**[Cite as *Novotny v. Fierle*, 2012-Ohio-4007.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

| | | |
|---|---|---|
| LAURIE NOVOTNY, | : | **O P I N I O N** |
| Plaintiff-Appellant, | : | **CASE NO. 2011-L-148** |
| - vs - | : | |
| JOSEPH FIERLE, et al., | : | |
| Defendants-Appellees. | : | |

Civil Appeal from the Lake County Court of Common Pleas, Case No. 10CV002385.

Judgment: Affirmed.

*Daniel S. White*, Daniel S. White, Esq., Parmelee Drive, Hudson, OH 44236 (For Plaintiff-Appellant).

*Michael C. Lucas*, Wiles and Richards, 37265 Euclid Avenue, Willoughby, OH 44094 (For Defendants-Appellees).

THOMAS R. WRIGHT, J.

**{¶1}** This appeal is predicated upon a final judgment of the Lake County Court of Common Pleas, in which summary judgment was granted in favor of both appellees, Joseph and Karlyn Fierle, on all pending claims. Appellant, Laurie Novotny, maintains that the trial court erred in not according any weight to the evidentiary materials that she submitted in response to appellees' motion. Specifically, she argues that her supporting affidavits were sufficient to raise a factual dispute concerning whether appellees had fraudulently concealed certain problems with the basement of a residential home.

**{¶2}** The subject matter of the underlying civil action pertains to the propriety of the sale of the disputed home, located at 1241 East 349th Street, Eastlake, Ohio. Prior to August 2009, appellees had been the sole owners of the residence. During the five years before the sale, appellees experienced two incidents in which water had infiltrated the basement of the home, causing some damage. First, in the summer of 2007, flood water seeped into the basement during a "torrential" rainstorm. Second, in July 2008, water dripped into the basement from the first floor after a supply line under the kitchen sink had developed a leak. Following the second incident, appellees made substantial repairs to the drywall in the basement.

**{¶3}** After placing their residence on the market in 2009, appellees received an offer from appellant. As part of the ensuing transaction, the parties signed a purchase agreement and a residential property disclosure form. In answering certain questions in the disclosure form, appellees referenced the two incidents in which water had infiltrated the basement. In addition, appellees stated that there had been some "moisture" in the basement, but then described the repairs they had made to the drywall. Finally, they indicated that they had recently had the basement inspected by a professional.

**{¶4}** The parties' purchase agreement contained a specific provision governing the inspection of the premises. The provision first gave appellant the express ability to waive a professional inspection. However, if appellant chose to have a "general home" inspection, she could then elect one of three options delineated in the provision. The first of these options provided:

**{¶5}** "(A) Remove the inspection contingency and accept the property in its 'AS IS' present physical condition. If the property is accepted in its 'AS IS' present physical

condition, then BUYER agrees to sign an *Amendment/Removal of Contingency*."

**{¶6}** Upon executing the purchase agreement, appellant immediately decided to select a certified inspector who performed a "general home" inspection. She further elected to follow the first option under the "inspection" provision; accordingly, she signed the cited amendment to the purchase agreement and accepted the premises in its "as is" condition. Once this process was completed, the sale of the residence was closed.

**{¶7}** Within one month of taking possession, appellant began to have problems associated with the home's basement. First, water "backed up" into the basement as a result of tree roots growing into an underground drainage pipe. Second, the furnace for the premises, located in the basement, stopped working and needed to be replaced.

**{¶8}** Appellant was able to remedy the foregoing problems in a relatively quick manner. However, in April 2010, she began to notice that, whenever any amount of rain fell in the area of the home, water would seep into the basement along the baseboards of all four walls. To combat this specific problem, she hired a professional in basement waterproofing, Larry Morris, to determine the cause of the seepage and try to correct it. Upon conducting an inspection of the premises, Morris concluded that the water around the baseboards was due to a substantial gap between the driveway and the foundation. According to Morris, this gap was caused by the failure to properly seal the driveway. In addition to the seepage along the four baseboards, Morris also found that the water was collecting under the foundation, creating pressure on the basement floor which caused cracks in the cement block.

**{¶9}** To alleviate the water seepage, Morris and his crew resealed the driveway and installed a new system that relieved the pressure on the foundation. Morris' crew

also scraped and treated certain mold which had begun to form on the lower courses of the basement walls.

**{¶10}** Approximately one year after the execution of the purchase agreement for the home, appellant initiated the underlying civil action against appellees, seeking either the rescission of the sale or an award of compensatory and punitive damages. As part of her complaint, she raised three claims for relief, sounding in fraudulent inducement, fraud, and mutual mistake of fact. In support of each claim, she alleged that appellees had failed to properly respond to certain questions on the residential property disclosure form concerning prior problems with, and prior repairs to, the basement.

