pgs. 14-15.
[53] Affidavit of Sue Miller on behalf of Comey & Shepherd Realtors at ¶ 6.
[54] Robert Ringhand at pgs. 22-23.
[55] Id. at pgs. 23-24.
[56] Id. at pgs. 28 and 32.
[57] Lindsey Ringhand Depo. at pgs. 20-21 and 48.
[58] Barbara Klein Depo. at pg. 37.

The Ringhands went directly from the house to the closing.[59] During the closing, they brought up the fact that the well pump was missing from the backyard, and Barbara Klein said the Chaneys would take care of it.[60] The closing occurred as scheduled on February 25, 2011. That same day, Robert Ringhand returned to the house to begin some remodeling work, and when he returned back to his home, he smelled strongly of oil and was not feeling well.[61] The Ringhands thought the strong oil smell might dissipate in a few days but it did not.[62]

Lindsey Ringhand emailed Sue Miller in early March of 2011 about the issues with the oil smell in the house.[63] Sue Miller forwarded this email to Barbara Klein and called her.[64] At that time, Klein told Sue Miller that the air conditioning repairman mentioned he thought one or two gallons spilled and that she would see what she could find out.[65]

After forwarding this information to David Chaney, Barbara Klein testified that this was the first time she was told that there was approximately one hundred gallons of heating oil in the tank at the time of the break-in.[66] This was also the first time Sue Miller was made aware of this information.[67]

When Sue Miller passed this information on to the Ringhands, this was the first time they were aware of the extent of the spill.[68]

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[59] Lindsey Ringhand Depo. at pgs. 21-22.
[60] Id. at pgs. 22-23.
[61] Id. at pg. 25 and Robert Ringhand Depo. at pgs. 41-43.
[62] Id. at pg. 26.
[63] Id. at pg. 27.
[64] Barbara Klein Depo. at pg. 36.
[65] Id. at pgs. 37 and 121.
[66] Id. at pgs. 36 and 82.
[67] Miller Aff. at ¶ 9.
[68] Lindsey Ringhand Depo. at pg. 29 and Robert Ringhand Depo. at pg. 57.

Barbara Klein told Sue Miller that the Chaneys were good people and that they would make things right.[69] She also related to Miller that David Chaney was willing to buy the property back from the Ringhands.[70] However, based on the statement that things would be made right and other monetary issues, the Ringhands indicated they did not want to sell the property back.[71]

Steven Rucker, an industrial hygienist, testified that fuel oil is a hazardous substance when spilled.[72] He noted that fuel oil can cause irritation of the mucous membranes, eyes and nose, as well as headaches and nausea in humans, and can also have harmful effects if it contaminates water and soil.[73]

LEGAL ANALYSIS

I. FOREMOST INSURANCE COMPANY

Foremost Insurance Company has moved for summary judgment on the claims for declaratory judgment and breach of contract filed against it by Clementine Chaney. Additionally, Clementine Chaney has moved for summary judgment on her claim for declaratory judgment against Foremost Insurance.

First, this court notes that, while the insurance policy at issue is attached to Foremost's motion for summary judgment, it was not incorporated into a properly filed affidavit. However, there was no objection from any party regarding its consideration.

[69] Barbara Klein Depo. at pg. 45.
[70] Id. at 53 and David Chaney Depo. at pg. 75.
[71] Lindsey Ringhand Depo. at pg. 31-33 and Robert Ringhand Depo. at pg. 58-61.
[72] Deposition of Steven Rucker at pg. 25.
[73] Id. at pgs. 44-45.

"Failure to move to strike or otherwise object to documentary evidence submitted by a party in support of, or in opposition to, a motion for summary judgment waives any error in considering that evidence under Civ.R. 56(C)."[74] As such, the court will consider the insurance policy attached to Foremost's motion for summary judgment.

The policy issued to Clementine Chaney for the vacant/unoccupied structure located at Lindale Nicholsville Road states in relevant part as follows:

> "Section I – Your Property Coverages
> Coverage A – Dwelling
>
> We insure:
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> 1. The dwelling that is described on the Declarations Page;
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> * * *
>
> But we do not insure:
>
> * * *
>
> 2. Land including any cost to repair, rebuild, stabilize or otherwise restore land on which the dwelling is located either before or after a loss;
>
> * * *
>
> When a premium for Vandalism or Malicious Mischief is shown on the Declarations Page, the following Insured Peril is also included.
>
> 9. Vandalism or malicious mischief, meaning the intentional and willful damage or destruction of property by anyone other than the owner of the property.
>
> * * *
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> Section I – Exclusions

[74] *Foster v. Cleveland Clinic Foundation* (Dec. 16, 2004), 8th Dist. Nos. 84156 and 84169, 2004-Ohio-6863, at ¶ 8, citing *Stegawski v. Cleveland Anesthesia Group*, 37 Ohio App.3d 78, 83, 523 N.E.2d 902 (Ohio App. 8th Dist., 1987).

