[Cite as *Mynes v. Brooks*, 2009-Ohio-5017.]

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

Timothy Mynes, et al.	:	
Plaintiffs-Appellees/ Cross-Appellants,	:	Case No. 08CA3211
v.	:	
Otis R. Brooks, et al.	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants/ Cross-Appellees.	:	
	:	File-stamped date: 9-14-09

APPEARANCES:

Stanley C. Bender, Law Office of Stanley C. Bender, Portsmouth, Ohio, for Defendants-Appellants/Cross-Appellees.

Kristin E. Rosan and Darcy A. Burdette, Madison & Rosan, LLP, Columbus, Ohio, and Mark A. Serrott, Law Offices of Mark A. Serrott, Columbus, Ohio, for Plaintiffs-Appellees/Cross-Appellants.[1]

Kline, P.J.:

{¶1} Husband and wife Otis Brooks and Judy Brooks (hereinafter the "Brookses") appeal the judgment of the Scioto County Common Pleas Court in favor of husband and wife Timothy and Janeen Mynes (hereinafter the "Myneses"). Shortly after purchasing real property from the Brookses, the Myneses discovered toxic black mold throughout the house. The Myneses filed

[1] Although the Myneses' notice of cross-appeal lists both Kristin E. Rosan and Mark A. Serrott as the Myneses' attorneys of record, Serrott apparently did not take part in the briefing of either the Brookses' appeal or the Myneses' cross-appeal.

suit, alleging multiple claims against the Brookses and various other defendants. After a jury trial, the trial court found in favor of the Myneses on their claim of negligent misrepresentation. On appeal, the Brookses contend that the trial court erred by not granting the Brookses' motion for judgment notwithstanding the verdict. Because we find that the sale of the property at issue was an "as is" sale, we agree. The "as is" nature of the sale and the doctrine of caveat emptor bar a claim for negligent misrepresentation. Therefore, the Brookses are entitled to judgment as a matter of law on the Myneses' negligent misrepresentation claim.

{¶2} The Myneses have also cross-appealed the trial court's judgment in favor of the Brookses and Fort Hills Estate, Inc. (hereinafter "Fort Hills") on the Myneses' negligent construction claim. First, the Myneses contend that the trial court erred in excluding the testimony of two of the Myneses' expert witnesses. However, we find no reversible error. Allowing the testimony of one expert witness would have resulted in unfair surprise. And although the trial court did err by excluding some of the testimony of the other expert witness, that exclusion did not materially prejudice the Myneses. Next, the Myneses contend that the trial court erred by sua sponte directing a verdict against the Myneses on their negligent construction claims. Because the Brookses did not build the house in their individual capacities, and because the Myneses failed to present evidence of the relevant standard of care, we disagree.

{¶3} Accordingly, we affirm, in part, and reverse, in part, the judgment of the trial court and remand this cause to the trial court. On remand, we instruct the

trial court to enter judgment in favor of the Brookses on the Myneses' negligent misrepresentation claim.

I.

{¶4} This matter is before this court for a second time. See *Mynes v. Brooks*, Scioto App. No. 07CA3185, 2008-Ohio-5613 (dismissing an appeal for lack of jurisdiction).

{¶5} The Myneses purchased real property from the Brookses in 2005. The property at issue consists of more than 54 acres, the main house (hereinafter the "House"), and a guesthouse. The House was built in an unusual manner. Specifically, the house was built against a steep hill. As a result, approximately half of the House is underground. The back wall of the House also acts as a retaining wall and is made of half inch, assault-treated plywood coated with tar and plastic. The alleged defects in the House are the subject matter of this case.

{¶6} Fort Hills is a corporation that developed the Fort Hills Estates subdivision in Scioto County. Husband and wife Otis Brooks and Judy Brooks own Fort Hills as equal shareholders, and Fort Hills built the House in 1992. Although Fort Hills owned the property, the Brookses lived in the House from 1992 until 1997. In 1997, the Brookses moved to Florida.

{¶7} From 1997 until 2005, various tenants rented and lived in the House. Apparently, some of these tenants complained about leaks and mold in the House. The House remained vacant when these various tenants did not occupy it.

{¶8} In 1998, a water leak caused damage throughout the House. The Brookses repaired the resulting damage and took steps to end the leak.

{¶9} In 2002, Fort Hills conveyed the property to the Brookses.

{¶10} In June 2005, the Brookses made several major repairs to the House. Apparently, water damage necessitated many of these repairs.

{¶11} The Myneses first saw the House at a July 17, 2005 “open house” presentation. After another tour of the property, the Myneses tendered a purchase offer of $250,000. Eventually, the Brookses contracted to sell the property to the Myneses for $265,000. The purchase agreement between the Brookses and the Myneses states: “Purchaser agrees to accept property and improvements in present physical condition, either known, unknown or hidden, after examination by the undersigned purchaser prior to the closing.” By hand, Otis Brooks wrote “No Warranties on House(s)” on the purchase agreement. Janeen Mynes initialed this handwritten clause.