**{¶11}** After answering appellant's complaint and engaging in limited discovery, appellees moved for summary judgment as to all three claims. As the primary grounds for the motion, they argued that, in completing the disclosure form, they did not engage in any fraudulent behavior because they gave full disclosure of all basement problems of which they had knowledge. In other words, it was appellees' position that they had no prior knowledge of the conditions which led to the problems appellant experienced upon taking possession. In support of their factual assertions, each appellee submitted an affidavit containing identical averments as to the extent of their prior knowledge.

**{¶12}** In responding to the summary judgment motion, appellant submitted her own affidavit and Larry Morris' affidavit. In light of the statements in those documents, she basically asserted that the evidentiary materials before the trial court were sufficient to create a factual dispute concerning whether appellees had actual knowledge of the conditions which caused the subsequent problems in the basement. In her affidavit, appellant averred that, when she took possession of the home, the basement floor and

visible cement block had been freshly painted, and new drywall had been installed on all four walls; based upon this, she stated that it was her belief that appellees intentionally tried to conceal latent defects pertaining to the seepage of water. In his affidavit, Morris opined that it would have taken a "number" of years for the existing water problems to have developed under the foundation.

**{¶13}** After appellees had filed a reply brief, the trial court rendered its judgment granting summary judgment on the entire complaint. In the first part of its analysis, the court held that, in light of the pre-sale general home inspection and the existence of the "AS IS" clause, the sole "fraud" claim appellant could maintain against appellees was for fraudulent concealment. Concerning the merits of that claim, the trial court concluded that the averments in the affidavits submitted by appellant were insufficient to create a factual dispute as to whether appellees were aware of any additional "water" problems which were not referenced in the disclosure form. Regarding appellant's separate claim of mutual mistake, the court held that such a claim could not be maintained as a matter of law when she had agreed to accept the premises "as is."

**{¶14}** In appealing the summary judgment determination, appellant has asserted one assignment of error for review:

**{¶15}** "The trial court's decision in favor of appellees Joseph and Karlyn Fierle is against the manifest weight of the evidence and constitutes reversible error."

**{¶16}** Although appellant's summary of her sole assignment is worded in terms of the "manifest weight" of the evidence, our review of the actual text of the assignment shows that she has contested the propriety of the trial court's evidentiary analysis in the context of a summary judgment exercise. Specifically, she submits that her evidentiary

materials were sufficient to create a "jury" question as to whether appellees were aware of the additional "water" problems which she could not discover until the water began to seep into the basement. According to her, the fact that appellees had recently painted and installed new drywall could support a logical inference that they were attempting to conceal latent defects of which they had knowledge.

**{¶17}** At the outset of our legal discussion, this court would again note that, even though the first two claims in appellant's complaint were labeled as causes of action in fraud and fraudulent inducement, the trial court held that appellant's factual assertions could only support a claim in fraudulent concealment. Notwithstanding the fact that the trial court's ruling had the effect of limiting the scope of her "fraud" claims, appellant has not challenged this aspect of the trial court's analysis. In order to prevail on a claim of fraudulent concealment, a plaintiff must satisfied the following six elements:

**{¶18}** "'(1) an actual concealment[;] (2) of a material fact[;] (3) with knowledge of the fact concealed[;] (4) with intent to mislead another into relying upon such conduct[;] (5) followed by actual reliance thereon by such other person having the right to so rely[;] and (6) with injury resulting to such person because of such reliance[.]' *Bagdasarian v. Lewis* (June 4, 1993), 11th Dist. No. 92-L-171, 1993 Ohio App. LEXIS 2881, at *6-7." *Kimball v. Duy*, 11th Dist. No. 2002-L-046, 2002-Ohio-7279, ¶25.

**{¶19}** In considering the "knowledge" element of a fraudulent concealment claim in the context of a real estate transaction involving a property disclosure form, this court has recently indicated that "the seller is only required to disclose defects of which they have actual knowledge." *Tutolo v. Young*, 11th Dist. No. 2010-L-118, 2012-Ohio-121, ¶46. Therefore, the dispositive issue in this case is not whether appellees should have

known under the circumstances that a new "water" problem existed; instead, appellant had to demonstrate that they had actual knowledge that water was collecting under the foundation.

**{¶20}** As previously noted, the essence of appellant's factual argument was that, since appellees had installed new drywall and re-painted the basement floor just prior to placing the home on the market, logic dictates that they were trying to conceal the fact that water was seeping into the basement along the baseboards. In rejecting this point, the trial court emphasized that appellant had not offered any evidence indicating that there was any actual damage to the cement block or floor behind the new drywall or the new paint.

**{¶21}** Our review of the two affidavits submitted by appellant readily supports the trial court's analysis. Specifically, neither affiant stated that the removal of the drywall or the layer of paint had revealed latent cracks or other indications of prior water damage to the floor or the lower portions of the walls. If the water had previously seeped into the basement while appellees were still the owners, as appellant has alleged, it follows that there would have been indicia of prior water damage below the drywall or paint.

