

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

JOHN P. TUTOLO, et al.,	:	O P I N I O N
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2010-L-118
STEPHEN V. YOUNG, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 09 CV 003551.

Judgment: Affirmed.

James E. Kovac, 2000 Standard Building, 1370 Ontario Street, Cleveland, OH 44113-1701 (For Plaintiffs-Appellants).

Gerald R. Walker, Redmond, Walker & Murray, 174 North St. Clair Street, Painesville, OH 44077-4091 (For Defendants-Appellees, Stephen & Jane Young).

Robert E. Zulandt, Jr., Zulandt & Smalheer, 114 East Park Street, Chardon, OH 44024 (For Defendant-Appellee, Brent McGarvey).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final judgment of the Lake County Court of Common Pleas. Appellants, John P. Tutolo and Victoria L. Tutolo, seek reversal of the trial court's summary judgment decision in favor of appellees, Brent McGarvey, Stephen V. Young, and Jane C. Young, on each of appellants' four claims for relief. As the primary basis for the appeal, appellants contend that the trial court erred in not holding that a

genuine issue of material fact existed concerning whether the Youngs fraudulently concealed certain information as part of an underlying real estate transaction.

{¶2} The dispute between the parties was predicated upon the following basic facts. In 1980, the Youngs purchased a home located on Wisner Road in Kirtland, Ohio. One of the prominent features of the building was a flat roof which covered the family room and an office.

{¶3} After living in the home for approximately 15 years, the Youngs chose to construct a new pitched roof over the area that had been covered by the flat roof. As part of this project, the Youngs decided not to remove the flat roof. Instead, they chose to build the new pitched roof directly over the existing roof.

{¶4} The Youngs hired Brent McGarvey to construct the pitched roof. Prior to working on this project, McGarvey had never taken any formal training as a carpenter and was not a bonded roofer. However, he was a retired industrial arts teacher who had performed a number of home-repair jobs around his own residence.

{¶5} Before beginning construction of the new roof, neither McGarvey nor the Youngs obtained a building permit from the appropriate city officials. Similarly, once the project was completed, the pitched roof was never inspected and approved by any city official.

{¶6} The Youngs continued to live in the home for approximately nine years after the completion of the pitched roof. During that time period, the Youngs did not experience any leaks or other problems associated with the new roof. At the close of those nine years, they decided to sell the home and move to a new residence in Kirtland. In June 2005, they reached an agreement to sell the home to appellants for

the sum of \$250,000.

{¶7} In the first paragraph of the purchase agreement, appellants specifically agreed to accept the home and property in its present condition; i.e., “as is.” In another clause of the agreement, appellants had the right to have a professional conduct a general home inspection. An inspection was subsequently performed by an individual hired by appellants. It did not reveal any problems with the pitched roof.

{¶8} In conjunction with the purchase agreement, the Youngs also completed a residential property disclosure form. Section (C) of the form asked whether the Youngs were aware of any current leaks or other material problems pertaining to the roof of the home. In response, they checked the answer “no.” As to Section (N), which inquired if they were aware of any other material defect in or on the property, the Youngs did not provide any response.

{¶9} During the first four years in which appellants owned the residence, they were unaware of any problems with the pitched roof. However, in July 2009, they hired an individual to trim certain trees on the adjoining land. While performing this work, a tree limb fell and crashed through the pitched roof. At that point, appellants first learned of the existence of the original flat roof. Appellants further discovered at that time that significant amounts of moisture had been leaking over the years through the pitched roof, thereby causing much of the wood in the area to remain wet and begin to rot.

{¶10} Appellants immediately hired an expert in residential design to determine the cause of the various leaks. Ultimately, the expert found that a considerable number of errors had been made in both the design and construction of the pitched roof. The expert also found that both of the existing roofs would have to be torn down, and that a

second proper pitched roof would have to be built over the entire area.

{¶11} In October 2009, appellants brought an action for money damages against the Youngs and McGarvey. As to the Youngs, appellants asserted four claims sounding in fraud, wanton and reckless conduct, negligence, and breach of contract. As the basis of their fraud claim, they alleged that, at the time of the conveyance of the property, the Youngs failed to disclose the following points: (1) no building permit was obtained prior to the construction of the pitched roof; and (2) the pitched roof was improperly designed and poorly constructed. Regarding McGarvey, appellants alleged that he had engaged in wanton and reckless behavior by constructing the roof without a building permit and by making numerous mistakes throughout the entire process.