We do not insure loss caused directly or indirectly by any of the following regardless of any other cause or event contributing concurrently or in any sequence to the loss:

* * *

5. Loss caused by:

a. The actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.

b. Loss, cost or expense from any governmental direction or request that any of you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

* * *

Section II – Your Liability Coverages

Coverage F – Premises Liability
If a claim is made or a suit is brought against you for damages because of bodily injury or property damage caused by an accident on your premises, we will:
1. Pay up to the Limit of Liability shown on the Declarations Page for the damages for which you are legally liable; and,
2. Provide a defense at our expense by attorneys of our choice.

* * *

Section II – Exclusions

We will not pay for bodily injury or property damage:

* * *

4. Arising out of the actual, alleged or threatened discharge, dispersal, release, escape of, or the ingestion, inhalation or absorption of pollutants.

* * *

We will not pay for bodily injury or property damage for:

* * *

> 2. Damage to property owned, sold, rented to others, abandoned or given away by any of you."[75]

The policy defines "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, metals, lead paint components and compounds, and waste. Waste includes materials to be recycled, reconditioned or reclaimed. However, irritants and contaminants released by an accidental fire on your premises are not a pollutant."[76]

Foremost argues that the pollution exclusion applies in the case at bar to prevent coverage for Chaney's claim for liability coverage as to the plaintiffs' claims against her and for Chaney's claim for property damage arising from the vandalism.

In *Este Oils Co. v. Federated Ins. Co.*, 132 Ohio App.3d 194, 724 N.E.2d 854 (Ohio App. 1st Dist., 1999), Este Oils delivered home heating oil to the Weils' house.[77] However, unbeknownst to Este Oils, the oil tank in the Weils' basement had been removed but the delivery pipe outside had not been removed or capped off.[78] Consequently, 320 gallons of heating oil was pumped directly into the Weils' basement, causing property damage.[79] That court found that the pollution exclusion in the insurance policy applied and discussed the issue as follows:

> "Under Ohio law, an insurance policy is a contract, and a court's construction of any contract is a matter of law. * * * When the intent of the parties is evident from the clear and unambiguous language in the provision, the plain language of the provision must be applied.
>
> The definition of a 'pollutant' in the Business Auto Policy includes a liquid contaminant. Heating oil is a liquid

[75] Motion for Summary Judgment of Foremost Insurance Company, Exhibit A.
[76] Id.
[77] *Este Oils Co. v. Federated Ins. Co.*, 132 Ohio App.3d 194, 197, 724 N.E.2d 854 (Ohio App. 1st Dist., 1999).
[78] Id.
[79] Id.

> contaminant. See R.C. Chapter 3746; see, also, *Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co.* (1993), 84 Ohio App.3d 302, 616 N.E.2d 988 (holding hydronic oil is a pollutant); *W. Am. Ins. Co. v. Hopkins* (Oct. 14, 1994), Clark App. No. CA 3108, unreported, 1994 WL 559005 (holding gasoline is a pollutant). The Business Auto Policy specifically excludes coverage for the 'dispersal' of a pollutant. In this case, the heating oil was not delivered into an oil tank. It was dispersed into the Weils' basement. Applying the unambiguous policy language to the undisputed facts of the case, we hold that the dispersal of heating oil into the Weils' basement was the dispersal of a pollutant, and, thus, it was excluded under the Business Auto Policy. *Zell v. Aetna Cas. & Sur. Ins. Co.* (1996), 114 Ohio App.3d 677, 683 N.E.2d 1154; *W. Am. Ins. Co. v. Hopkins*, supra."[80]

In *Rybacki v. Allstate Ins. Co.* (April 28, 2004), 9th Dist. No. 03CA0079-M, 2004-Ohio-2116, an underground heating oil storage tank located on the plaintiffs' property ruptured, causing property damage.[81] The plaintiffs argued that the Ohio Supreme Court's holding in *Andersen v. Highland House Co.* (2001), 93 Ohio St.3d 547, 757 N.E.2d 329, prevented the pollution exclusion in the policy from precluding coverage because the language of the policy did not unambiguously exclude coverage of the pollutant in question, namely heating oil.[82] The court discussed that issue as follows:

