

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

2020 APR 10 PM 12: 04

BARBARA A. WIEDENBEIN  
CLERK OF COMMON PLEAS  
CLERMONT COUNTY, OH

**FILED**

**CHRIS SHANNON, ET AL.** : **CASE NO. 2017 CVH 016**  
Plaintiffs : **Judge Jerry R. McBride**  
vs. : **DECISION/ENTRY**  
**ROBERT FISCHER, ET AL.** :  
Defendants :

Jeffrey T. Kenney and Melanie M. Lennon, counsel for the plaintiffs Chris Shannon and Erika Shannon, 2175 Riverside Drive, Columbus, Ohio 43221.

Brian C. Shrive, counsel for the defendants Robert Fischer and Amy Fischer, 4270 Ivy Pointe Boulevard, Suite 225, Cincinnati, Ohio 45245.

Timothy T. Brick and Steven D. Strang, counsel for the defendants Deborah Martin and Keller Williams Advisors Realty, 1501 Euclid Avenue, Cleveland, Ohio 44115.

This cause is before the court for consideration of the following: (1) the second motion for summary judgment filed by the defendants Robert Fischer and Amy Fischer on August 9, 2019, and (2) the second motion for summary judgment filed by the defendants Deborah Martin and Keller Williams Advisors Realty on August 13, 2019. The parties did not request oral argument, and the court took the motions under advisement on October 14th.

Upon consideration of the motions, the written arguments of counsel, the record of this case, the evidence submitted, and the applicable law, the court renders this written decision.

## UNDISPUTED FACTS

This case involves a dispute concerning a home located at 999 Bridle Ridge, New Richmond, Ohio ("the Property").<sup>1</sup> The defendants Amy Fischer and Robert Fischer bought the Property at the end of 2012.<sup>2</sup> The Fischers' real estate agents in purchasing the Property were defendant Deborah Martin and Mildred Fischer.<sup>3</sup> Martin is Robert Fischer's sister.<sup>4</sup> Mildred Fischer is Robert Fischer's mother.<sup>5</sup> Martin is employed by the defendant Keller Williams Advisors Realty.<sup>6</sup> At the time that the Fischers purchased the property, Mildred Fischer worked at Keller Williams Advisors Realty as well.<sup>7</sup>

When the Fischers originally purchased the Property, the prior homeowner disclosed in the Residential Disclosure Form that there had been earlier water intrusion.<sup>8</sup> The form indicated that the sump pump failed in 2011, leading to a small amount of water getting onto the carpet.<sup>9</sup> It further indicated that an electric backup was installed, and there "were no problems since."<sup>10</sup> The Residential Disclosure Form also stated: "This form and the representations contained in it are provided by the owner exclusively to potential purchasers in a transfer made by the owner, and are not made to purchasers in

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<sup>1</sup> E. Shannon Dep., pg. 5.

<sup>2</sup> A. Fischer Dep., pg. 7.

<sup>3</sup> A. Fischer Dep., pg. 7.

<sup>4</sup> R. Fischer Dep., pg. 24; D. Martin Dep., pg. 7.

<sup>5</sup> D. Martin Dep., pg. 10.

<sup>6</sup> D. Martin Dep., pg. 7.

<sup>7</sup> D. Martin Dep., pg. 11.

<sup>8</sup> Ex. A. to D. Martin Dep., pg. Fischer – 000053; A. Martin Aff., ¶ 5.

<sup>9</sup> Ex. A. to D. Martin Dep., pg. Fischer – 000053.

<sup>10</sup> Ex. A. to D. Martin Dep., pg. Fischer – 000053.

any subsequent transfers."<sup>11</sup> Prior to purchasing the Property, the Fischers had a home inspection.<sup>12</sup>

After purchasing the Property, the Fischers experienced water intrusion on or about December 12, 2014, when the Fischers' sump pump stopped working.<sup>13</sup> Amy Fischer discovered water around the perimeter of the basement, which is essentially the size of the first floor of the Property.<sup>14</sup> That same day, the Fischers contacted ServPro, a water remediation business, to come to their residence.<sup>15</sup> ServPro remediated the basement from December 12th through December 17th.<sup>16</sup>

On December 15, 2014, ServPro provided the following progress report: " \* \* \* homeowner removed all baseboards himself found visible mold behind baseboards on drywall in rec room exterior walls also exterior wall in pool table room will be cut out drywall himself \* \* \*."<sup>17</sup> On December 16th, ServPro reported: " \* \* \* Homeowner removed drywall exterior walls in rec room, and pool table room. \* \* \* Does have mold coverage to cover general contracting work that will need to be done. \* \* \*"<sup>18</sup> A ServPro employee, David Dean, who helped remediate the Property, recalls seeing visible mold behind the baseboards and drywall that was removed.<sup>19</sup> The Fischers paid ServPro \$6,059.89 for water damage restoration, which included construction charges and demolition.<sup>20</sup>

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<sup>11</sup> Ex. A. to D. Martin Dep., pg. Fischer – 000051.

<sup>12</sup> D. Martin Dep., pgs. 20-21.

<sup>13</sup> A. Fischer Dep., pg. 15; R. Fischer Dep., pg. 11.

<sup>14</sup> A. Fischer Dep., pg. 16.

<sup>15</sup> A. Fischer Dep., pgs. 15, 17; R. Fischer Dep., pg. 11.

<sup>16</sup> Ex. A to A. Fischer Dep., pg. Fischer – 000040.

<sup>17</sup> Ex. A to A. Fischer Dep., pg. Fischer – 000040.

<sup>18</sup> Ex. A to A. Fischer Dep., pg. Fischer – 000040.

<sup>19</sup> D. Dean Aff., ¶¶ 1-2, 4.

<sup>20</sup> Ex. E. to A. Fischer Dep.

As the ServPro notes indicate, Robert Fischer cut out the drywall and removed the baseboards himself.<sup>21</sup> After ServPro dried the wall, Robert Fischer replaced the drywall and baseboards.<sup>22</sup> The insulation inside the wall was also removed and replaced.<sup>23</sup> After ServPro dried the carpet, the padding was later replaced.<sup>24</sup>

In the fall of 2015, the Fischers decided to sell the Property.<sup>25</sup> They hired Deborah Martin as their listing agent, and Mildred Fischer was her co-listing agent.<sup>26</sup> During the three years the Fischers owned the Property, Martin had only been over to visit a couple of times.<sup>27</sup> They listed their home for sale for \$289,000.<sup>28</sup>

The Fischers signed a Residential Property Disclosure Form on October 5, 2015.<sup>29</sup>

The form states at the outset:

**"THIS FORM IS NOT A WARRANTY OF ANY KIND BY THE OWNER OR BY ANY AGENT OR SUBAGENT REPRESENTING THE OWNER. THIS FORM IS NOT A SUBSTITUTE FOR INSPECTIONS. POTENTIAL PURCHASERS ARE ENCOURAGED TO OBTAIN THEIR OWN PROFESSIONAL INSPECTION(S)."**<sup>30</sup>

As to the disclosures themselves, the Fischers checked "yes" to the following query on their Residential Property Disclosure Form: **"D) WATER INTRUSION: Do you know of any previous or current water leakage, water accumulation, excess moisture or other defects to the property, including but not limited to any area below grade, basement, or**

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<sup>21</sup> R. Fischer Dep., pg. 11.

<sup>22</sup> R. Fischer Dep., pg. 11.

<sup>23</sup> R. Fischer Dep., pg. 14.

<sup>24</sup> R. Fischer Dep., pg. 39.

<sup>25</sup> A. Fischer Dep., pg. 31; R. Fischer Dep., pg. 10.