{¶12} After the parties engaged in extensive discovery, McGarvey and the Youngs submitted separate motions for summary judgment. In his motion, McGarvey maintained that, pursuant to R.C. 2305.131, appellants could not pursue any claim against him because the problems with the pitched roof were not discovered within 10 years of his completion of the project. In their motion, the Youngs argued that appellants could not prevail on their first two claims because they had no evidence demonstrating that the Youngs had actual knowledge of the defects in the pitched roof prior to the sale of the property in 2005. As to the claims in negligence and breach of contract, the Youngs contended that such claims cannot be brought when the residential home had been purchased “as is.”

{¶13} In responding to McGarvey’s Civ.R. 56(C) motion, appellants asserted that the statute of repose, R.C. 2305.131, was inapplicable in this case because McGarvey did not have the qualifications to be considered a proper construction worker. They also

contested when the pitched roof had been built and whether 10 years had elapsed after its completion. As to the Youngs' summary judgment motion, appellants reiterated that their fraud claim was not primarily based upon whether the Youngs had been aware of the leaks in the roof prior to the conveyance, but upon the fact that the Youngs had not disclosed the lack of the building permit and the faulty design of the roof. They further asserted that, even if the Youngs' actual knowledge of the leaks was a critical question, there was still a possible factual dispute because there was deposition testimony that Stephen Young had occasionally shoveled snow off the roof during the winter.

{¶14} In granting both motions for summary judgment and disposing of all four pending claims, the trial court first concluded that there was no dispute that the pitched roof had been built in 1996, and that appellants had not raised any claim of fraud as to McGarvey. In light of this, the court held that R.C. 2305.131 barred any claim against McGarvey regarding the construction of the roof. As to the Youngs, the trial court held that they were entitled to prevail because appellants did not present any evidence showing that the Youngs made any false statements or attempted to be deceitful at the time of the sale. The court also emphasized that there was no showing that the Youngs had prior knowledge of the leaks or tried to cover up any apparent water damage.

{¶15} In challenging the merits of the trial court's decision, appellants raise the following assignments of error:

{¶16} “[1.] Trial court erred by incorrectly applying R.C. 2305.131 to the facts of the case based on the statute's ‘Statement of Findings and Intent.’

{¶17} “[2.] In the alternative, the trial court erred in finding that the plaintiffs-appellants failed to meet their burden of proof that the roof was not installed in 1996 as

alleged by the defendants-appellees.

{¶18} “[3.] Trial court erred in finding that there was no evidence that the appellees Youngs were not even aware of any defective condition in the roof while they owned the house.

{¶19} “[4.] Trial court erred in finding there were no patent or latent defects within the actual knowledge of the appellees Youngs.

{¶20} “[5.] Trial court erred in ignoring the deposition testimony of appellees Youngs and by finding and construing the evidence most strongly for them, that they did not know building permits were required; and further finding there are no genuine issues of material fact.

{¶21} “[6.] The trial court erred in dismissing appellants’ counts of negligence and breach of contract.

{¶22} “[7.] Trial court erred in combining appellant’s complaint count II for wanton and reckless conduct into complaint count I for fraud.

{¶23} “[8.] Trial court erred in granting summary judgment for appellee McGarvey.”

{¶24} Since appellants’ first, second, and eighth assignments relate only to McGarvey, they will be addressed in consecutive order. Under their first assignment, appellants assert two issues regarding the application of R.C. 2305.131 to the facts of this case. First, they submit that, in concluding that the statute was applicable to McGarvey, the trial court misconstrued a statement of intent which the Ohio General Assembly promulgated with the statute. Second, appellants state that McGarvey is not covered by the statute because they can raise a viable claim of fraud against him.

{¶25} As was noted above, the trial court's decision to enter judgment in favor of McGarvey was based entirely upon R.C. 2305.131. This provision sets forth the statute of repose for claims predicated upon unsafe conditions of real property improvements. Subsection (A)(1) of the provision states, in pertinent part:

{¶26} "Notwithstanding an otherwise applicable period of limitations specified in this chapter ***, no cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property *** shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement."