> "We disagree that *Andersen* holds that the language of this policy is unenforceable. The *Andersen* court was primarily concerned with determining if carbon monoxide from an internal heater was the equivalent of environmental pollution which these types of exclusions are addressing. The *Andersen* court cited to *Am. States Ins. Co. v. Koloms* (1997), 177 Ill.2d 473, 227 Ill.Dec. 149, 687 N.E.2d 72, which 'best described the real purpose of the pollution exclusion when it wrote: 'Our review of the history of the pollution exclusion amply demonstrates that the predominate motivation in drafting an exclusion for pollution-related injuries was the avoidance of the enormous expense and exposure resulting from the 'explosion' of environmental

[80] Id. at 200.
[81] *Rybacki v. Allstate Ins. Co.* (April 28, 2004), 9th Dist. No. 03CA0079-M, 2004-Ohio-2116, at ¶ 2.
[82] Id. at ¶ 3.

> litigation.' The *Andersen* court further cited to *Vantage Development Corp. v. American Environment Technologies Corp.* (1991), 251 N.J.Super. 516, 525, 598 A.2d 948, which advised that it is remiss to consider only the bare words of the exclusion, 'ignore its raison d'etre, and apply it to situations which do not remotely resemble traditional environmental contamination.' The holding of *Andersen* is 'that carbon monoxide emitted from a malfunctioning residential heater is not a pollutant under the pollution exclusion of a comprehensive general liability policy unless specifically enumerated as such.' We think that the case of an internal heater emitting carbon monoxide within the atmosphere of residential living quarters does not equate to the environmental degradation of a pollutant leak into the earth. We feel that the *Andersen* court would agree, having distinguished the facts of their case from cases of traditional environmental contamination when they cited to *Regional Bank of Colorado, N.A. v. St. Paul Fire & Marine Ins. Co.* (C.A.10, 1994), 35 F.3d 494, 498 ("[w]hile a reasonable person of ordinary intelligence might well understand [that] carbon monoxide is a pollutant when it is emitted in an industrial or environmental setting, an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a residential heater which malfunctioned as 'pollution.')
>
> Appellants were seeking recovery of clean up costs resulting from the leak of a pollutant. Their argument that *Andersen* invalidates the exclusion language of their homeowners' policy lacks merit. This claim is unambiguously precluded under the language of the 'Coverage X' section, and summary judgment to Allstate was appropriate."[83]

The Eastern District of Pennsylvania has held that the pollution exclusion in an insurance policy does not apply when ten to fifteen gallons of heating oil leaked into the basement during delivery of the oil.[84] The pollution exclusion at issue included almost the identical definition of "pollutant" as the policy at issue in the case at bar.[85] That court noted that "[t]here is no mention of home heating oil or, for that matter, any other petroleum product in the pollution exclusion;" and "Liberty Mutual has not provided any

[83] Id. at ¶¶ 11-12.
[84] *Whitmore v. Liberty Mut. Fire Ins. Co.*, unreported, 2008 WL 4425227 (E.D.Pa., 2008).
[85] Id. at *4.

product report, expert opinion, or other source of information to show or even argue that home heating oil is a 'pollutant' within the policy's pollution exclusion."[86] It its analysis, the court also concluded that heating oil must be released into the environment in order for it to be considered a pollutant and, because the oil at issue was contained to the plaintiffs' basement, the court concluded there was no support for the finding that it constituted a pollutant under any state or federal regulation.[87]

In contrast, Massachusetts law has consistently held that heating oil is a pollutant under similar policy language, although it should be noted that many of those cases involved a release of the oil into land and soil and not simply within an indoor structure.[88]

The policy at issue in the case at bar excludes coverage for the discharge, dispersal, seepage, migration, release or escape of pollutants. The definition of "pollutant" includes any liquid irritant or contaminant. Steven Rucker, an industrial hygienist, testified that fuel oil is a hazardous substance when spilled and that it can cause irritation of the mucous membranes, eyes and nose, as well as headaches and nausea in humans and can also have harmful effects if it contaminates water and soil. In the present case, there are allegations that the heating oil contaminated the land on which the dwelling is located, as well as causing damage within the dwelling itself (although it should be noted that damage to the land is clearly excluded from coverage based on the policy language excerpted above).