<sup>26</sup> A. Fischer Dep., pg. 38; D. Martin Dep., pgs. 17, 50.

<sup>27</sup> D. Martin Dep., pg. 25.

<sup>28</sup> A. Fischer Dep., pg. 32.

<sup>29</sup> Ex. B. to D. Martin Dep.

<sup>30</sup> Ex. B. to D. Martin Dep.

crawl space?"<sup>31</sup> The form instructed: "If 'Yes', please describe and indicate any repairs completed."<sup>32</sup> The Fischers described: "Sump pump quit 12/14. Replaced and have no further issues."<sup>33</sup>

An additional question on the form asked: "Do you know of any water moisture related damage to floors, walls or ceilings as a result of flooding; moisture seepage; moisture condensation; ice damming; sewer overflow/backup; or leaking pipes, plumbing fixtures, or appliances?"<sup>34</sup> The Fischers did not check "Yes" or "No" but did write a comment following the directive, "If 'Yes', please describe and indicate any repairs completed [.]"<sup>35</sup> The Fischers indicated: "Sump pump quit Dec. 2014. Replaced sump pump. ServPro, a water clean-up company was contracted."<sup>36</sup>

The Fischers did not list the sump pump failure that occurred during the prior owners' ownership of the Property in 2011.<sup>37</sup> They decided not to list it because it did not happen while they owned the Property, and therefore it did not occur to them to list it.<sup>38</sup> Martin, who had helped the Fischers purchase the Property as their agent, was aware of this prior sump pump failure as well.<sup>39</sup>

Martin was also personally aware of the sump pump failure in 2014.<sup>40</sup> Martin learned of the failure from Mildred Fischer, who told her about it around Christmas in

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<sup>31</sup> Ex. B. to D. Martin Dep.

<sup>32</sup> Ex. B. to D. Martin Dep.

<sup>33</sup> Ex. B. to D. Martin Dep.

<sup>34</sup> Ex. B. to D. Martin Dep.

<sup>35</sup> Ex. B. to D. Martin Dep.

<sup>36</sup> Ex. B. to D. Martin Dep.

<sup>37</sup> Ex. B to D. Martin Dep.

<sup>38</sup> A. Fischer Dep., pg. 39; R. Fischer Dep., pgs. 26-27; A. Fischer Aff., ¶ 11.

<sup>39</sup> D. Martin Dep., pg. 48.

<sup>40</sup> D. Martin Dep., pgs. 39-40.

2014.<sup>41</sup> Martin never personally went over and saw the water damage resulting from the sump pump failure.<sup>42</sup>

The Fischers did not consult Martin for her input about what needed to be included in the form.<sup>43</sup> Martin reviewed the form only to ensure it was completed.<sup>44</sup> The Residential Property Disclosure Form further states: "The statements in this form are made by the owner and are not the statements of the owner's agent or subagent."<sup>45</sup>

Aside from the 2014 sump pump issue, Martin was unaware of any further water intrusion incidents at the Property.<sup>46</sup> She did not consider the sump pump failure that was disclosed when the Fischers purchased the Property to be a material defect that she was required to disclose to the Shannons.<sup>47</sup> Martin did not consider it a material defect because a broken sump pump is a broken appliance, and the disclosure form indicated that only a small amount of water got onto the carpet, and a backup sump pump was installed with no further problems.<sup>48</sup>

The plaintiffs Erika Shannon and Chris Shannon were represented by Lauren Lee of Keller Williams Pinnacle Group.<sup>49</sup> The Fischers hosted three open houses, and Mildred Fischer was present at them as the host.<sup>50</sup> Erika Shannon came to two of those open houses.<sup>51</sup> Erika Shannon also returned a third time with her husband, parents, and a

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<sup>41</sup> D. Martin Dep., pg. 40.

<sup>42</sup> D. Martin Dep., pg. 40.

<sup>43</sup> D. Martin Dep., pg. 31.

<sup>44</sup> D. Martin Dep., pg. 31.

<sup>45</sup> Ex. B. to D. Martin Dep.

<sup>46</sup> D. Martin Dep., pg. 58.

<sup>47</sup> D. Martin Dep., pgs. 59-61.

<sup>48</sup> D. Martin Dep., pg. 76.

<sup>49</sup> C. Shannon Resp. to Defs. Interrogs. No. 14.

<sup>50</sup> D. Martin Dep., pg. 41.

<sup>51</sup> E. Shannon Dep., pg. 17.

representative from Lee's office, during which they received a private showing of the Property, before deciding to enter into a contract to buy it.<sup>52</sup> The Shannons viewed the Property a fourth time before closing, with Lee accompanying them.<sup>53</sup>

At one of the visits, the Shannons received an information sheet about the Property.<sup>54</sup> Erika Shannon made notations on the sheet, which included " \* \* \* water damage \* \* \*" and " \* \* \* mold? \* \* \*".<sup>55</sup> Erika Shannon explained that they wanted to ask about mold because the disclosure form mentioned water intrusion.<sup>56</sup>

In an October 20, 2015 text message, the Shannons' realtor, Lee, asked: "Hey guys how's it going? What are you thinkingv [sic]. ?"<sup>57</sup> In response, Erika Shannon replied: "Going over everything now. A little concerned with the basement and flooding.. [sic] They have had issues. Not so sure it isn't why these people are selling .. [sic] [sad smiley face emoji] Talking it over and researching."<sup>58</sup>

At another point, before November 2, 2015, Erika Shannon texted Lee: " \* \* \* But we are also trying to stay fiscally responsible. Don't want to end up upside down or having to fix water damage etc."<sup>59</sup> Lee replied: "Ok that makes sense [sic] I can ask if there is a continuing issue [sic] Many homes have bad history of things happeninf [sic]".<sup>60</sup> To which Erika Shannon stated: "They say the problem was resolved, but then say they never have

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<sup>52</sup> E. Shannon Dep., pg. 17.

<sup>53</sup> C. Shannon Resp. to Defs. Interrogs. No. 17.

<sup>54</sup> E. Shannon Dep., pgs. 22-23; Ex. 4 to E. Shannon Dep.

<sup>55</sup> E. Shannon Dep., pgs. 22-23; Ex. 4 to E. Shannon Dep.

<sup>56</sup> E. Shannon Dep., pg. 24.

<sup>57</sup> Ex. 5 to E. Shannon Dep.

<sup>58</sup> Ex. 5 to E. Shannon Dep.

<sup>59</sup> Pls. Doc. Produc. to Defs., Doc. No. 591.

<sup>60</sup> Ex. 6 to E. Shannon Dep.

tested for mild. [sic] And we did notice green algae/mold on the outdoor basement steps where the water flooded so it made us leery lol [sic] \*mold".<sup>61</sup>

During the first open house that the Shannons attended, the Shannons asked Mildred Fischer about some water stains, including stains in a bathroom in the basement.<sup>62</sup> Mildred Fischer told her that they were probably from the 2014 sump pump failure.<sup>63</sup> Erika Shannon also asked Mildred Fischer about a spot under the window well farthest from the sump pump room, where a dry wall patch was visible.<sup>64</sup> Mildred Fischer answered that one of the Fischers' children probably shoved a pool cue stick into the wall, since it was right next to the pool table.<sup>65</sup>

The Shannons also asked Mildred Fischer additional questions she did not know the answers to, which she relayed to Martin, but none of which dealt with water intrusion or mold.<sup>66</sup> The Shannons' realtor, Lee,<sup>67</sup> never requested the disclosure form the Fischers received when they purchased the property in 2012, although she could have, or Lee could have accessed it by looking up the prior listing that the previous owners used.<sup>68</sup> The Shannons never had any direct communications with Martin, Robert Fischer, or Amy Fischer.<sup>69</sup>

At some point before closing on the Property, the Shannons received a copy of the Fischers' Residential Property Disclosure Form.<sup>70</sup> The Shannons also hired a home

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<sup>61</sup> Ex. 6 to E. Shannon Dep.