{¶27} As the foregoing quote readily indicates, R.C. 2305.131(A)(1) is stated in very broad terms, in that it applies to any "person" who has provided services in regard to the design or construction of an improvement to real property. The other subsections in the provision then delineate specific limitations to the application of the statute of repose. For example, R.C. 2305.131(B) states that the statute of repose cannot bar a claim against a person who is the owner or has possession of the real property. Subsection (C) of the provision indicates that the statute of repose cannot be used as an affirmative defense when the person has engaged in fraud as to the improvement. In addition, subsection (D) states that the statute of repose has no application when the person has expressly warranted or guaranteed the work on the improvement.

{¶28} The present version of R.C. 2305.131 was passed by the Ohio legislature

in Senate Bill 80 and took effect in April 2005. As part of the basic legislation enacting the provision, the General Assembly promulgated a “statement of findings and intent” providing an explanation as to why the statute of repose had been passed. Under section (B)(2) of the statement, the General Assembly stated that the bill was enacted in recognition of the fact that, once the construction of any improvement to real property has been completed, the person who provided services for the construction will not only lose control over the improvement itself, but also, inter alia, will “lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement.”

{¶29} As part of its analysis of R.C. 2305.131, the trial court gave a summary of section (B)(2) of the legislature’s “statement of findings and intent.” Although the court did not expressly state why the summary was provided, presumably it was meant as a justification for the application of R.C. 2305.131 to McGarvey.

{¶30} Under the first aspect of their first assignment, appellants maintain that the trial court misapplied the factors cited by the legislature to the improvement that is the subject of this case. Specifically, they argue that this case does not involve an instance in which the problems with the pitched roof occurred as a result of intervening causes. According to them, the leaks in the roof were solely caused by the original design and construction.

{¶31} As to this point, this court would emphasize that it is unclear why the trial court chose to summarize the factors set forth by the General Assembly. Nevertheless, our review of section (B)(2) of the legislature’s “statement” demonstrates that it was not intended to delineate a test for determining who the statute of repose was intended to

cover. To this extent, the fact that one of the cited factors does not apply in a particular matter would not be controlling in deciding if a person is covered under R.C. 2305.131. Instead, such a determination would be governed by the exact language of the statutory provision.

{¶32} As part of their argument before the trial court, appellant contended that McGarvey could not be covered by the 10-year statute of repose because he was never a duly-licensed carpenter or contractor. However, there is no language in R.C. 2305.131 indicating that the provision was only intended to apply to a professional carpenter or a licensed architect. Rather, the language of subsection (A)(1) is stated in broad terms; i.e., it refers to a “person” who provides services for an improvement on real property.

{¶33} Under the facts of this case, McGarvey was a “person” who provided both design and construction services to the Youngs in regard to the pitched roof. Thus, as the trial court did not err in applying R.C. 2305.131 to Brent McGarvey, the first aspect of appellants’ first assignment lacks merit.

{¶34} Under the second aspect of the first assignment, appellants contend that McGarvey should not be allowed to raise the statute of repose because they are able to state a viable claim of fraud against him. As to this point, this court would note that, in support of his summary judgment motion, McGarvey submitted a copy of the deposition of John P. Tutolo. A review of the deposition shows that, at the close of the proceeding, appellants’ counsel stipulated on the record that his clients were not asserting a claim of fraud against McGarvey. In light of this concession, appellants are barred from trying to now formulate a plausible argument in order to avoid the effect of R.C. 2305.131. As a

result, all aspects of appellants' first assignment are without merit.

{¶35} Under their second assignment, appellants argue that the trial court erred in rendering a final decision concerning the application of the statute of repose because the evidentiary submissions as to the date of the construction of the pitched roof had not been completed. Specifically, they alleged that they were never given an opportunity to present conflicting evidence regarding whether the pitched roof was built in 1996.

{¶36} A review of the trial record reveals that the deposition of Stephen Young was taken in April 2010. Near the close of this proceeding, appellants' counsel tried to pursue a line of questioning which was intended to discover whether the Youngs could obtain copies of the checks by which they had paid McGarvey for his services. Instead of allowing his client to respond, counsel for the Youngs stated that the information in question would be provided at a later date.

{¶37} On May 29, 2010, appellants moved the trial court for an extension of the date for the completion of discovery. As the basis for their motion, appellants asserted that the Youngs had still not provided the requested copies of the checks. They further asserted that the documentation was relevant to the issue of whether the Youngs had paid McGarvey a sum significantly less than what a bonded roofer would have received for such a job. The basis for the requested extension was not to challenge the date that McGarvey completed construction. This motion was filed only two days before the final date for discovery, and the trial court never rendered a ruling on the matter.