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[86] Id.
[87] Id. at *6.
[88] *Nascimento v. Preferred Mut. Ins. Co.*, 478 F.Supp.2d 143, 148 (D.Mass.,2007), citing *Hanover New England Ins. Co. v. Smith*, 35 Mass.App.Ct. 417, 621 N.E.2d 382 (1993); *Halstead Indus., Inc. v. Home Ins. Co.*, No. 9603835, 1998 WL 34066141 at *4 (Mass.Super.Jan.14, 1998); *Town of Wakefield v. Royal Ins. Co.*, No. 94-1579, 1995 WL 433585, at *3 (Mass.Super. July 20, 1995); and *Rubin v. St. Paul Fire and Marine Ins. Co.*, No. 931261, 1995 WL 809524, at *5 (Mass.Super.Apr.19, 1995).

The court finds that the language of the insurance policy in the case at bar is unambiguous. While it does not specifically include "heating oil" in its definition of pollutant, it does include any liquid irritant or contaminant, a category into which heating oil clearly falls. The heating oil at issue was discharged into the covered dwelling, causing damage to said dwelling. As such, these facts fall within the pollution exclusion contained in Clementine Chaney's policy and the damages claimed by her for both her own property damage and for liability coverage are not covered by the Foremost Insurance policy.

Consequently, Foremost Insurance's motion for summary judgment is well-taken and shall be granted. Conversely, Clementine Chaney's motion for summary judgment as to her claims against Foremost Insurance is not well-taken and shall be denied.

II. COMEY & SHEPHERD REALTORS

Comey & Shepherd Realtors has moved for summary judgment on the claims against it brought by Clementine Chaney for "representations, fraud, or false statements."

"Under Ohio law, to prevail on a fraudulent misrepresentation claim a plaintiff must prove: (1) a representation, or if a duty to disclose exists, concealment of a fact, (2) that is material to the transaction at issue, (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 on it, (5)

justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance."[89]

Sue Miller, the agent for the Ringhands in the present transaction, is affiliated with Comey & Shepherd. As set forth above, she stated in her affidavit that she was not aware of any oil leak or any amount of oil that may have leaked into the basement prior to the closing. While Barbara Klein testified that she informed Sue Miller about a smell of oil when she visited the house shortly after the vandalism was reported, there is no allegation that the smell of oil in the house was not known to the Ringhands; in fact, their deposition testimony supports the fact that they smelled oil in the home on the day of the closing. Furthermore, the record supports the conclusion that the Ringhands knew on the day of closing that some amount of oil spilled in the basement.

Both Robert Ringhand and Lindsey Ringhand testified at their depositions that they were not relying on any representations made by Sue Miller to make things right with the property.[90]

In her deposition, Lindsey Ringhand did testify that Sue Miller related to her that Barbara Klein stated that "they're making it right and everything will be fixed and nothing should prevent us from closing." While her deposition testimony is not entirely clear, Barbara Klein appears to deny making this precise statement.[91] However, this statement was made prior to the closing and prior to Sue Miller or the Ringhands having any knowledge of an oil spill. Lindsey Ringhand, when discussing this particular statement, noted in her deposition that she and her husband went to the closing and

[89] *Andrew v. Power Marketing Direct, Inc.*, 978 N.E.2d 974, 2012-Ohio-4371, ¶ 49, citing *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 73, 491 N.E.2d 1101.
[90] Robert Ringhand Depo. at pgs. 129-130 and Lindsey Ringhand Depo. at pg. 55.
[91] Klein Depo. at pg. 44-45.

"they fixed what they said was wrong."[92] As a result, it does not appear that there is any claim that this one particular statement is a statement upon which the Ringhands were relying for anything more than the assurance that the enumerated damaged items, namely the copper piping, the heater, and the air conditioning unit, would be fixed. As such, this particular statement was not a statement on which the Ringhands relied to their detriment which led to the alleged damages in the present case, as the items they believed were going to be fixed relative to that statement were, in fact, fixed as of the date of closing.

David Chaney has claimed that Sue Miller would have greater knowledge of the facts of the oil spill than he did because she was located in Cincinnati and had the opportunity to be present at the house. This statement is not based on any personal knowledge by David Chaney and is based merely on supposition regarding Sue Miller's knowledge of the extent of the oil spill that is unsupported in the record. Furthermore, any claim by the defendant that Sue Miller should have investigated the matter further cannot form the basis of a claim for fraud.

The defendant has failed to offer any evidentiary support for the allegation that Sue Miller made any misrepresentation or false statement during the course of these events. The facts in the record establish at the minimum that Sue Miller did not know the extent of the oil leak until after the March e-mail and the correspondence which occurred thereafter. As such, the defendant has not demonstrated any fraud on the part of Sue Miller, including any failure to disclose or concealment of fact.