{¶12} The Myneses hired Home Team Inspection Service, Inc. (hereinafter “Home Team”) to inspect the property. The inspection took place on August 12, 2005. Apparently, Home Team had unrestricted access to the House during the inspection. In relevant part, Home Team’s inspection report noted the following: (1) the general grade around the home appeared to be inadequate to direct rainwater away from the foundation; (2) there were indications of moisture present in the slab; (3) there was mold in various places throughout the house; (4) there was inadequate ventilation in the attic; and (5) there was water in the supply vent in the living room. Home Team’s inspection report discussed the

mold in an italic font, offsetting this discussion from the rest of the report. The section on mold also states, "If you wish to have the mold tested, please contact our office." However, the Myneses took no further action on the issue of mold.

{¶13} Before closing, the Myneses presented the Brookses with a list of questions about the property and the House. When asked about leaks, the Brookses responded, "there was." And when asked about mold, the Brookses responded, "unknown."

{¶14} Additionally, the Myneses claim that Otis Brooks represented that the House's retaining wall is made of steel and concrete. However, the retaining wall is actually made of half inch, assault-treated plywood coated with tar and plastic. Further, the Myneses claim that Otis Brooks said that you "can park a car" on the House because the House is so solid.

{¶15} The Brookses and Myneses closed on the house on October 17, 2005.

{¶16} Shortly after closing, the Myneses discovered that the house was full of toxic black mold. The Myneses hired a home inspector (the "Inspector") to inspect the House. The Inspector issued a report on March 10, 2006. In his report, the Inspector stated that, if he had conducted the original inspection on the House, he would have advised the Myneses not to buy the property. Further, the Inspector claimed that repairing the House could cost more than what the Myneses had paid for the property. Subsequently, the Director of the Scioto County General Health District issued a report indicating that the house was unfit for human habitation.

{¶17} Because of the alleged defects in the House, the Myneses filed a complaint against the Brookses, Fort Hills, and various other defendants. The complaint alleged Fraudulent Nondisclosure and/or Intentional Concealment, Negligent Concealment and/or Intentional Misrepresentation, Negligent Construction, Negligence Per Se, and various other claims against the Brookses. Further, the complaint alleged Negligent Construction and various other claims against Fort Hills. And finally, the complaint alleged a number of other causes of action against various other defendants, including Home Team and the real estate agents responsible for the transaction.

{¶18} Before trial, the Brookses and Fort Hills filed a motion for summary judgment on all of the Myneses' claims. The trial court denied that motion.

{¶19} During the trial, the Myneses called the Inspector as an expert witness. The Inspector did testify, but the trial court excluded his testimony regarding whether the house was built in a workmanlike manner. The Myneses also attempted to call a Scioto County Contractor (hereinafter the "Contractor") as an expert witness. However, the Myneses did not disclose the Contractor as an expert witness until just eleven days before trial, which was well after the trial court's deadline for discovery. As a result, the trial court did not permit the Contractor to testify.

{¶20} At the close of the Myneses' evidence, the trial court sua sponte directed a verdict against the Myneses' on their negligent construction claims against the Brookses and Fort Hills. Upon motion at the close of all evidence, the trial court directed a verdict in favor of Fort Hills on all remaining claims.

{¶21} The jury found in favor of the Myneses on their negligent representation claim against the Brookses. As a result, the jury awarded the Myneses $275,000 in damages. The jury found in favor of the Brookses on all of the Myneses' other remaining claims. (On fraud claims against the Brookses' realtors, the trial court awarded the Myneses $375,000 in damages and $7,500 in punitive damages. The realtors were parties in this appeal after this court consolidated cases 08CA3211 and 08CA3212. However, the realtors voluntarily dismissed their appeal upon reaching a settlement with the Myneses.)

{¶22} After the trial, the Brookses filed several motions, including motions for a new trial and for a judgment notwithstanding the verdict. The trial court denied these motions.

{¶23} The Brookses appeal, asserting the following four assignments of error: I. "THE TRIAL COURT ERRED IN DENYING BROOKS' MOTION FOR SUMMARY JUDGMENT." II. "THE TRIAL COURT ERRED WITH REGARD TO ITS RULINGS REGARDING THE ADMISSION OF TESTIMONY FROM MYNES' EXPERTS, CYNTHIA LAMMERT, LARRY FAWCETT AND KURT GRASHEL, AND BY THE EXCLUSION OF TESTIMONY FROM BROOKS' PROFFERED EXPERT JACK STEPHENSON. THE TRIAL COURT'S RULINGS CONSTITUTED A CLEAR SHOWING OF AN ABUSE OF DISCRETION, ALONG WITH ATTENDANT MATERIAL PEJUDICE." III. "THE TRIAL COURT OTHERWISE ERRED WITH REGARD TO ITS PROVISION OF INSTRUCTIONS TO THE JURY AND WITH REGARD TO ITS RULINGS ON BROOKS' MOTIONS FOR MISTRIAL." And, IV. "THE TRIAL COURT ERRED

WITH REGARD TO ITS RULINGS ON BROOKS' POST-TRIAL MOTIONS." The Myneses have cross-appealed against the Brookses and Fort Hills, asserting the following two assignments of error: I. "THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT SUA SPONTE DIRECTED A VERDICT IN FAVOR OF CROSS-APPELLEES ON CROSS-APPELLANTS' CLAIM FOR NEGLIGENCE." And, II. "THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE OF CROSS-APPELLEES' FAILURE TO CONSTRUCT THE HOUSE IN A WORKMANLIKE MANNER."