**{¶22}** In conjunction with the foregoing point, it must also be noted that appellant expressly averred that, once the water began to seep in along the baseboards in April 2010, the seepage would occur regardless of whether the rain was heavy or light. If this particular problem had already existed when appellees had possession in July 2009, it follows that the seepage would have also taken place during September-October 2009 when appellant had possession. However, in her affidavit, appellant indicated that the "seepage" problem did not begin until the following April.

**{¶23}** Regarding the new drywall and layer of paint, the trial court also indicated that appellees had provided a logical explanation as to why the repairs had been made immediately before placing the home on the market. That is, both appellees averred in their respective affidavits that the new drywall and paint job was intended to repair the damage which had occurred during the two "water" intrusions to which they had referred in completing the residential property disclosure form. In her evidentiary submissions, appellant never contested appellees' assertion as to damage caused by the 2007 flood and 2008 kitchen water leak. Furthermore, her materials never attempted to distinguish between the damage cited by appellees and the alleged damage caused by seepage along the baseboards that supposedly happened while appellees were still the owners.

**{¶24}** In addition to the averments in her affidavit, appellant also relied upon Larry Morris' separate averment that the concentration of water underneath the home's foundation had been developing for a substantial period of time. However, as the trial court noted in its written decision, the mere fact that the water had been collecting for a number of years did not mean that appellees were aware of it. Morris did not opine that the nature of the problem was such that appellees should have become aware of it prior to the onset of the seepage. Accordingly, since appellant did not present any evidence indicating that the seepage along the baseboards had occurred prior to April 2010, her materials were insufficient to support any inference that appellees had knowledge of the new "seepage" problem before they sold the residence in August 2009.

**{¶25}** The moving party in a summary judgment exercise is not entitled to prevail unless it is shown that: "(1) there are no genuine issues of material fact remaining to be litigated; (2) [the moving party] 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." *Tutolo*, 2012-Ohio-121, at ¶48. In relation to the "genuine issue" prong of the foregoing test, this court has stated:

**{¶26}** "Material facts are those 'that might affect the outcome of the suit under the governing law.' *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, * * *, quoting *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247, * * *. '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 one party must prevail as a matter of law[?]"' *Turner*, supra, at 340, quoting *Anderson*, supra, at 251-252." *Kimball*, 2002-Ohio-7279, at ¶17.

**{¶27}** When reviewed as a whole, the evidentiary materials before the trial court could only be construed to demonstrate that, even though the build-up of water beneath the home's foundation may have been occurring while appellees owned the residence, the new "water" problem did not begin to manifest itself until after appellant had taken possession. Given these undisputed facts, it follows that appellant will never be able to establish that appellees had actual knowledge of the new "seepage" problem as of the date of the real estate transaction. Hence, since appellees established that appellant would not be able to satisfy every element for her claim of fraudulent concealment, the granting of summary judgment under Civ.R. 56(C) was appropriate.

**{¶28}** As a separate argument under her sole assignment, appellant challenges the trial court's analysis as to her claim of mutual mistake. In relation to that claim, the trial court primarily held that such a claim is not viable when the buyer of real property

has agreed to take the home "as is" and has been afforded an opportunity to conduct a general inspection. Before this court, appellant merely contends that she should have been allowed to proceed on this claim because the evidentiary materials showed that both sides were "mutually mistaken" as to the condition of the basement.

**{¶29}** The trial court predicated its ruling on the mutual mistake claim upon the analysis of the Eighth Appellate District in *Wallington v. Hageman*, 8th Dist. No. 94763, 2010-Ohio-6181. Like the instant matter, *Wallington* involved a real estate transaction in which the purchase agreement provided that the buyers would accept the home "as is." As to the effect of this provision upon the buyers' ability to assert a mutual mistake, the *Wallington* court held that they "cannot argue that the absence of water problems in the basement was a basic assumption upon the contract was made." *Id.* at ¶27. In upholding the granting of summary judgment, the appellate court also indicated that "the claimed defects in the property as to the water intrusion issues do not go to the character of the property, were not material to the completion of the contract, and did not frustrate either side's ability to complete the contract." *Id*.

**{¶30}** In the present case, appellant did not submit any evidentiary materials that would tend to show that, as a result of the new "seepage" problem, the disputed home has lost a significant portion of its fair market value or has became uninhabitable. For this reason, it cannot be said that the development of the new problem has materially affected a basic underlying assumption of the parties' purchase agreement. Therefore, the logic of the *Wallington* decision is persuasive, and is clearly applicable to the facts as established in the parties' evidentiary materials.

**{¶31}** Pursuant to the foregoing discussion, the trial court did not err in granting

summary judgment in favor of appellees as to all three claims in appellant's complaint. Accordingly, appellant's sole assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.