Accordingly, the motion for summary judgment filed by Comey & Shepherd Realtors is well-taken and shall be granted.

[92] Lindsey Ringhand Depo. at pg. 45-46.

III. HUFF REALTY

The third-party defendant Huff Realty has also moved for summary judgment on the claim against it of indemnification and/or contribution for fraud.

The affidavit of Wayne Johnson, the Senior Vice President of Finance and Operations for Huff Realty, establishes that Huff Realty executed an independent contractor agreement with Barbara Klein.[93] Johnson attests that Klein was not an employee of Huff Realty at any time during the term of the independent contractor agreement, which was from June 2007 to the spring of 2012.[94] The independent contactor agreement states in pertinent part:

> "It is the intention of the parties hereto that Agent shall perform any work contemplated hereunder in accordance with his/her own initiative and pursuant to the terms and conditions of the Agreement. Any control over the activities of the Agent reserved to Broker shall be construed as being over the results to be accomplished hereunder only, and not as to the method of doing work."[95]

While an employer is generally liable for the acts of its employees, the employer of an independent contractor generally is not liable for the acts of the independent contractor.[96] " 'The chief test in determining whether one is an employee or an independent contractor is the right to control the manner or means of performing the work.' "[97] "If such right is in the employer, the relationship is that of employer and

[93] Affidavit of Wayne Johnson at ¶ 2 and Exhibit A.
[94] Id. at ¶¶ 3-4.
[95] Id. at Exhibit A.
[96] *Pusey v. Bator* (2002), 94 Ohio St.3d 275, 278, 762 N.E.2d 968.
[97] Id., citing *Bobik v. Indus. Comm.* (1946), 146 Ohio St. 187, 32 O.O. 167, 64 N.E.2d 829, paragraph one of the syllabus.

employee; but if the manner or means of performing the work is left to one responsible to the employer for the result alone, an independent contractor relationship is created."[98] When examining who has the right to control the manner and means of performance of the work, a court can examine the following factors: " 'who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools and personnel used; who selects the routes traveled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts .'"[99]

Exceptions to the general rule of lack of liability for the acts of an independent contractor include nondelegable duties such as affirmative duties imposed on the employer by statute, contract, franchise, charter, or common law and (2) duties imposed on the employer that arise out of the work itself because its performance creates dangers to others.[100]

In the present case, Huff Realty has met its burden of establishing that Barbara Klein is an independent contractor[101] and, consequently, the burden shifted to Clementine Chaney as the third-party plaintiff to establish a question of fact. Chaney did not respond to the independent contractor argument nor offer any evidence in opposition to Huff Realty's position. As a result, Huff Realty's evidence that Barbara Klein was an independent contractor is not refuted. As no exception has been demonstrated, the court finds that Huff Realty cannot be held liable for the actions of Barbara Klein, its independent contractor.

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[98] Id.
[99] *Snyder v. Stevens* (Aug. 30, 2012), 4th Dist. No. 12CA3465, 2012-Ohio-4120, ¶ 19, quoting, *Bostic v. Conner* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881.
[100] *Pusey* at 279.
[101] See, *Fayne v. Vincent* (Aug. 5, 2004), Tenn.Ct.App. No. E2003-01966-COA-R3-CV, 2004 WL 1749189.

As a result, the motion for summary judgment filed by Huff Realty is well-taken and shall be granted.

IV. CLEMENTINE CHANEY

The defendant and third-party plaintiff Clementine Chaney has also moved for summary judgment. The claims regarding Foremost Insurance were disposed of above, leaving Chaney's request for summary judgment as to the plaintiffs' claims against her.

The Ringhands have brought claims against Chaney for breach of contract, fraudulent misrepresentation, promissory estoppel and for declaratory judgment regarding the parties' rights and obligations relative to the purchase of the property.

As to the breach of contract claim, the defendant argues that merger and the parol evidence rule bar any such claim.

" 'The parol evidence rules states that, 'absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.' "[102] However, as the plaintiffs point out in their memorandum in opposition, the breach of contract claim is based on the language in the purchase contract regarding the maintenance of the property until closing, not on verbal statements. As such, the parol evidence rule does not apply.