<sup>62</sup> E. Shannon Dep., pg. 19; C. Shannon Dep., pgs. 22-23.

<sup>63</sup> E. Shannon Dep., pg. 19; C. Shannon Dep., pg. 24.

<sup>64</sup> E. Shannon Dep., pg. 19; C. Shannon Dep., pg. 23.

<sup>65</sup> E. Shannon Dep., pg. 19; C. Shannon Dep., pg. 28.

<sup>66</sup> D. Martin Dep., pg. 45; E. Shannon Dep., pg. 49.

<sup>67</sup> C. Shannon Dep., pg. 13.

<sup>68</sup> D. Martin Dep., pg. 75.

<sup>69</sup> C. Shannon Dep., pgs. 15-16, 34; E. Shannon Dep., pgs. 88-89.

<sup>70</sup> E. Shannon Dep., pgs. 15-16

inspector, who conducted an inspection on November 7, 2015.<sup>71</sup> They received a report from Reliable Home Inspections, LLC prior to closing on the property.<sup>72</sup> The report noted, among other findings, moisture stains present on the basement bathroom walls, as well as a notation of indication of moisture and old stains in the basement.<sup>73</sup> The report also noted possible causes and solutions for basement dampness, indicating that they can sometimes cost thousands of dollars.<sup>74</sup> However, the report listed no "major concerns."<sup>75</sup> And the inspector did not note any mold.<sup>76</sup>

The Shannons decided not to get a home inspector who had expertise in mold.<sup>77</sup> They also did not directly instruct the home inspector to pay special attention to water issues or mold, but did make him aware of their concerns generally.<sup>78</sup> And they had asked the inspector to "do everything."<sup>79</sup> But ultimately the home inspector did not conduct mold testing.<sup>80</sup> The Shannons trusted the home inspector to do his job competently.<sup>81</sup> So in deciding to purchase the Property, the Shannons relied upon the home inspection report, the disclosure form, and Mildred Fischer's representations about the property.<sup>82</sup>

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<sup>71</sup> C. Shannon Dep., pgs. 13, 38.

<sup>72</sup> E. Shannon Dep., pg. 97; C. Shannon Resp. to Defs. Reqs. for Admis. No. 1.

<sup>73</sup> C. Shannon Resp. to Defs. Reqs. For Admis. No. 4.

<sup>74</sup> C. Shannon Resp. to Defs. Reqs. For Admis. No. 5.

<sup>75</sup> Ex. 14 to E. Shannon Dep.

<sup>76</sup> E. Shannon Dep., pgs. 92-93.

<sup>77</sup> C. Shannon Dep., pg. 30.

<sup>78</sup> C. Shannon Dep., pgs. 30-31.

<sup>79</sup> E. Shannon Dep., pg. 92.

<sup>80</sup> C. Shannon Dep., pg. 33.

<sup>81</sup> E. Shannon Dep., pgs. 94-95.

<sup>82</sup> C. Shannon Dep., pgs. 12, 15.

The Fischers and Shannons entered into a Purchase Agreement on November 1, 2015.<sup>83</sup> The Purchase Agreement between the Fischers and Shannons provided the following pertinent provisions:

**"REAL ESTATE INSPECTION CONTINGENCY: \* \* \*** The Buyer has the option to have the Real Estate inspected, at Buyer's expense. Buyer shall have up to 10 calendar days ('Inspection Period') beginning the day following written Contract acceptance to conduct all inspections related to the Real Estate. Inspections regarding the physical material condition \* \* \* shall be the sole responsibility of the Buyer. **Buyer is relying solely upon Buyer's examination of the Real Estate, the seller's certification herein, and inspections herein requested by the Buyer or otherwise required, if any, for its physical condition and overall character, and not upon any representation by the REALTORS® involved.**

\* \* \*

If Buyer is not satisfied with the condition of the Real Estate as revealed by the inspector(s) and desires corrections to material defect(s), Buyer shall provide written notification of any material defect(s) and the portion(s) of the inspection report which describe the basis for the Buyer's dissatisfaction to the Listing Firm or Seller with a request for corrections desired within the Inspection period.

\* \* \*

**BUYER ELECTS TO CONDUCT INSPECTION(S) OF THE REAL ESTATE** to determine the material physical condition of the house \* \* \* *(The inspection(s) may include, but are not limited to, the following inspections which may or may not be performed by the same or different inspectors on the same or different dates.)* \* \* \* Mold

\* \* \*

**SELLER(S) AND REALTORS® SHALL NOT BE RESPONSIBLE FOR ANY UNKNOWN AND/OR DISCLOSED DEFECTS IN THE REAL ESTATE. BUYER ACKNOWLEDGES THAT BUYER HAS BEEN ADVISED BY**

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<sup>83</sup> Ex. 3 to E. Shannon Dep.

**REALTOR® TO CONDUCT INSPECTIONS OF THE REAL ESTATE THAT ARE OF CONCERN TO BUYER AND HAS BEEN PROVIDED THE OPPORTUNITY TO MAKE THIS CONTRACT CONTINGENT UPON THE RESULTS OF SUCH INSPECTION(S).<sup>84</sup>**

The Fischers sold the Property to the Shannons for \$275,000<sup>85</sup> and closed on December 15, 2015.<sup>86</sup> The Shannons factored the condition of the house into their price negotiations with the Fischers.<sup>87</sup> In fact, when texting with Lee about what price to offer, Erika Shannon stated: "The bones of the house absolutely look like a \$285 house, but they used all builder grade materials besides the hardwood floors and water damage in basement. \* \* \*"<sup>88</sup>

They also included an addendum to the contract, following the home inspection, which added five conditions that the Fischers needed to address or remedy.<sup>89</sup> The Fischers satisfied all the conditions in the addendum.<sup>90</sup> None of the conditions addressed water or mold issues the Shannons perceived in the basement.<sup>91</sup>

Since the Shannons purchased the Property, water has flooded into the basement through two window wells and an outside door.<sup>92</sup> The first time the flooding occurred through the windows was twelve days after the Shannons closed on the Property.<sup>93</sup> The basement has suffered water intrusion again on several occasions since then.<sup>94</sup> One of

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<sup>84</sup> Ex. 3 to E. Shannon Dep.

<sup>85</sup> A. Fischer Dep., pg. 37; Ex. 3 to E. Shannon Dep.

<sup>86</sup> E. Shannon Dep., pg. 77.

<sup>87</sup> E. Shannon Dep., pg. 30.

<sup>88</sup> Pls. Doc. Produc. to Defs., Doc. No. 599.

<sup>89</sup> C. Shannon Dep., pg. 36; Ex. 20 to C. Shannon Dep.

<sup>90</sup> C. Shannon Dep., pgs. 35-38.

<sup>91</sup> Ex. 20 to C. Shannon Dep.

<sup>92</sup> E. Shannon Dep., pg. 53.

<sup>93</sup> E. Shannon Dep., pgs. 72, 78.

<sup>94</sup> E. Shannon Dep., pg. 78; Ex. 11 to E. Shannon Dep.

the window wells in question was on the opposite side of the basement from the sump pump.<sup>95</sup> When the Shannons removed the drywall under that window well, they noticed mold, dirt, and sludge behind it.<sup>96</sup> Amy Fischer testified that she had never seen any water coming in through the window well while she lived there.<sup>97</sup>

To fix the issue involved with water coming under the outside door in the basement, the Shannons have also had to have a drain replaced, new stairs built, and new concrete poured by the door, so that it is slanted away from the home.<sup>98</sup> Both of the windows had to be fixed as well.<sup>99</sup> Due to the flooding that occurred after they moved in, the Shannons have had to pull out the carpet and install waterproof flooring.<sup>100</sup> The Shannons have also incurred damage to their drywall where the water intruded.<sup>101</sup>

Following their purchase of the Property, several neighbors, including Denyse Hannah, informed the Shannons that the Property has had ongoing water intrusion problems.<sup>102</sup> In April of 2016, the Shannons had mold testing conducted on the property, which detected mold and recommended remediation.<sup>103</sup> The testing showed elevated mold spores at both levels of the home, including black mold.<sup>104</sup>

In August of 2016, the Shannons had mold remediation conducted on both floors.<sup>105</sup> Erika Shannon understands from Dry Effect, the mold remediation company,

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<sup>95</sup> A. Fischer Dep., pg. 17.

<sup>96</sup> E. Shannon Dep., pg. 54.

<sup>97</sup> A. Fischer Dep., pg. 38.

<sup>98</sup> E. Shannon Dep., pg. 67.

<sup>99</sup> E. Shannon Dep., pg. 79.

<sup>100</sup> E. Shannon Dep., pgs. 73, 84.

<sup>101</sup> E. Shannon Dep., pg. 75.

<sup>102</sup> E. Shannon Dep., pgs. 10-13; C. Shannon Resp. to Defs. Interrogs. No. 9.

<sup>103</sup> Pls. Doc. Produc. to Defs., Doc. Nos. 00070-71.

<sup>104</sup> J. McIntyre Aff., ¶ 6; E. Shannon Dep., pg. 102.

<sup>105</sup> J. McIntyre Aff., ¶ 7.

that the mold spread to both floors because the HVAC system was submerged in water, which then made the mold become airborne.<sup>106</sup>

The Shannons now allege that the Fischers did not disclose to them ongoing water intrusion problems and significant mold at the Property.<sup>107</sup> They aver that this has caused problems with drywall, flooring, and the HVAC.<sup>108</sup> They contend that, due to the ongoing water and mold problems, they are no longer able to use the fully finished basement.<sup>109</sup> And they also believe that the stress from the ongoing water and mold problems caused Chris Shannon to suffer shingles.<sup>110</sup> To date, the Shannons believe that the undisclosed water intrusion has incurred over \$43,000 in costs to them.<sup>111</sup>

### **DISPUTED FACTS**

The following facts are in dispute based upon the following evidence in the record:

(1) whether the Fischers experienced additional water intrusion beyond the 2014 sump pump failure, (2) whether the Fischers were aware of ongoing mold problems in the basement, and (3) whether any mold remediation took place in 2014.

During the time the Fischers lived in the Property, from 2012 through 2015, they testified that they experienced water intrusion once.<sup>112</sup> Specifically, aside from the sump

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<sup>106</sup> E. Shannon Dep., pgs. 102-103.

<sup>107</sup> E. Shannon Dep., pg. 7.

<sup>108</sup> E. Shannon Dep., pg. 8.

<sup>109</sup> E. Shannon Dep., pg. 8.

<sup>110</sup> E. Shannon Dep., pgs. 99-100.

<sup>111</sup> Ex. 16 to E. Shannon Dep.

<sup>112</sup> A. Fischer Dep., pg. 15.

pump failure in December of 2014, the Fischers averred that there were no other water issues in the basement.<sup>113</sup>

However, the individual who conducted the mold remediation for the Shannons and who owns Dry Effect, the company that specializes in mold remediation, believes that the extent of the mold present in the Property was an indication of repeated water intrusion over several years.<sup>114</sup> Further, Dynese Hannah, the Fischers neighbor, claims she had witnessed Robert Fischer pump water from the basement on at least four occasions.<sup>115</sup> The Fischers claim that what Denyse Hannah actually observed was Robert Fischer cleaning the carpets using his carpet cleaning supplies from his business.<sup>116</sup> However, Hannah believes, based on her experience having carpets cleaned, that Robert Fischer was not having his carpets cleaned.<sup>117</sup>

The Fischers also aver that they were not aware of any mold on the Property.<sup>118</sup> A ServPro employee, David Dean, who helped remediate the Property, recalls seeing visible mold behind the baseboards and drywall that were removed in 2014.<sup>119</sup> However, Robert Fischer testified that he did not observe any mold while removing the baseboards in the basement.<sup>120</sup>

Lastly, it was Amy Fischer's understanding that ServPro sprayed some antimicrobial agents to remediate the mold, although the ServPro workers did not tell her

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<sup>113</sup> A. Fischer Dep., pgs. 29-30; R. Fischer Dep., pgs. 21-22.

<sup>114</sup> J. McIntyre Aff., ¶¶ 2, 8.

<sup>115</sup> E. Shannon Dep., pg. 10; D. Hannah Aff., ¶ 4.

<sup>116</sup> A. Fischer Dep., pgs. 42-43; R. Fischer Dep., pg. 22.

<sup>117</sup> D. Hannah Aff., ¶ 5.

<sup>118</sup> R. Fischer Aff., ¶¶ 22, 24; A. Fischer Aff., ¶ 23.

<sup>119</sup> D. Dean Aff., ¶¶ 1-2, 4.

<sup>120</sup> R. Fischer Dep., pgs. 31-32.

that they saw mold in the basement.<sup>121</sup> Robert Fischer recollected that ServPro never did any mold remediation.<sup>122</sup>

### **PROCEDURAL BACKGROUND**

The Shannons filed a verified complaint on December 26, 2017. They alleged the following causes of action against the defendants: (1) negligence, negligent misrepresentation, and fraud against the Fischers, (2) breach of contract against the Fischers, (3) violations of R.C. 4735.67, negligent misrepresentation, fraudulent misrepresentation, and negligence against Martin and Keller Williams Advisors Realty (hereinafter referred to as "Keller Williams"), and (4) punitive damages against all defendants.

The Fischers filed a motion for summary judgment as to the Shannons' fraudulent misrepresentation and breach of contract claims on January 25, 2019. Martin and Keller Williams filed a motion for summary judgment on the Shannons' claims of violations of R.C. 4735.67 and fraudulent misrepresentation the same day. The court issued a decision on the motions on July 25, 2019, granting summary judgment in favor of the Fischers, Martin, and Keller Williams.

Thereafter, on August 9, 2019 the Fischers filed a second motion for summary judgment on the Shannons' remaining claims for negligent misrepresentation and

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<sup>121</sup> A. Fischer Dep., pg. 26.

<sup>122</sup> R. Fischer Dep., pg. 30.

negligence. Martin and Keller Williams did the same on August 13th. The Shannons filed a response in opposition to the Fischers' motion on September 5th and to Martin and Keller Williams' motion on September 10th. The Fischers filed a reply in support of their motion for summary judgment on September 12th. Martin and Keller Williams filed a reply in support of their motion on September 17th. None of the parties requested oral argument on the motions, and the court took the motions under advisement on October 14th.

### LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

"(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the party opposing the motion."<sup>123</sup>

The court must view the evidence in a light most favorable to the nonmoving party.<sup>124</sup> Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits,

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<sup>123</sup> *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). See *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).  
<sup>124</sup> *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

depositions, etc.<sup>125</sup> A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."<sup>126</sup>

Whether a genuine issue exists 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"?<sup>127</sup> This threshold inquiry determines whether 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."<sup>128</sup>

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.<sup>129</sup> This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."<sup>130</sup> "To this end, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment."<sup>131</sup> If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.<sup>132</sup>

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<sup>125</sup> *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

<sup>126</sup> *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

<sup>127</sup> *Id.* at 251-52.