II.

{¶24} We address the Brookses' fourth assignment of error out of order because it is dispositive. In their fourth assignment of error, the Brookses contend that the trial court erred in denying the Brookses' post-trial motions. Specifically, we will address the trial court's denial of the Brookses' motion for judgment notwithstanding the verdict (JNOV) pursuant to Civ.R. 50(B).

{¶25} "Pursuant to Civ.R. 50(B), where there has been a verdict for the plaintiff, the test to be employed by the trial court in determining whether to sustain a motion for judgment notwithstanding the verdict is whether the defendant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the plaintiff." *Daniels v. Fraternal Order of Eagles Aerie of Tecumseh #979*, 162 Ohio App.3d 446, 2005-Ohio-3657, at ¶12. A motion for JNOV under Civ.R. 50(B) tests the legal sufficiency of the evidence. See, e.g., *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 679; *McKenney v. Hillside Dairy Co.* (1996), 109 Ohio App.3d 164,

176. Thus, a trial court must construe the evidence most strongly in favor of the non-moving party and deny the motion where there is some evidence to support the non-moving party's case. See generally, *Texler* at 679; *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 318; *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275. In doing so, a trial court may not weigh the evidence or judge the credibility of witnesses. *Osler v. Lorain* (1986), 28 Ohio St.3d 345, syllabus; *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 67-68. A trial court should deny a motion for JNOV if there is substantial evidence upon which reasonable minds could come to different conclusions on the essential elements of the claim. *Ramage v. Cent. Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 109; *Posin* at 275.

{¶26} Initially, the Brookses argue that the trial court should have granted their motion for JNOV because the doctrine of caveat emptor defeats all claims, except for fraud, and controls the as-is sale of property. Before analyzing this argument, we must determine whether the transaction was indeed an "as is" sale.

A. The "As Is" Sale of Property

{¶27} To determine whether the transaction was an "as is" sale, we must examine the intent of the parties as expressed in the purchase agreement. "A purchase agreement for real estate is a written contract whose construction is a matter of law." *St. Paul's Lutheran Church v. Brooks*, Huron App. No. H-07-022, 2008-Ohio-2481, at ¶16, citing *Kellie Auto Sales, Inc. v. Rahbars & Ritters Ents., L.L.C.*, 172 Ohio App.3d 675, 2007-Ohio-4312, at ¶13, citing *Alexander v.*

Buckeye Pipe Line Co. (1978), 53 Ohio St.2d 241, paragraph one of the syllabus, superseded by statute on other grounds. When interpreting a contract, this court's role "is to give effect to the intent of the parties to the agreement." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶11, citing *Hamilton Ins. Serv. Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 273; Section 28, Article II, Ohio Constitution.

{¶28} We will examine the contract "as a whole and presume that the intent of the parties is reflected in the language used" by the parties in the contract. *Westfield Ins. Co.* at ¶11, citing *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. We must also "look to the plain and ordinary meaning of the language used * * * unless another meaning is clearly apparent[.]" *Westfield Ins. Co.* at ¶11, citing *Alexander* at paragraph two of the syllabus. "When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties." *Westfield Ins. Co.* at ¶11, citing *Alexander* at paragraph two of the syllabus.

{¶29} Here, the purchase agreement states that "Purchaser agrees to accept property and improvements in *present physical condition*, either known, unknown or hidden, after examination by the undersigned purchaser prior to the closing." (Emphasis added). This court has repeatedly found that a "'present physical condition' clause is substantially equivalent to an 'as is' clause." *Masten v. Brenick* (Mar. 6, 2001), Hocking App. No. 99CA8, 2001-Ohio-2500, unreported, citing *Good v. McElhaney* (Sept. 30, 1998), Athens App. No. 97CA41, unreported; *Boulton v. Vadakin*, Washington App. No. 07CA26, 2008-Ohio-666,

at ¶17, fn. 2; *Evans v. Baker* (Mar. 17, 2000), Ross. App. No. 99 CA 2502, unreported; *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470, 471 (treating a "present physical condition" clause as an "as is" clause). See, also, *Arbor Village Condominium Assn. v. Arbor Village, Ltd., L.P.* (1994), 95 Ohio App.3d 499, 511; *Plascak v. Textoris* (Mar. 24, 1994), Cuyahoga App. No. 64972, unreported; *Vilk v. Radley* (Aug. 18, 1989), Lake App. No. 13-087, unreported. Thus, we find that the contract at issue is, indeed, an "as is" purchase agreement.

{¶30} The Myneses argue that we should not treat the "present physical condition" clause as an "as is" clause because the "present physical condition" language is contained in nearly every standard board of realtors purchase contract. We disagree and, instead, choose to follow this court's own clear precedent regarding the "present physical condition" clause. But even if we were to accept this argument, we note that this purchase agreement contains an additional clause that differs from a standard board of realtors contract. The purchase agreement states that there are "No Warranties on House(s)." Otis Brooks added this clause in his own handwriting, and Janeen Mynes initialed the clause. The Myneses contend that the "No Warranties" clause only relates to the appliances in the House and guesthouse. But the plain and ordinary meaning of "No Warranties on House(s)" indicates that the parties intended an "as is" sale; i.e., a sale without warranties. This is especially true when combined with the purchase agreement's "present physical condition" language.

B. Caveat Emptor

{¶31} Next, we must examine the doctrine of caveat emptor. "The doctrine of caveat emptor generally applies to all real estate transactions." *Lewis v. Basinger*, Mahoning App. No. 03 MA 223, 2004-Ohio-6377, at ¶9. "*Caveat emptor* literally means 'let the buyer beware' and is a maxim that purchasers must examine and judge property for themselves before purchasing it." *Smith v. Cooper*, Gallia App. No. 04CA12, 2005-Ohio-2979, at ¶3, fn. 2 (italics in original). The doctrine "precludes recovery in an action by the purchaser for a structural defect 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." *Layman v. Binns* (1988), 35 Ohio St.3d 176, syllabus. (Importantly, we note that the jury found against the Myneses on all of their fraud claims.)

C. Negligent Misrepresentation

{¶32} Here, the trial court should have granted the Brookses' motion for JNOV because, in an "as is" sale, the "doctrine of caveat emptor bars a cause of action based upon negligent misrepresentation." *Kossutich v. Krann* (Aug. 16, 1990), Cuyahoga App. No. 57255, unreported. See, also, *Boulton* at ¶18 ("In the case sub judice, appellants accepted the property 'as is.' Thus, they may recover from appellees *only* for fraudulent misrepresentation or concealment.") (emphasis added); *Williams v. Brown*, Muskingum App. Nos. CT2004-0048, CT2004-0051, 2005-Ohio-5301, at ¶42, quoting *Moreland v. Ksiazek,* Cuyahoga App. No. 83509, 2004-Ohio-2974, at ¶ 57; ("Further, ' * * * as long as a seller

does not engage in fraud, these two principles, caveat emptor and 'as is' bar any claims brought by a buyer.'"); *Basinger* at ¶2 ("[Appellant] argues that the trial court erred when it found him liable for negligent misrepresentation since both the 'as is' nature of the contract and the doctrine of caveat emptor shield him from all liability except for fraud. [Appellant] is correct."). Thus, we find that the Brookses are entitled to judgment as a matter of law on the Myneses' negligent misrepresentation claim.

{¶33} Further, we believe that an "as is" sale of real property should indeed bar a claim for negligent misrepresentation because, in an "as is" sale, the seller has no duty to disclose. "[T]he doctrine of negligent misrepresentation * * * provides a tort vehicle for recovery of economic damages that arise from *the breach of a contractual duty*, where information is negligently supplied for the guidance of others in their business transactions, and a foreseeable recipient of such information justifiably relies upon it and suffers injury as a proximate cause of the negligent act." *Westfield Ins. Co. v. HULS Am., Inc.* (1998), 128 Ohio App.3d 270, 296 (emphasis added) (internal citation omitted); *Stout v. N. Am. Group*, Butler App. No. 2006-10-286, 2007-Ohio-4971, at ¶12. However, "[a]n 'as is' clause in a real estate contract * * * *relieves the seller of any duty to disclose.*" *Rogers* at 471 (emphasis added). See, also, *Kaye v. Buehrle* (1983), 8 Ohio App.3d 381, at syllabus. Thus, in an "as is" sale of property, the seller "only has the duty not to commit an affirmative fraud." *Basinger* at ¶9. Without the duty to disclose, there can be no claim for negligent misrepresentation.

{¶34} The Myneses further argue that the “as is” clause applies only to the Brookses as the sellers of the House, not as the builders of the House. The Myneses claim this is so because the purchase agreement was not for the construction of the House, but merely the sale. This argument is without merit. First, we note that the Brookses did not build the House in their individual capacities. Rather, Fort Hills built the House. Fort Hills conveyed the property to the Brookses in December 2002. Therefore, the Brookses were not builder-vendors as the Myneses’ claim. Regardless, in the sale of real property, an “as is” clause applies even to builder vendors. See, e.g., *Brewer v. Brothers* (1992), 82 Ohio App.3d 148, 155.

{¶35} Because the principles of caveat emptor and “as is” bar a claim for negligent misrepresentation, we find that the trial court erred by not granting the Brookses’ motion for JNOV. The Brookses are entitled to judgment as a matter of law on the Myneses’ negligent misrepresentation claim. Furthermore, because our resolution of this argument is dispositive, we will not address the Brookses’ other arguments under this assignment of error. See App.R. 12(A)(1)(c).

{¶36} Accordingly, we sustain the Brookses’ fourth assignment of error and find that the Brookses are entitled to judgment as a matter of law on the Myneses’ negligent misrepresentation claim.

III.

{¶37} In our resolution of the Brookses’ fourth assignment of error, we found that the Brookses are entitled to judgment as a matter of law on the Myneses’

negligent misrepresentation claim. Therefore, all of the Myneses' claims against the Brookses have been resolved in the Brookses' favor. Accordingly, we find the Brookses' other assignments of error moot and decline to address them. See App.R. 12(A)(1)(c).

IV.

{¶38} The Myneses have cross-appealed. The resolution of the Myneses' second assignment of error affects our analysis of the Myneses' first assignment of error. Therefore, we will address the Myneses' second assignment of error out of order. In their second assignment of error, the Myneses contend that the trial court erred in excluding the testimony of the Contractor and the Inspector. The Myneses argue that this testimony would have established the standard of care relevant to the Myneses' negligent construction claim against the Brookses and Fort Hills.

{¶39} A trial court has broad discretion in the admission or exclusion of evidence. *Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 113. An abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "So long as a trial court exercises its discretion in accordance with the rules of procedure and evidence, a reviewing court will not reverse that judgment absent a clear showing of an abuse of discretion with attendant material prejudice to defendant." *Willis v. Martin*, Scioto App. No. 06CA3053, 2006-Ohio-4846, at ¶21; *Beard v. Meridia Huron Hosp*, 106

Ohio St.3d 237, 2005-Ohio-4787, at ¶20; *State v. Hymore* (1967), 9 Ohio St.2d 122, 128.

A.

{¶40} "A trial court may exclude expert testimony as a sanction for violating Civ.R. 26(E)(1)." *Wright v. Suzuki Motor Corp.*, Meigs App. Nos. 03CA2, 03CA3, 03CA4, 2005-Ohio-3494, at ¶64. In relevant part, Civ.R. 26(E)(1) provides: "A party is under a duty seasonably to supplement his response with respect to * * * the identity of each person expected to be called as an expert witness at trial and the subject matter on which he is expected to testify." However, the "[e]xclusion of otherwise reliable and probative evidence is an extreme sanction for a discovery violation." *Suzuki Motors Corp.* at ¶65, citing Cucciolillo *v. East Ohio Gas Co.* (1980), 4 Ohio App.3d 36, 38; *Mulford v. Columbus & S. Ohio Elec. Co.* (Jan. 12, 1994), Athens App. No. CA-1548, unreported. "Thus, a court should exclude evidence only when clearly necessary to enforce willful non-compliance or to prevent unfair surprise." *Suzuki Motors Corp.* at ¶65. See, also, *Hardy v. Newbold*, Gallia App. No. 02CA12, 2003-Ohio-3995, at ¶15. In deciding whether to exclude evidence, "the trial court should weigh the conduct of the party offering the expert witness along with the level of prejudice suffered by the opposing party attributable to the discovery violation, in order to determine the appropriate sanction." *Savage v. Correlated Health Serv., Ltd.* (1992), 64 Ohio St.3d 42, 55. "The existence and effect of prejudice resulting from noncompliance with the disclosure rules is of primary concern, not just the intent or motive involved." *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 85.

{¶41} Here, we find that the trial court did not abuse its discretion by excluding the testimony of the Contractor. The Myneses did not disclose the Contractor as an expert witness until eleven days before trial, which was well after the court's deadline for discovery had passed. The Supreme Court of Ohio addressed a similar situation in *Vaught v. Cleveland Clinic Found.*, 98 Ohio St.3d 485, 2003-Ohio-2181. In *Vaught*, the defendant-physician waited until a week before trial to reveal that he would be testifying not only as a fact witness, but also as an expert witness. Id. at ¶6. As a result, the Supreme Court of Ohio found that the trial court did not abuse its discretion by excluding the defendant-physician's expert testimony. Id. at ¶28. See, also, *Jones v. Murphy* (1984), 12 Ohio St.3d 84 (discussing the exclusion of expert testimony where the plaintiff did not reveal the identity of an expert witness until twelve days before trial).

{¶42} We agree that "the trial court had a responsibility to ensure that there was no unfair prejudice or surprise to [the Brookses.]" *Vaught* at ¶27. The Myneses offered to make the Contractor available for a telephone deposition, but that deposition would not have taken place until either the Friday or Saturday before the Monday trial date. In this instance, the trial court could have reasonably concluded that allowing the Contractor to testify would have resulted in unfair surprise to the Brookses. The Brookses would not have had an adequate opportunity to (1) depose the Contractor, (2) review the Contractor's deposition testimony, and then (3) prepare for the Contractor's testimony at trial. Therefore, we find that the trial court did not abuse its discretion by excluding the testimony of the Contractor.

{¶43} Furthermore, we can only speculate as to whether the Myneses were materially prejudiced by the exclusion of the Contractor's testimony. From the Myneses' pre-trial statement, we know that the Contractor was to testify about "the relevant customs in the residential home construction industry; specifically, the construction of an underground home." However, beyond the pre-trial statement, the Myneses did not proffer any reports by the Contractor or the substance of the Contractor's proposed testimony. "'Absent a proffer in the trial court and a direct reference in the brief to specific evidence that should have been admitted, we have nothing to rule upon.'" *Reaper v. James*, Lawrence App. No. 08CA20, 2009-Ohio-151, at ¶16, quoting *In re West,* Washington App. No. 01CA8, 2001-Ohio-2634, unreported. See, also, App.R. 16(D).