{¶38} McGarvey submitted his summary judgment motion on June 3, 2010. Two weeks later, appellants filed their response to the McGarvey motion. In addressing the issue of when the pitched roof had been completed, appellants again indicated that the

Youngs had still not provided the requested copies of the checks. However, in raising this point, they never asked for a continuance to complete discovery under Civ.R. 56(F).

{¶39} As a general proposition, a party in a summary judgment exercise waives the ability to contest the adequacy of discovery when he responds to the motion without making a specific request for a continuance under Civ.R. 56(F). *MacConnell v. Safeco Property*, 2d Dist. No. 21147, 2006-Ohio-2910, at ¶51. In the instant case, appellants' May 29, 2010 motion to extend discovery was only raised in regard to the Youngs, not McGarvey. Furthermore, that motion did not indicate that the copies of the checks were needed to establish the date that the construction of the pitched roof was completed. Accordingly, it was incumbent upon appellants to move the trial court for additional time in which to conduct additional discovery and respond to McGarvey's motion, pursuant to Civ.R. 56(F). They did not follow this procedure.

{¶40} As part of the evidentiary materials submitted with his motion for summary judgment, McGarvey attached a copy of his answers to certain interrogatories, in which he averred that the pitched roof was built in September/October 1996. Since appellants did not present any materials contradicting this averment, the trial court justifiably held that there was no genuine issue as to this point. In turn, because the "1996" date was more than 10 years before the actual discovery of the problems with the roof, the statute of repose under R.C. 2305.131 was applicable to the claim against McGarvey. Therefore, appellants' second assignment lacks merit.

{¶41} Under appellants' eighth assignment, their last which pertains directly to McGarvey, they maintain that the trial court erred in granting judgment on their claim of wanton and reckless conduct because their evidentiary materials were readily sufficient

to establish the elements of such a claim. Regarding this point, this court would indicate that, given our disposition of the first two assignments, it follows that appellants' claim against McGarvey was barred under the 10-year statute of repose. For this reason, the eighth assignment has no merit.

{¶42} Under their third assignment, appellants dispute the trial court's disposition of their fraud claim against the Youngs. As was discussed earlier, appellants predicated this claim primarily on the allegation that the Youngs never disclosed the nature of the pitched roof and the fact that they never obtained a building permit. In now contending that summary judgment should not have been granted as to this claim, they argue that a genuine issue of material fact existed regarding whether the Youngs were unaware that a building permit was needed for the roof. Basically, appellants assert that the project was so substantial that the Youngs' denial of any knowledge of the requirement is just unbelievable. They further submit that the extent of the Youngs' prior experiences and education was such that the credibility of their denials can easily be challenged.

{¶43} According to appellants, the Youngs were required to disclose information concerning the pitched roof in the residential property disclosure form, a copy of which was attached to their complaint. A review of the form shows that section (c) requested a seller to indicate whether he knew of any "current" leak or other material problem with the roof. If the seller answered affirmatively to this question, he was asked to respond to the following query:

{¶44} "If owner knows of any leaks or other material problems with the roof or rain gutters since owning the property (but no longer than the past 5 years), please describe and indicate any repairs completed: ***."

{¶45} As the plain language of the foregoing quote indicates, the Youngs were only obligated to disclose leaks or problems which occurred over the past five years of their ownership. In this case, the undisputed evidence before the trial court showed that construction of the pitched roof was completed in the fall of 1996. Therefore, even if the lack of a building permit or flaws in the roof's design constituted a "problem" which normally had to be disclosed in the form, the Youngs had no such duty in this instance because the pitched roof was built more than five years before the conveyance of the home and property to appellants. Under this analysis, the extent of the Youngs' knowledge at the time of construction becomes irrelevant.

{¶46} In light of the foregoing, the dispositive issue as to appellants' fraud claim concerned whether, during the last five years of their ownership of the disputed home, the Youngs had any knowledge that the pitched roof was leaking and that the wood in that area was constantly wet and beginning to rot. To be legally entitled to prevail on a claim of fraudulent concealment, the plaintiff must be able to prove, inter alia, that there was actual concealment of a material fact, and that the defendant had knowledge of the concealed fact. *Thaler v. Zovko*, 11th Dist. No. 2008-L-091, 2008-Ohio-6881, at ¶39. In regard to disclosure forms in real estate transactions, it has been expressly held that the seller is only required to disclose defects of which they have actual knowledge. *Good v. McElhaney* (Sept. 30, 1998), 4th Dist. No. 97 CA 41, 1998 Ohio App. LEXIS 4763, at *22, citing R.C. 5302.30(D).