<sup>128</sup> *Id.* at 250.

<sup>129</sup> *AAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

<sup>130</sup> *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

<sup>131</sup> *Heard v. Dayton View Commons Homes*, 2d Dist. No. 27706, 2018-Ohio-606, 106 N.E.3d 327, ¶ 7, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996).

<sup>132</sup> *Id.* See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

However, if the movant 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.<sup>133</sup> The duty of the nonmoving party is more than that of resisting the motion’s allegations.<sup>134</sup> Instead, this burden requires the nonmoving party to “produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial.”<sup>135</sup> The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.<sup>136</sup> It may not rely on the pleadings or unsupported allegations.<sup>137</sup>

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action.”<sup>138</sup> The trial court maintains the sound discretion to admit or exclude relevant evidence.<sup>139</sup> When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.<sup>140</sup>

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<sup>133</sup> *Dresher*, 75 Ohio St.3d at 293.

<sup>134</sup> *Wells Fargo*, 2013-Ohio-855 at ¶ 25.

<sup>135</sup> (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; See *Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

<sup>136</sup> *Williams*, 2014-Ohio-3778 at ¶ 8. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

<sup>137</sup> *Id.*

<sup>138</sup> See *Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 (“Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.”).

<sup>139</sup> *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

<sup>140</sup> *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.<sup>141</sup> "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."<sup>142</sup> "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."<sup>143</sup> Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."<sup>144</sup>

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."<sup>145</sup> Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).<sup>146</sup>

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents referenced in the affidavit "must be attached to the affidavit."<sup>147</sup> If the affiant "relies" on

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<sup>141</sup> Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

<sup>142</sup> *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

<sup>143</sup> *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*, quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

<sup>146</sup> *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist. 1989).

<sup>147</sup> *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."<sup>148</sup>

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.<sup>149</sup> Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.<sup>150</sup>

## **LEGAL ANALYSIS**

### **I. THE FISCHERS' SECOND MOTION FOR SUMMARY JUDGMENT**

#### **A. NEGLIGENT MISREPRESENTATION**

The Fischers have moved for summary judgment on Count 1 as it pertains to the Shannons' claim of negligent misrepresentation against them. The Fischers moved for summary judgment on the Shannons' claim of fraudulent misrepresentation in their first motion for summary judgment, which the court granted. "The elements of fraud, fraudulent concealment, and negligent misrepresentation are very similar."<sup>151</sup>

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<sup>148</sup> *Id.* at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. See *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

<sup>149</sup> *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

<sup>150</sup> *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

<sup>151</sup> *Roberts v. McCoy*, 2017-Ohio-1329, 88 N.E.3d 422, ¶ 15 (12th Dist.), citing *Johnson v. Church of the Open Door*, 179 Ohio App.3d 532, 2008-Ohio-6054, 902 N.E.2d 1002, ¶ 15 (9th Dist.).

Importantly to this motion, negligent representation and fraudulent misrepresentation share the common element of justifiable reliance. The elements for negligent representation 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."<sup>152</sup>

By comparison, the elements for fraudulent misrepresentation are:

"(a) a representation or, where there is a duty to disclose, concealment of a fact,

(b) which is material to the transaction at hand,

(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,

(d) with the intent of misleading another into relying upon it,

(e) justifiable reliance upon the representation or concealment, and

(f) a resulting injury proximately caused by the reliance."<sup>153</sup>

The basis of the Shannons' negligent misrepresentation claim is the same as it was for their fraudulent misrepresentation claim: they believe the Fischers had ongoing

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<sup>152</sup> (Emphasis added.) *Levy v. Seiber*, 12th Dist. No. CA2015-02-019, 2016-Ohio-68, 57 N.E.3d 331, ¶ 36, citing *Delman v. Cleveland Heights*, 41 Ohio St.3d 1, 4, 534 N.E.2d 835 (1989).

<sup>153</sup> (Emphasis added.) *Burr v. Bd. of Cty. Commrs. of Stark Cty.*, 23 Ohio St.3d 69, 491 N.E.2d 1101 (1986), syllabus, citing *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 462 N.E.2d 407 (1984). See *Roberts*, 2017-Ohio-1329 at ¶ 15, citing *Mertens v. Dever*, 12th Dist. Clermont No. CA2005-07-060, 2006-Ohio-1001, ¶ 14 (citing the same elements for fraud); *Tanzillo v. Edwards*, 10th Dist. Franklin No. 06AP-383, 2007-Ohio-497, ¶ 12 (citing the same elements for fraud).

water intrusion and mold problems but only disclosed the 2014 sump pump failure in the Residential Disclosure Form.<sup>154</sup>

In its first summary judgment decision the court found, as a matter of law, that the Shannons did not justifiably rely upon the Fischers representations.<sup>155</sup> The court incorporates by reference the same case law and findings here, which are likewise dispositive of the negligent misrepresentation claim.

For justifiable reliance, “[a] buyer cannot be said to have justifiably relied upon representations made by the seller where the purchase agreement is clearly contingent upon the inspection rather than any alleged representations.”<sup>156</sup> Indeed, “sellers have no duty to inspect or acquire knowledge regarding defects of their property.”<sup>157</sup> “Rather, the duty to conduct a full inspection falls on the purchasers and the disclosure form does not function as a substitute for such careful inspection.”<sup>158</sup>

“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.”<sup>159</sup> Moreover, “[c]ourts have held that even when structural defects are described in less severe terms than what is actually true, notice to the buyer of the defect precludes claims of fraud and misrepresentation.”<sup>160</sup>

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<sup>154</sup> Pls. 2nd Mot. for Summ. J., pg. 5.

<sup>155</sup> 1st Summ. J. Decision, pg. 25.

<sup>156</sup> *Roberts*, 2017-Ohio-1329 at ¶ 25, citing *Liotta v. Eckley*, 8th Dist. Cuyahoga No. 75127, 2000 WL 23128, \*4 (Jan. 13, 2000).

<sup>157</sup> *Roberts*, 2017-Ohio-1329 at ¶ 17, citing *Clark*, 2003-Ohio-4617 at ¶ 19.

<sup>158</sup> *Roberts*, 2017-Ohio-1329 at ¶ 17, citing *Clark*, 2003-Ohio-4617 at ¶ 19.

<sup>159</sup> *Crown Property Dev., Inc. v. Omega Oil Co.*, 113 Ohio App.3d 647, 657, 681 N.E.2d 1343, 1349 (12th Dist. 1996), citing *Lepera v. Fuson*, 83 Ohio App.3d 17, 26, 613 N.E.2d 1060 (1st Dist. 1992).

<sup>160</sup> *Kramer v. Raterman*, 161 Ohio App.3d 363, 2005-Ohio-2742, 830 N.E.2d 416, ¶ 20 (1st Dist.).

In examining the present case, the court finds that, as a matter of law, the Shannons did not justifiably rely upon the Fischers' alleged representations or concealment. There are several reasons why the Shannons cannot be deemed to have justifiably relied on the Residential Disclosure Form. First, their purchase of the Property was contingent upon an inspection of the Property, but they failed to request the proper inspections for water and mold.<sup>161</sup> Despite their ongoing concerns about water damage and mold, the Shannons did not contact a specialist to conduct a mold inspection. They did have a general home inspection performed, the report from which noted moisture stains present on the basement bathroom walls, as well as a notation indicating moisture and old stains in the basement.<sup>162</sup> Although the Shannons asked the inspector to "do everything,"<sup>163</sup> they also did not directly instruct the home inspector to pay special attention to water issues or mold.<sup>164</sup> The Purchase Agreement especially noted that it was the Shannons' responsibility to have whatever home inspections they desired, including for mold.<sup>165</sup> And although the Shannons had the Fischers address multiple physical conditions of the home in the addendum to the Purchase Agreement, they never requested that the Fischers fix any conditions related to water intrusion or mold.<sup>166</sup>

Secondly, there was apparent reason to doubt the veracity of the Residential Disclosure Form, and the Shannons in fact doubted it.<sup>167</sup> The Shannons' personal notes and text messages with their real estate agent evince that they had ongoing, multiple

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<sup>161</sup> *Roberts*, 2017-Ohio-1329 at ¶ 25, citing *Liotta*, 2000 WL 23128, \*4.

<sup>162</sup> C. Shannon Resp. to Defs. Reqs. for Admis. No. 4.

<sup>163</sup> E. Shannon Dep., pg. 92.

<sup>164</sup> C. Shannon Dep., pgs. 30-31.

<sup>165</sup> Ex. 3 to E. Shannon Dep.

<sup>166</sup> C. Shannon Dep., pg. 36; Ex. 20 to C. Shannon Dep.

<sup>167</sup> *Crown Property Dev., Inc.*, 113 Ohio App.3d at 657, citing *Lepera*, 83 Ohio App.3d at 26.

concerns about water damage and mold based on the Disclosure Form and their own observations in inspecting the basement. In one of Erika Shannon's early visits to the home, she recorded the notes: " \* \* \* water damage \* \* \*" and " \* \* \* mold? \* \* \*".<sup>168</sup> In an October 20, 2015 text message, the Shannons' realtor, Lee, asked: "Hey guys how's it going? What are you thinkingv [sic]. ?"<sup>169</sup> In response, Erika Shannon replied: "Going over everything now. A little concerned with the basement and flooding.. [sic] They have had issues. Not so sure it isn't why these people are selling .. [sic] [sad smiley face emoji] Talking it over and researching."<sup>170</sup>

At another point, before November 2, 2015, Erika Shannon texted Lee: " \* \* \* But we are also trying to stay fiscally responsible. Don't want to end up upside down or having to fix water damage etc."<sup>171</sup> Lee replied: "Ok that makes sense [sic] I can ask if there is a continuing issue [sic] Many homes have bad history of things happeninf [sic]".<sup>172</sup> To which Erika Shannon stated: "They say the problēm was resolved, but then say they never have tested for mild. [sic] And we did notice green algae/mold on the outdoor basement steps where the water flooded so it made us leery lol [sic] \*mold".<sup>173</sup>

Further evidencing the Shannons' concerns about water and mold are the questions they asked Mildred Fischer at an open house. During the first open house that the Shannons attended, the Shannons asked Mildred Fischer about some water stains, including in a bathroom in the basement.<sup>174</sup> Erika Shannon also asked Mildred Fischer

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<sup>168</sup> E. Shannon Dep., pgs. 22-23; Ex. 4 to E. Shannon Dep.

<sup>169</sup> Ex. 5 to E. Shannon Dep.

<sup>170</sup> Ex. 5 to E. Shannon Dep.

<sup>171</sup> Pls. Doc. Produc. to Defs., Doc. No. 591.

<sup>172</sup> Ex. 6 to E. Shannon Dep.

<sup>173</sup> Ex. 6 to E. Shannon Dep.

<sup>174</sup> E. Shannon Dep., pg. 19; C. Shannon Dep., pgs. 22-23.

about a spot under the window well farthest from the sump pump room, where a dry wall patch was visible.<sup>175</sup>

And lastly, even when structural defects are described in less severe terms than what is actually true, notice to the buyer of the defect precludes claims of fraud and misrepresentation.<sup>176</sup> The Residential Disclosure Form did disclose water intrusion, and even assuming *arguendo* it was more severe than the form suggested, the Shannons were clearly aware of it. Accordingly, the court finds that the Shannons could not have justifiably relied on any negligent misrepresentation by the Fischers. As such, their claim for negligent misrepresentation must fail, and summary judgment is appropriate as a matter of law.

## **B. NEGLIGENCE**

The Fischers have moved for summary judgment on Count 1 as it pertains to the Shannons' claim of negligence against them. As with the Shannons' negligent misrepresentation claim, the basis for their negligence claim is the same, which is that the Fischers had ongoing water intrusion and mold problems but only disclosed the 2014 sump pump failure in the Residential Disclosure Form.<sup>177</sup>

At common law, it is axiomatic that to establish a negligence claim a plaintiff "must demonstrate that (1) the defendant owed a duty of care to the plaintiff, (2) the defendant

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<sup>175</sup> E. Shannon Dep., pg. 19; C. Shannon Dep., pg. 23.

<sup>176</sup> *Kramer*, 2005-Ohio-2742 at ¶ 20.

<sup>177</sup> Pls. 2nd Mot. for Summ. J., pg. 3.

breached that duty, and (3) the defendant's breach proximately caused the plaintiff to be injured."<sup>178</sup>

The Shannons cite to the Ohio real property disclosure statute, R.C. 5302.30, as imposing a duty of care upon the Fischers. R.C. 5302.30 requires the disclosure of certain material defects regardless of whether the defect is discoverable or observable.<sup>179</sup> Pursuant to R.C. 5302.30(D), sellers of residential real estate must complete a disclosure form to inform potential buyers of "material matters relating to the physical condition of the property to be transferred \* \* \* [and] the condition of the structure of the property, including the roof, foundation, walls, and floors \* \* \*."<sup>180</sup> R.C. 5302.30(E)(1) requires that transferors complete the form "in good faith," which is defined in R.C. 5302.30(A)(1) as "honesty in fact."<sup>181</sup> However, R.C. 5302.30(D) requires sellers to disclose on the form only those defects that are within their actual knowledge.<sup>182</sup> R.C. 5302.30(F)(1) relieves sellers of liability for damages "allegedly aris[ing] from any error in, inaccuracy of, or omission of any item of information required to be disclosed in the property disclosure form if the error, inaccuracy, or omission was not within the transferor's actual knowledge."<sup>183</sup>

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<sup>178</sup> *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, ¶ 10, citing *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 21. See *McLoughlin v. Williams*, 12th Dist. Clermont No. CA2015-02-020, 2015-Ohio-3287, ¶ 8, citing *Johnston v. Filson*, 12th Dist. Clinton No. CA2014-04-007, 2014-Ohio-4758, ¶ 9 (the plaintiff "must demonstrate a duty owed by the defendant to the plaintiff, a breach of that duty, and that the plaintiff's injury proximately resulted from the defendant's breach of duty.").

<sup>179</sup> *Reardon v. Hale*, 12th Dist. Warren No. CA2006-09-105, 2007-Ohio-435, ¶ 10.

<sup>180</sup> *Roberts*, 2017-Ohio-1329 at ¶ 16, citing R.C. 5302.30(D). See *Clark v. Allen*, 154 Ohio App.3d 200, 2003-Ohio-4617, 796 N.E.2d 965, ¶ 18 (12th Dist.) (holding same).

<sup>181</sup> R.C. 5302.30. See *Keams v. Huckaby*, 12th Dist. Butler No. CA2005-12-507, 2006-Ohio-5196, ¶ 28.

<sup>182</sup> *Roberts*, 2017-Ohio-1329 at ¶ 17, citing *Clark*, 2003-Ohio-4617 at ¶ 18.

<sup>183</sup> R.C. 5302.30(F)(1). See *Reardon*, 2007-Ohio-4351 at ¶ 10 (holding same); *Clark*, 2003-Ohio-4617 at ¶ 18 (holding same).

In addition, sellers of residential real estate have no duty to inspect their property or otherwise acquire additional knowledge of the defects of their property.<sup>184</sup> "The disclosure form is not a substitute for a careful inspection by potential purchasers. Under the statute, the duty to conduct a full inspection falls on the purchasers, not the sellers."<sup>185</sup>

In their second motion for summary judgment, the Fischers cite to *Kearns v. Huckaby*, 12th Dist. Butler No. CA2005-12-507, 2006-Ohio-5196, in support of their argument that the Shannons' negligence claim cannot be maintained. In *Kearns* the plaintiffs-buyers alleged that the defendants-sellers negligently issued a residential property disclosure form. The Twelfth District Court of Appeals found that "to prevail on a claim based upon information contained in the property disclosure form, appellants [buyers] were required to show more than negligence; appellants were required to submit evidence from which a reasonable jury could conclude the [sellers] had actual knowledge of errors in the form."<sup>186</sup> The court affirmed the trial court's grant of summary judgment in favor of the sellers, who had checked "unknown" on their disclosure form box for asbestos, and there was no other evidence in the record that the sellers had actual knowledge of asbestos in the home.<sup>187</sup> However, this case is distinguishable from *Kearns* in that there are disputed facts as to whether the Fischers were aware of ongoing water and mold problems in their basement, which were not disclosed in the disclosure form.

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<sup>184</sup> *Clark*, 2003-Ohio-4617 at ¶ 19, citing *Good v. McElhaney*, 4th Dist. Athens No. 97 CA 41, 1998 WL 682328, \* 9 (Sept. 30, 1998).

<sup>185</sup> *Clark*, 2003-Ohio-4617 at ¶ 19, citing *Good*, 1998 WL 682328 at \*9. See *Good*, 1998 WL 682328 at \*9 (holding same).

<sup>186</sup> *Kearns*, 2006-Ohio-5196 at ¶ 28.

<sup>187</sup> *Id.* at ¶ 29.

The Fischers alternatively argue that the doctrine of caveat emptor precludes the Shannons' negligence claim. The Shannons do not address this argument in their response in opposition. Instead, they posit that the elements of negligence are satisfied.

The doctrine of caveat emptor is applicable in real estate transactions.<sup>188</sup> And the common law defense of caveat emptor still applies in spite of the disclosure statute the Shannons rely on.<sup>189</sup>

"The doctrine of caveat emptor precludes recovery in an action by the purchaser for structural defects in real estate where (1) the condition complained of 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 vendor."<sup>190</sup>

"The rationale underlying the doctrine is that 'a party has no right to rely on certain representations regarding the property when the true facts are equally open to both parties.'"<sup>191</sup> "A defect is observable or discoverable if an ordinarily prudent person would discover it upon reasonable inspection."<sup>192</sup> A defect meeting this description is a patent defect, and all other defects are latent defects.<sup>193</sup> Further, the Ohio Supreme Court has found that, when determining whether a defect was "open to observation," the issue is not

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<sup>188</sup> *Brewer v. Bros.*, 82 Ohio App.3d 148, 153, 611 N.E.2d 492, 495 (12th Dist. 1992), citing *Said v. Steger*, 12th Dist. Clermont No. CA90-10-107 (June 17, 1991).

<sup>189</sup> *Petroskey v. Martin*, 9th Dist. No. 17CA011098, 2018-Ohio-445, 104 N.E.3d 1021, ¶ 17, citing R.C. 5302.30(J) and *Hearty v. First Merit Bank, N.A.*, 9th Dist. Summit No. 19273, 1999 WL 1068447, \*3 (Nov. 24, 1999).

<sup>190</sup> *Brewer*, 82 Ohio App.3d at 153, quoting *Layman v. Binns*, 35 Ohio St.3d 176, 519 N.E.2d 642 (1988).

<sup>191</sup> *Keams*, 2006-Ohio-5196 at ¶ 18, quoting *Traverse v. Long*, 165 Ohio St. 249, 252 (1956).

<sup>192</sup> *McCoy*, 2017-Ohio-1329 at ¶ 12, quoting *Moravek v. Hornsby*, 12th Dist. Clermont No. CA96-12-113, 1997 WL 397012, \*3 (July 14, 1997).

<sup>193</sup> *McCoy*, 2017-Ohio-1329 at ¶ 12, citing *Clark*, 2003-Ohio-4617 at ¶ 15. See *Sexton v. Wiley*, 12th Dist. Butler No. CA2004-05-115, 2005-Ohio-2269, ¶ 18, citing *Bins*, 35 Ohio St.3d 176 ("Where those conditions are discoverable and the purchaser has the opportunity for investigation and determination without concealment or hindrance by the vendor, the purchaser has no just cause for complaint even though there are misstatements and misrepresentations by the vendor not so reprehensible in nature as to constitute fraud.").

the "cause of the defect or the remedial effectiveness of [a repair]."<sup>194</sup> Similarly, "the cause of the defect, the underlying problem, does not have to be open and obvious. If the defects are open and obvious \* \* \*, the buyer is on notice to make further inquiry as to the underlying condition."<sup>195</sup> Indeed, "[o]nce alerted to a possible defect, a purchaser may not simply sit back and then raise his lack of expertise when a problem arises."<sup>196</sup> "When a purchaser becomes aware of a possible problem, he or she has a duty to 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."<sup>197</sup>

In examining whether the defense of caveat emptor applies to the case at hand, the conditions in the basement were open to observation. Nothing in the record indicates the Shannons lacked the opportunity to observe and discover the water damage and mold in the basement. In fact, as detailed extensively above when discussing negligent misrepresentation, Erika Shannon did notice mold and water damage in the basement and asked her realtor and Mildred Fischer questions about these conditions due to the concerns it caused her. Furthermore, the Shannons had the unimpeded opportunity to examine the premises. The Purchase Agreement gave the Shannons the option to fully inspect the premises, and they exercised that option by hiring an inspector. The Shannons do not contend that their inspection was impeded in any way, and there is no evidence in the record of any complaints regarding access to the premises. Moreover, the Shannons had the right to conduct mold testing but elected not to, in spite of the fact

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<sup>194</sup> *Layman*, 35 Ohio St.3d at 177-178 (buyer argued he merely saw a "symptom" of the defect).

<sup>195</sup> *Petroskey*, 2018-Ohio-445 at ¶ 19, citing *Hearty*, 1999 WL 1068447 at \*3.

<sup>196</sup> *Sexton*, 2005-Ohio-2269 at ¶ 21, citing *Tipton v. Nuzum*, 84 Ohio App.3d 33, 38, 616 N.E.2d 265 (9th Dist. 1992).

<sup>197</sup> *Sexton*, 2005-Ohio-2269 at ¶ 21, citing *Tipton*, 84 Ohio App.3d at 38.

that they saw visible evidence of mold. In sum, the true facts were equally open to both parties. Finally, as the court held in its decision on the Fischers' first motion for summary judgment, the Fischers did not engage in fraud. Accordingly, the doctrine of caveat emptor applies. The court grants summary judgment to the Fischers on the Shannons' cause of action for negligence in Count 1.

## **II. MARTIN AND KELLER WILLIAMS' SECOND MOTION FOR SUMMARY JUDGMENT**

### **A. NEGLIGENT MISREPRESENTATION**

The Shannons' Count 3 includes a claim for negligent misrepresentation against Martin and Keller Williams. Just as with the claim against the Fischers, the court held in its decision on the defendants' first motion for summary judgment that the Shannons' claim of fraudulent misrepresentation against Martin and Keller Williams failed for lack of justifiable reliance.<sup>198</sup> And as explained *supra*, a negligent misrepresentation claim also requires that the plaintiff prove justifiable reliance.<sup>199</sup>

Here, Martin and Keller Williams argue that the Shannons' negligent misrepresentation claim fails for lack of justifiable reliance, and the court agrees. As with the fraudulent misrepresentation claim, the court finds that the Shannons did not justifiably rely on any representations made by Martin and Keller Williams because: (1) their purchase of the Property was contingent upon an inspection of the Property,<sup>200</sup> (2)

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<sup>198</sup> 1st Summ. J. Decision, pg. 40.

<sup>199</sup> *Roberts*, 2017-Ohio-1329 at ¶ 15, citing, 2008-Ohio-6054 at ¶ 15.

<sup>200</sup> *Roberts*, 2017-Ohio-1329 at ¶ 25, citing *Liotta*, 2000 WL 23128, \*4.

there was apparent reason to doubt the veracity of the Residential Disclosure Form and Mildred Fischer's statements based on their own observations on the Property,<sup>201</sup> and (3) they had notice of water intrusion from the Residential Disclosure Form and Mildred Fischer, albeit it may have been described in less severe terms than what was actually true.<sup>202</sup> Accordingly, the court finds that the Shannons could not have justifiably relied on any fraudulent misrepresentation by Martin and Keller Williams. As such, their claim for negligent misrepresentation must fail, and summary judgment is appropriate as a matter of law.

## B. NEGLIGENCE

The Shannons' Count 3 also includes a claim for negligence against Martin and Keller Williams. As described above, to succeed on a negligence claim that Shannons must prove that (1) the defendants owed a duty of care to the plaintiffs, (2) the defendants breached that duty, and (3) the defendants' breach proximately caused the plaintiffs to be injured.<sup>203</sup>

The Shannons posit that Martin and Keller Williams owed a duty of care to them due to R.C. 4735.67. "R.C. 4735.67 governs a real estate agent's duty to disclose material facts regarding the physical condition of property."<sup>204</sup> R.C. 4735.67 provides:

(A) A licensee [i.e. real estate agent] shall disclose to any purchaser all material facts of which the licensee has actual knowledge pertaining to the physical condition of the property

<sup>201</sup> *Crown Property Dev., Inc.*, 113 Ohio App.3d at 657, citing *Lepera*, 83 Ohio App.3d at 26.

<sup>202</sup> *Kramer*, 2005-Ohio-2742 at ¶ 20.

<sup>203</sup> *Lang*, 2009-Ohio-2495 at ¶ 10, citing *Robinson*, 2006-Ohio-6362 at ¶ 21.

<sup>204</sup> *Tanzillo*, 2007-Ohio-497 at ¶ 15. See *Moreland v. Ksiazek*, 8th Dist. Cuyahoga No. 83509, 2004-Ohio-2974, ¶ 40 (holding same).

that the purchaser would not discover by a reasonably diligent inspection, including material defects in the property, environmental contamination, and information that any statute or rule requires be disclosed. For purposes of this division, actual knowledge of such material facts shall be inferred to the licensee if the licensee acts with reckless disregard for the truth.

(B) A licensee is not required to discover latent defects in the property or to advise on matters outside of the scope of the knowledge required for real estate licensure, or to verify the accuracy or completeness of statements made by the seller, unless the licensee is aware of information that should reasonably cause the licensee to question the accuracy or completeness of such statements."<sup>205</sup>

"Thus, a real estate agent has a statutory duty to disclose to the purchaser material facts pertaining to the physical condition of the property of which the agent has or should have knowledge."<sup>206</sup> However, a real estate agent is "not required to discover latent defects or to advise on matters outside the scope of his [or her] knowledge."<sup>207</sup>

The meaning of "reckless disregard for the truth" is not defined in the statute, nor has it been defined by the courts for purposes of R.C. 4735.67.<sup>208</sup> Instead, at least one Ohio court has applied the same meaning as is used in the defamation context, which is that "a person acts with reckless disregard for the truth when the person acts with a high degree of awareness of the probable falsity of facts or with serious doubts as to the truth of the statements."<sup>209</sup>

In examining the case at hand, in the Shannons' Count 3 they allege that Martin and Keller Williams were negligent when they breached their duties as outlined above in

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<sup>205</sup> Emphasis added.

<sup>206</sup> *Tanzillo*, 2007-Ohio-497 at ¶ 16.

<sup>207</sup> *Moreland*, 2004-Ohio-2974 at ¶ 42.

<sup>208</sup> *Tanzillo*, 2007-Ohio-497 at ¶ 16.

<sup>209</sup> *Id.*, citing *Jackson v. Columbus*, 10th Dist. Franklin No. 05AP-1035, 2006-Ohio-5209, ¶ 12.

R.C. 4735.67. The Shannons' Count 3 also included a cause of action for violations of R.C. 4735.67. In the court's decision on the defendants' first motion for summary judgment, the court held that Martin and Keller Williams did not violate R.C. 4735.67(A) or (B).<sup>210</sup> The court incorporates its findings from its July 25, 2019 decision here. Since the court has concluded as a matter of law that Martin and Keller Williams did not violate R.C. 4735.67, it follows that the Shannons cannot prove that Martin and Keller Williams breached R.C. 4735.67 to sustain a negligence claim.

Furthermore, as with the Shannons' claim of negligence against the Fischers, Martin and Keller Williams likewise maintain that the doctrine of caveat emptor applies and bars the Shannons' negligence claim against them. For the same reasons as discussed in Section I(B), the doctrine of caveat emptor is applicable in this case and therefore defeats the Shannons' negligence claim. For these reasons, summary judgment should be granted in Martin and Keller Williams' favor on the Shannons' claim of negligence.

### **CONCLUSION**

For the foregoing reasons, the court rules as follows:

- (1) The defendants Robert Fischer and Amy Fischer's second motion for summary judgment is granted as to the Shannons' causes of action for negligent misrepresentation and negligence, and

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<sup>210</sup> 1st Summ. J. Decision, pgs. 36-38.

(2) The defendants Deborah Martin and Keller Williams' motion for summary judgment is granted as to the Shannons' causes of action for negligent misrepresentation and negligence.

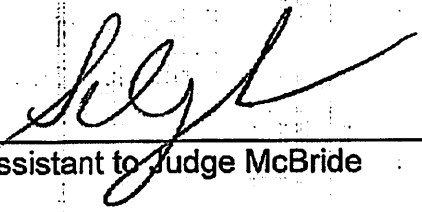
**IT IS SO ORDERED.**

DATED: 4-10-20

  
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Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

I hereby certify that copies of this Decision/Entry were sent on this 10<sup>th</sup> day of April 2020 by e-mail to Jeffrey T. Kenney, Attorney for the Plaintiffs, at [jkenney@drodermiller.com](mailto:jkenney@drodermiller.com), Brian C. Shrive, Attorney for the Defendants Robert Fischer and Amy Fischer, at [brian@finneylawfirm.com](mailto:brian@finneylawfirm.com), and Steven D. Strang, at [ssstrang@gallasherssharp.com](mailto:ssstrang@gallasherssharp.com), and Timothy T. Brick, at [tbrick@gallaherssharp.com](mailto:tbrick@gallaherssharp.com), Attorneys for the Defendant Deborah Martin and Keller Williams Advisors Realty FRI Mason LLC.

  
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Judicial Assistant to Judge McBride