B.

{¶44} We find that the trial court did indeed abuse its discretion by excluding the Inspector's testimony regarding whether the House was built in a workmanlike manner. When deciding the issue, the trial court stated: "I guess from day one I've sort of considered this to be not a home construction case in the sense that the home was built improperly. I've considered it more of an issue that the buyers weren't told of the existence of mold and water in the house so I am not going to allow [the Inspector] to talk of the physical problems with the residence.

{¶45} MR. SERATT: For negligent construction?

{¶46} THE COURT: For negligent construction. * * *." Transcript Volume 2, Page 571.

{¶47} Here, the trial court abused its discretion by seemingly finding the Inspector's proposed testimony irrelevant. "All relevant evidence is admissible, except as otherwise provided * * *. Evidence which is not relevant is not admissible." Evid.R. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. "Generally speaking, the question of whether evidence is relevant is ordinarily not one of law but rather one * * * based on common experience and logic." *State v. Lyles* (1989), 42 Ohio St.3d 98, 99. And based on common experience and logic, evidence of whether the house was built in a workmanlike manner is clearly relevant to the Myneses' negligent construction claim. Indeed, such evidence is the crux of any negligent construction case.

{¶48} However, from the record, we cannot find that the Myneses were materially prejudiced by the exclusion of the Inspector's testimony. Importantly, the Inspector's excluded testimony would have been the only evidence presented regarding the Myneses' negligent construction claim. Unlike the situation with the Contractor, the Myneses did indeed proffer the Inspector's excluded testimony. The Inspector would have testified that, in his professional opinion, the House was negligently constructed. As we discuss later, to succeed on their claim for negligent construction, the Myneses had to (1) establish the relevant standard of care and (2) demonstrate how the construction of the House deviated from that standard. See, infra, Section V. B. of this Opinion (discussing the

relevant standard of care). However, the Inspector's proffered testimony is merely conclusory in nature and does not establish how the construction of the house deviated from the relevant standard of care. See, generally, *Mills v. Mills*, Trumbull App. No. 2002-T-0102, 2003-Ohio-6676, at ¶49 ("Thomas fails to make a specific proffer of the exact nature of this proposed evidence. Instead, he made general conclusory statements regarding the contents of the diary."). And because the excluded testimony would have been the only evidence on the Myneses' negligent construction claim, that claim would have failed as a matter of law – even if the trial court had allowed the Inspector to testify on this subject. See *Ohio Valley Bank v. Copley* (1997), 121 Ohio App.3d 197, 205, citing 2 Restatement of Law 2d, Torts (1965) 73, section 299A. Thus, the trial court's exclusion of the Inspector's proffered testimony did not materially prejudice the Myneses.

{¶49} Furthermore, the Myneses did not attempt to qualify the Inspector as an expert in the construction of underground houses. And after reviewing the Myneses' pre-trial statement, the Inspector's resume, and the Inspector's testimony, we can only speculate as to whether the Inspector is qualified to testify about such matters. Namely, we have found insufficient evidence to demonstrate whether the Inspector is an expert in the standard of care for the construction of underground houses in Scioto County or a similar community. See Evid.R. 702(B).

{¶50} Accordingly, for the foregoing reasons, we overrule the Myneses' second assignment of error on their cross-appeal.

V.

{¶51} In their first assignment of error on cross appeal, the Myneses contend that the trial court erred by directing a verdict against the Myneses on their claims for negligent construction.

{¶52} Initially, we note that a trial court has the authority to sua sponte enter a directed verdict. *Fiske v. U.S. Health Corp. of S. Ohio*, Scioto App. No. 04CA2942, 2005-Ohio-1295, at ¶37; *Graham v. Cedar Point, Inc.* (1997), 124 Ohio App.3d 730, 733; *Stephens v. Ratcliff* (July 26, 1993), Lawrence App. No. 92CA29, unreported. In the present case, there is some debate as to whether the Myneses objected to the trial court's directed verdict and thereby preserved the issue for appeal. If the Myneses failed to object, they would have forfeited all but a plain error review. *Goldfuss v. Davidson* (1987), 79 Ohio St.3d 116, 121-122. See, also, *Rocky v. Rockey*, Highland App. No. 08CA4, 2008-Ohio-6525, at ¶37; *Lehmkuhl v. ECR Corp.*, Knox App. No. 06CA039, 2008-Ohio-6295, at ¶26-30 (finding that appellant waived argument except for plain error when appellant failed to object to trial court's sua sponte judgment). However, for purposes of this opinion, we will assume, without deciding, that the Myneses actually objected because we find no error, let alone plain error, in the trial court's directed verdict against the Myneses on their negligent construction claims.

{¶53} We review the trial court's sua sponte directed verdict in the same manner that we would review a directed verdict pursuant to Civ.R. 50(A). *City of Steubenville v. Schmidt*, Jefferson App. No. 01JE13, 2002-Ohio-6894, at ¶31; *Stephens*. Because the trial court directed a verdict against the Myneses, we

treat the Myneses as the non-moving party for purposes of our review. *City of Steubenville* at ¶31-32; *Stephens*.

{¶54} Civ.R. 50(A)(4) provides that, upon a proper motion for a directed verdict, the trial court must construe the evidence most strongly in favor of the party against whom the motion is directed and determine whether "upon any determinative issue [that] reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." The rule requires the trial court to give the non-moving party the benefit of all reasonable inferences that may be drawn from the evidence. *Keeton v. Telemedia Co. of Southern Ohio* (1994), 98 Ohio App.3d 405, 408, citing *Broz v. Winland* (1994), 68 Ohio St.3d 521, 526. When determining a motion for a directed verdict, the trial court must submit an essential issue to the jury if there is sufficient credible evidence to permit reasonable minds to reach different conclusions on that issue. *O'Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph four of the syllabus. See, also, *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284-285, quoting *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 115.

{¶55} Although a motion for directed verdict requires a trial court to review and consider the evidence, the motion does not present a question of fact or raise factual issues. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, paragraph one of the syllabus. A motion for a directed verdict tests the legal sufficiency of the evidence rather than its weight or the credibility of the witnesses. *Ruta* at 68-69. A motion for a directed verdict therefore presents a question of law, and we conduct a de novo review of the lower court's judgment.

Howell v. Dayton Power & Light Co. (1995), 102 Ohio App.3d 6, 13; *Keeton* at 409.

A.

{¶56} Here, we find that the trial court did not err by sua sponte directing a verdict in favor of the Brookses on the Myneses' negligent construction claim. Initially, we once again note that the Brookses did not build the house in their individual capacities. Rather, the Brookses' built the house through the Fort Hills corporation. "A corporation is a legal entity unto itself, separate and apart from the natural persons composing it." *Atlantic Veneer Corp. v. Robbins*, No. 01CA678, 2002-Ohio-5363, at ¶50, citing *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 287. The corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation if: "(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." *Belvedere* at paragraph three of the syllabus. "To fulfill the second prong of the *Belvedere* test for piercing the corporate veil, the plaintiff must demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act." *Dombroski v. WellPoint, Inc.* (2008), 119 Ohio St.3d 506, syllabus. The Myneses have not alleged, nor

have they demonstrated, that the Brookses exercised control over Fort Hills in a manner that satisfies the *Belvedere* test. Indeed, as it regards the negligent construction claim against the Brookses, such a suggestion seems illogical because the Brookses themselves were the first to live in the house after Fort Hills built it. Therefore, the trial court did not err by sua sponte directing a verdict in favor of the Brookses on the Myneses' negligent construction claim.

B.

{¶57} The trial court also did not err by sua sponte directing a verdict in favor of Fort Hills on the Myneses' negligent construction claim. "It is well settled that the law imposes a duty on builders to construct buildings in a 'workmanlike manner.'" *Simms v. Heksett* (Sept. 18, 2000), Athens App. No. 00CA20, unreported; *McCray v. Clinton Cty. Home Improvement* (1998), 125 Ohio App.3d 521, 525; *Floyd v. United Home Improvement Ctr., Inc.* (1997), 119 Ohio App.3d 716, 719; *Lin v. Gatehouse Constr. Co.* (1992), 84 Ohio App.3d 96, 101. "A failure to comply with that duty is actionable through a tort claim in negligence." *Simms*; *Gardens of Bay Landing Condominiums v. Flair Builders, Inc.* (1994), 96 Ohio App.3d 353, 358; *Barton v. Ellis* (1986), 34 Ohio App.3d 251, 253. See, also, *Velotta v. Leo Petronzio Landscaping* (1982), 69 Ohio St.2d 376, at paragraph one of the syllabus. "The elements of a claim in negligence are generally (1) a duty to perform to a certain standard; (2) a breach of that duty; (3) causation; and (4) damages." *Simms*; *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. "In order to prove that [Fort Hills] breached their duty, the [Myneses] had to demonstrate that [Fort Hills] acted unreasonably and

did not exercise that degree of care which a member of the construction trade in good standing in similar communities would exercise under the same or similar circumstances." *Ohio Valley Bank* 121 Ohio App.3d at 205, citing 2 Restatement of Law 2d, Torts (1965) 73, Section 299A. Furthermore, "[p]rivity of contract is not a necessary element of an action in negligence brought by a vendee of real property against the builder-vendor." *McMillan v. Brune-Harpenau-Torbeck Builders, Inc.* (1983), 8 Ohio St.3d 3, at syllabus.

{¶58} Here, we find that the trial court did not err by directing a verdict against the Myneses because the Myneses did not present evidence as to the relevant standard of care. (The exclusion of this evidence is the basis of the Myneses' second assignment of error on cross-appeal.) "In many cases, a plaintiff must present expert testimony to prove a builder deviated from common standards of workmanship and failed to exercise ordinary care. (Internal citation omitted.) But a plaintiff need not do so when the issue is not highly technical or scientific in nature, or beyond the experience or knowledge of the average trier of fact." *Fullenkamp v. Homan, Inc.*, Mercer App. No. 10-05-16, 2006-Ohio-4191, at ¶12, citing *Floyd* at 721-722.

{¶59} In *Fullenkamp*, the owner of a farm sued a contractor for failing to build a dairy barn roof in a workmanlike manner. After the trial court directed a verdict in favor of the contractor, the farm owner appealed. The Third District Court of Appeals upheld the trial court's decision because, "[a]lthough the [farm owner] demonstrated that some problems exist with the roof and the collection system, that alone is insufficient to prove breach of the duty to build in a workmanlike

manner without also showing that those problems resulted from [the contractor's] failure to exercise the requisite degree of care. 'The fundamental issue concerns, not what was done by the defendants, but whether what was done was in accordance with certain standards of workmanship. These standards are not matters which are within the common knowledge but must be in some manner established by evidence.'" *Fullenkamp* at ¶21, quoting *Schlachter v. Davis* (May 26, 1978), Defiance App. No. 4-77-12, unreported.

{¶60} Here, we find that the relevant standard of care is beyond the experience and knowledge of the average trier of fact. See *Floyd* at 722-23. As the Myneses admit, the "House is unusual with approximately one half of it below grade. * * * Specifically, the master bedroom and bathroom, utility room, a portion of the living room, a small back bedroom and a portion of the garage are underground." Brief of Appellees at 4 (internal citation to the record omitted). Further, the back wall of the house also acts as a retaining wall. "A duty is imposed by law upon a builder-vendor of a real-property structure to construct the same in a workmanlike manner and to employ such care and skill in the choice of materials and work as will be commensurate with the gravity of the risk involved in protecting the structure against faults and hazards, *including those inherent in its site*." *Mitchem v. Johnson* (1966), 7 Ohio St.2d 66, at paragraph three of syllabus (emphasis added). We believe that the standards of workmanship for a house built one-half below grade, including the care and skill needed to protect a house built in such a manner, are highly technical in nature. Thus, the Myneses had to establish the relevant standard of care through their

presentation of the evidence. Because the Myneses failed to do this, we find no error in the trial court sua sponte directing a verdict against the Myneses on their negligent construction claims.

{¶61} Accordingly, we overrule the Myneses first assignment of error on cross-appeal.

VI.

{¶62} In conclusion, we find that the sale of the property was an “as is” sale and, therefore, the Brookses are entitled to judgment as a matter of law on the Myneses’ negligent misrepresentation claim. Accordingly, we sustain the Brookses’ fourth assignment of error. Based on our resolution of the Brookses’ fourth assignment of error, all of the Myneses’ claims against the Brookses have been resolved in the Brookses’ favor. Accordingly, we find the Brookses’ other assignments of error moot and decline to address them. Further, we find that the trial court did not abuse its discretion by excluding the Contractor’s testimony. And even though the trial court did abuse its discretion by excluding part of the Inspector’s testimony, the exclusion did not materially prejudice the Myneses. Accordingly, we overrule the Myneses’ second assignment of error on cross-appeal. Finally, we find that the trial court did not err by sua sponte directing a verdict against the Myneses on their negligent construction claims because (1) the Brookses did not build the house in their individual capacities and (2) the Myneses failed to present evidence of the relevant standard of care. Accordingly, we overrule the Myneses’ first assignment of error. Therefore, we affirm, in part, and reverse, in part, the judgment of the trial court and remand this

cause to the trial court. On remand, we instruct the trial court to enter judgment in favor of the Brookses on the Myneses' negligent misrepresentation claim.

JUDGMENT AFFIRMED, IN PART, AND REVERSED, IN PART, AND CAUSE REMANDED.

Harsha, J., concurring in part and dissenting in part:

{¶63} I concur in judgment and opinion in all regards except for the holdings that: 1) essentially finds harmless error in the exclusion of the Inspector's testimony concerning the standard of care for the negligent construction claim and 2) affirms the directed verdict in favor of Fort Hills Estate, Inc. on that claim. In my view, the plaintiff's proffer was specific enough to satisfy its intended purpose. All Evid.R.103 (A)(2) requires is that the proponent of the evidence proffer the substance of the excluded testimony. That type of proffer puts the trial court on notice of the basis of the proponent's claim for admissibility and allows the appellate court to conduct a meaningful review of the trial court's ruling. I also cannot join the opinion's conclusion on the Inspector's qualifications to render an opinion on the construction of an underground residence because that issue was not before the trial court.

{¶64} Finally, based upon the error in excluding the Inspector's testimony and the satisfactory proffer, I also conclude that the claim for negligent construction against Fort Hills Estate, Inc. should have proceeded to the jury for its disposition.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, in part, and REVERSED, IN PART and this CAUSE BE REMANDED to the trial court for further proceedings consistent with this opinion. Appellees-Cross Appellants shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Harsha, J.: Concurs in Part and Dissents in part with Opinion.
Abele, J.: Concurs in Judgment and Opinion to Direct Appeal as to Assignments of Error 1, 2, 3 & 4; Concurs in Judgment Only to Cross-Appeal as to Assignments of Error 1 & 2.

For the Court

BY: ______________________________
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.