{¶47} In moving for summary judgment in the present matter, the Youngs cited to the deposition testimony of John P. Tutolo. As part of that proceeding, Tutolo was asked whether he had evidence showing that the Youngs had knowledge of the leaks or

had tried to conceal them. In response, Tutolo could not cite to any such evidence. In addition, Tutolo also admitted during the deposition that, until the tree limb fell on the roof in 2009, he had not been aware of any leaks. Hence, appellants' own statements supported the conclusion that the Youngs had no actual knowledge that the pitched roof was materially defective, and the Youngs expressly stated that they did not have any knowledge of leaks.

{¶48} To prevail in a summary judgment exercise, the moving party must show that: (1) there are no genuine issues of material fact remaining to be litigated; (2) he is entitled to judgment as a matter of law; and (3) the state of the evidentiary materials is such that, even when those materials are construed in a manner most favorable to the non-moving party, a reasonable person could only reach a conclusion adverse to that particular party. *Goddard v. Stabile*, 185 Ohio App.3d 485, 2009-Ohio-6375, at ¶16. In light of the foregoing analysis, this court concludes that the Youngs were able to satisfy all three prongs of the "summary judgment" standard as to the "knowledge" element for fraudulent concealment. Thus, since the Youngs established that appellants lacked evidence to prove all elements for that claim, the trial court's decision to grant summary judgment under Civ.R. 56 was justified. For this reason, appellants' third assignment is not well-taken.

{¶49} Although appellants' brief states a separate fourth assignment, they have not provided a separate argument in support of it; rather, they merely cite the argument set forth under their third assignment. Moreover, while appellants do attempt to provide a separate argument for their fifth assignment, a review of that argument readily shows that it raises the same points as the third assignment. Accordingly, consistent with our

holding on the third assignment, we conclude that the fourth and fifth assignments are also lacking in merit.

{¶50} In their next assignment, appellants assert that final judgment should not have been granted in favor of the Youngs as to the separate claims of negligence and breach of contract. In essence, they maintain that the doctrine of caveat emptor cannot be applied to them when the Youngs failed to properly complete the residential property disclosure form.

{¶51} As was noted above, the purchase agreement between appellants and the Youngs contained a clause stating that appellants were accepting the property “as is.” Under Ohio law, the inclusion of an “as is” clause has the effect of relieving the seller of the duty to disclose any defects. *Massa v. Genco* (Mar. 1, 1991), 11th Dist. No. 89-L-14-162, 1991 Ohio App. LEXIS 867, at *5. As a result, the buyer can no longer bring an action for fraudulent nondisclosure against the seller. *Id.* Instead, the buyer’s remedies against the seller are limited to claims of fraudulent misrepresentation or concealment. *Brewer v. Brothers* (1992), 82 Ohio App.3d 148, 151.

{¶52} In light of the foregoing, it has been expressly held that the presence of an “as is” clause in a purchase agreement bars a buyer’s claim for negligent construction. *Id.* at 155. This court has also reached the same conclusion as to a claim for breach of contract. *Massa*, 1991 Ohio App. LEXIS 867, at *6.

{¶53} In the instant case, the first claim in appellants’ complaint alleged that the Youngs had fraudulently concealed the fact that the pitched roof had been improperly designed and constructed, and that no building permit had ever been obtained for their project. To the extent that appellants could assert any viable claim against the Youngs,

the law of this state dictates that it was limited to that type of claim. Therefore, as they could not properly maintain claims in negligence and breach of contract in this action, appellants' sixth assignment is without merit.

{¶54} Under their seventh assignment, appellants argue that the trial court erred in not treating their claim for wanton and reckless conduct as being separate from their fraud claim. As to this point, this court would again emphasize that any claim appellants might have had against the Youngs would have been predicated upon the conveyance of the real property and the underlying purchase agreement. Given the presence of the "as is" clause, appellants could only recover against the Youngs if they could establish the elements of fraudulent concealment or misrepresentation. In light of this, it follows that that the trial court did not commit any prejudicial error by implicitly concluding that its holding as to the fraud claim likewise disposed of the claim for wanton and reckless conduct.

{¶55} Since all eight of appellants' assignments do not have merit, it is the judgment and order of this court that the judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J., and

MARY JANE TRAPP, J., concur.