Additionally, summary judgment is not appropriate on the issue of whether the merger doctrine applies in the case at bar. "The doctrine of merger provides that 'when

[102] *D&H Autobath v. PJCS Properties, Inc.* (Dec. 10, 2012), 12th Dist. No. CA2012-05-018, 2012-Ohio-5845, ¶ 17, quoting *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000).

a deed is delivered and accepted without qualification, the general rule is that the contract is merged in the deed; no cause of action upon the prior agreement then exists.' "[103] However, the merger doctrine does not apply when "one of the parties engaged in fraudulent conduct."[104] In the case at bar, there is a question of fact as to whether the defendant engaged in fraudulent conduct as there is a question of fact as to what was known about the extent of the damage prior to the closing and not disclosed to the Ringhands.

The defendant also alludes to an argument in her motion that she, Clementine Chaney, personally had no knowledge of the events and failed to engage in fraudulent behavior. However, David Chaney had a power of attorney for her throughout the relevant time period. "A power of attorney is a form of agency,"[105] and, as a result, summary judgment is not appropriate simply because it was David Chaney, and not Clementine Chaney personally, who is alleged to have made fraudulent misstatements or concealments of fact.

This existence of a question of fact also precludes summary judgment on the plaintiffs' claim for fraudulent misrepresentation. As set forth in the statement of facts above, there is a factual dispute as to what the defendant's agents knew about the extent of the oil damage prior to the closing. There is also a factual dispute as to what information was disclosed and to whom. This abundance of factual disputes makes it clear that summary judgment is not appropriate on the fraudulent misrepresentation claim.

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[103] *Village of Seaman v. Altus Metals, Inc.* (March 24, 2000) 4th Dist. No. 99CA683, 2000 WL 331596, *5, quoting *Mayer v. Sumergrade* (1960), 111 Ohio App. 234, 239, 167 N.E.2d 516, 518.
[104] Id.
[105] See, e.g., *Tewksbury v. Tewksbury*, 194 Ohio App.3d 603, 957 N.E.2d 362, 2011-Ohio-3358, ¶ 23 (Ohio App. 4th Dist., 2011).

Additionally, this question of fact as to whether the defendant's agents engaged in fraudulent behavior precludes summary judgment on any of the plaintiffs' claims under the doctrine of caveat emptor. Ohio law states that a seller seeking to invoke the doctrine of caveat emptor cannot have engaged in fraud.[106]

As to the claim for promissory estoppel, the elements of such a claim are "(1) a clear, unambiguous promise; (2) reliance upon the promise by the person to whom the promise is made; (3) the reliance is reasonable and foreseeable; and (4) the person claiming reliance is injured as a result of reliance on the promise."[107] The defendant made no specific argument as to why summary judgment should be granted on this particular claim. Regardless, the facts as set forth above demonstrate that there is a question of fact as to all of the elements of promissory estoppel as to certain promises that may or may not have been made to the Ringhands regarding remedying of the situation.

Similarly, the court finds that there is a question of fact on the plaintiffs' claim for declaratory judgment. Declaratory relief is available to a plaintiff who can show that "(1) a real controversy exists between the parties, (2) the controversy is justiciable, and (3) speedy relief is necessary to preserve the rights of the parties."[108] The declaratory judgment claim of the Ringhands requests a determination of the rights and obligations of the parties surrounding the plaintiffs' purchase of the subject property. The facts of the present case demonstrate that there currently exists a real controversy between the parties as to whether the defendant should be required to compensate the Ringhands

[106] See, e.g., *Lepera v. Fuson*, 83 Ohio App.3d 17, 24-26, 613 N.E.2d 1060 (Ohio App. 1st Dist., 1992).
[107] *Weiper v. W.A. Hill & Assoc.*, 104 Ohio App.3d 250, 661 N.E.2d 796 (Ohio App. 1st Dist., 1995), *Healey v. Republic Powdered Metals, Inc.* (1992), 85 Ohio App.3d 281, 284-285, 619 N.E.2d 1035, 1037.
[108] *Moore v. Middletown* (2012), 133 Ohio St.3d 55, 975 N.E.2d 977, 2012-Ohio-3897, ¶ 49.

for damages relating to the condition of the home. This controversy is justiciable in nature and speedy relief is necessary.

Based on this analysis, the court finds that the defendant's motion for summary judgment is not well-taken and shall be denied.

CONCLUSION

Foremost Insurance's motion for summary judgment as to all claims against it is well-taken and is hereby granted.

The motion for summary judgment filed by Comey & Shepherd Realtors is well-taken and is hereby granted.

Huff Realty's motion for summary judgment is also well-taken and is hereby granted.

Clementine Chaney's motion for summary judgment is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 17th day of January 2013 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride