[Cite as *Ferguson v. Cadle*, 2009-Ohio-4285.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JESSE FERGUSON, et al.,	:	JUDGES:
	:	Sheila G. Farmer, P.J.
Plaintiffs-Appellants	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008 CA 0077
WILLIAM CADLE, et al.	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from Richland County Court of Common Pleas Case No. 2007 CV 1055
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	August 20, 2009
APPEARANCES:	
For Plaintiffs-Appellants	For Defendants-Appellees
EDWARD CLARK CORLEY 3 North Main Street, Suite 714 Mansfield, Ohio 44902	JOSEPH T. OLECKI 28 Park Avenue West Mansfield, Ohio 44902

Edwards, J.

{¶1} Appellants, Jesse and Beulia Ferguson, appeal a summary judgment of the Richland County Common Pleas Court dismissing their complaint against appellees, William and Marcia Cadle, alleging breach of contract, breach of warranty, fraud, and misrepresentation.

STATEMENT OF FACTS AND CASE

{¶2} On July 28, 2006, appellants entered into a real estate purchase agreement to purchase a home located at 611 Orchard Drive East, Mansfield, from appellees. Appellants were moving from Barboursville, West Virginia, to be closer to their daughter due to Jesse's disability and Beulia's retirement.

{¶3} The real estate purchase agreement included the following clause:

{¶4} "Purchaser acknowledges that, except as otherwise herein noted, the real estate property is being purchased in its present physical condition after examination and inspection by Purchaser. Purchaser further acknowledges that Purchaser(s) are relying solely upon such examination and inspection with reference to condition, value, character, and dimensions of property, improvements, component systems and fixtures. Purchaser acknowledges that neither Seller, nor Seller's Agent(s) have made any representation or warranties upon which Purchaser has been induced to rely; rather Seller and Seller's Agent(s) have encouraged Purchaser to conduct a thorough and independent inspection(s) of the premises."

{¶5} On the same date, appellants received and executed the Residential Property Disclosure Form pursuant to R.C. 5302.30, which appellees filled out on May 11, 2006, and amended on July 13, 2006. In subsection (D) of the form regarding water

intrusion, appellees were asked if they knew of any previous or current water leakage, water accumulation, excess moisture, or other defects to the property, including but not limited to any area below grade, basement or crawl space. Appellees checked the box labeled "yes," and underlined "previous" and "basement" in the question. In the line asking appellees to describe and indicate any repairs completed, appellees indicated that during a national power outage "for days," no sump pumps worked. Appellees also indicated that on July 13, 2006, eleven inches of rain fell in two days, which was too much for the sumps to handle.

{¶6} When asked if they knew of any water or moisture related damage to floors, walls, or ceilings as a result of flooding, moisture seepage, moisture condensation, ice damming, sewer overflow/backup, or leaking pipes, plumbing fixtures, or appliances, appellees checked "yes" and underlined "floors" and "flooding." In the explanation line, appellees wrote, "floor tiles replaced."

{¶7} In subsection (E) of the form concerning structural components, appellees were asked if they knew of any movement, shifting, deterioration, material cracks/settling (other than visible minor cracks or blemishes) or other material problems with the foundation, basement/crawl space, floors, or walls, appellees checked "yes" and underlined "minor cracks." In the explanation line appellees wrote, "repaired." The next question asked if the owner knew of any repairs, alterations, or modifications to control the cause or effect of any problem identified above, since owning the property but not longer than five years. Appellees responded, "none."

{¶8} On August 1, 2006, prior to closing, a home inspection was conducted by National Property Inspections at appellants' request. The inspection report noted the following issues with regard to the interior foundation:

{¶9} "Even though there is no evidence of moisture intrusion in the basement, inspector noted slightly elevated moisture readings at various locations on the block walls, most notably the corners, indicating there is some moisture on the exterior wall which is migrating though (sic) block to interior. Suspect this moisture can be reduced or eliminated if the suggestions included in the exterior section of this report are implemented. According to the 'Journal of Light Construction' over 90% of all moisture intrusion into foundations is due to one or both of the following: 1. Poor grading, 2. Poor utilization of gutters and downspouts. This basement has been partially waterproofed. Some of the waterproofers have transferable warranty's (sic) and conditions vary. Suggest inquiry of seller as to details."

{¶10} The transaction closed on August 31, 2006, and appellants took possession of the property on September 15, 2006.

{¶11} Within a few months of taking possession of the house, appellants began to experience water intrusion problems in the basement. In January, 2007, they experienced a four-inch flood and a one-inch flood in the basement. Appellants experienced a five-foot flood in the basement in August, 2007, and two separate three-foot floods in February of 2008.

{¶12} As a result of the flooding problems in the basement, appellants contacted B Dry System of North Central Ohio to waterproof the basement. Dave Hedrick, president of B Dry System, examined the property on March 13, 2007, for water

intrusion problems. He discovered that the property had been subject to significant long-term water intrusion and measures had been taken to correct the problem. Steel rods had been drilled into the ground at the base of the basement footers to support steel braces attached to footers, which supported a basement wall which was compromised as a result of water intrusion. Due to the minimal wear on the rods and braces, it appeared to Mr. Hedrick that the steel support structure had been installed in the last ten years.

{¶13} Appellants filed the instant complaint in the Richland County Common Pleas Court alleging breach of contract, breach of warranty, fraud, and misrepresentation. Appellees moved for summary judgment. Appellees argued that the breach of contract claim was barred by the doctrine of merger, and the breach of warranty claim was barred by the express terms of the purchase agreement precluding any warranty. Appellants did not contest summary judgment on these two claims, and the court dismissed them without discussion. Appellants do not argue on appeal that summary judgment was improper as to these two claims.

{¶14} On the claims for fraud and misrepresentation, the court granted summary judgment and dismissed the claims on the basis that appellees made sufficient disclosure of the water problems in the basement. The court also found that appellants did not justifiably rely on the representations, given the information of which they were made aware concerning the water intrusion problems in the basement. The court placed particular reliance on the fact that appellees disclosed a water problem in the basement which occurred just fifteen days before the purchase agreement was executed.

{¶15} Appellants assign a single error to this court on appeal:

{¶16} "THE DECISION OF THE TRIAL COURT TO GRANT THE APPELLEE'S [SIC] MOTION FOR SUMMARY JUDGMENT CONSTITUTES A REVERSIBLE ERROR."

{¶17} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. As such, we must refer to Civ. R. 56(C) which provides in pertinent part: "Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶18} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the

non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates that the moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶19} Appellants argue that appellees' answers to the questions on the Disclosure Form outlined above concerning water intrusion and repairs to the basement were misleading, as they failed to disclose the latent foundational defect and the extent of the repairs to the basement caused by the water problem. Appellants argue that they relied on the statements in the disclosure form, as the structural steel support system was not discoverable by home inspection.

{¶20} The doctrine of caveat emptor precludes recovery in an action by the purchaser where (1) the condition complained of is open to observation or discernable 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, 178. Once alerted to a possible defect, a purchaser has a duty to either (1) make further inquiry of the owner, who is under a duty not to engage in fraud, or (2) seek the advice of someone with sufficient knowledge to appraise the defect. *Timpton v. Nuzum* (1992), 84 Ohio App.3d 33, 38. A buyer who is aware of a possible problem may not simply sit back and then raise his lack of expertise when trouble arises. Id.

{¶21} An "as is" clause in a real estate contract places the risk upon the purchaser as to the existence of defects and relieves the seller of any duty to disclose latent defects. *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 471, *Funk v. Durant*, 155 Ohio App.3d 99, 103, 2003-Ohio-5591. The 'as is' contract provision cannot be relied upon to relieve the sellers of liability on a claim for fraudulent mispresentation. *Funk*, supra at 103. While R. C. 5302. 30 specifically states that the disclosure form required by the statute is not a warranty, it can form the basis of a claim for false representation if the seller makes false statements to the buyer therein, which are relied upon by a buyer. Id.

{¶22} In summary, as long as the seller does not engage in fraud, the principles of caveat emptor and the "as is" clause bar any claims brought by a buyer. *Scafe v. Property Restorations, Ltd.,* Cuyahoga App. No. 84447, 2004-Ohio-6296.

{¶23} To prove fraud, a plaintiff must show that there was: (a) a representation, or where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying on it, (e) justifiable reliance upon the representation or concealment, and (f) resulting injury proximately caused by the reliance. *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus.

{¶24} In the instant case, the contract contained an "as is" clause. Appellees therefore had no duty to disclose the existence of the steel support structure in the

basement wall, and are only liable if they fraudulently misrepresented the condition of the basement.

{¶25} Summary judgment in this case is not appropriate on the basis of caveat emptor. Based on the evidence in this case, reasonable minds could find that the defect was not discoverable upon reasonable inspection, and appellants sought the advice of someone with sufficient knowledge to appraise the defect when they hired a home inspector to inspect the home prior to closing. While the disclosures made by appellees alerted appellants to the existence of a water intrusion problem in the past and repairs made to "minor cracks" in the basement wall, there is evidence that the steel support system in the basement wall was not discoverable upon reasonable inspection. This is not a case where appellants sat back and made no further inquiry into a problem. The inspector did not discover the support system, and suggested that appellants inquire further of the sellers concerning the partial waterproofing done in the basement only because a warranty might be transferable. Further, the affidavit of Dave Hedrick states that he discovered the steel support system upon installation of the waterproofing system, which reasonable minds could conclude is not "reasonable inspection" of the property. See *Southworth v. Weigand*, Cuyahoga App. No. 80561, 2002-Ohio-4584 (it is not reasonable to expect a home inspector or buyer to remove carpeting and wallpaper to ascertain if there is a problem).

{¶26} We next turn to the question of whether there are disputed facts concerning whether appellees made false representations in the disclosure form, and whether appellants justifiably relied on such representations. The trial court granted summary judgment on the basis that appellees fully disclosed the water problem and

appellants could not have justifiably relied on the representations, particularly as appellees disclosed a water intrusion problem just two weeks before the purchase agreement was signed.

{¶27} As to the representations in Section D of the Residential Property Disclosure Form, that appellees experienced two specific incidents of water intrusion, one due to a power outage when the sump pump failed and the second two weeks before the agreement was signed when 11 inches of rain fell in two days, there is no direct evidence from which reasonable minds could conclude that appellees fraudulently misrepresented the incidents of water intrusion. Appellants presented no evidence to directly rebut the veracity of this statement. However, Hedrick's affidavit stated that the property had been subject to long-term water intrusion and significant steps had been taken to correct the problem. From this evidence, reasonable minds could conclude that appellees fraudulently misrepresented the number of incidents of water intrusion in the basement.

{¶28} As to the representation in subsection E that appellees made no repairs in the last five years to correct any problem listed earlier in the form, which would include water intrusion, we find that there is no evidence that the steel support structure in the basement wall was installed in the last five years. Appellees state in their supplemental affidavit that it was installed in 1998 or 1999. Appellants' expert narrows the time frame for installation down to the last 10 years, but does not place the repair inside five years.

{¶29} However, we find that reasonable minds could differ on the issue of whether appellees made fraudulent misrepresentations in the disclosure form in subsection D. In response to the question, "Do you know of any water or moisture

related damage to floors, walls or ceilings as a result of flooding; moisture seepage; moisture condensation; ice damming; sewer overflow/backup; or leaking pipes, plumbing fixtures, or appliances," appellees checked "yes," underlined the words "floors" and "flooding," and wrote "floor tiles replaced" when asked to describe any repairs completed. Appellees state in their supplemental affidavit that they were not told that the cracks in the basement walls which they repaired with the steel support system were caused by water intrusion. However, appellants' expert states in his affidavit that the wall was compromised as a result of water intrusion and the support system was an attempt to correct the problem. This expert testimony that the repairs were extensive creates a disputed fact as to what appellees knew about the condition of the wall. A disputed fact exists as to whether appellees misrepresented the repairs undertaken to correct water damage to the basement wall.

{¶30} Further, reasonable minds could differ on the issue of whether appellees fraudulently misrepresented the condition of the basement in subsection E of the form. When asked if they knew of any "movement, shifting, deterioration, material cracks/settling (other than minor cracks or blemishes) or other material problems with the foundation, basement/crawl space, floors, or interior/exterior walls," appellees checked "yes," underlined "minor cracks," and wrote "repaired" on the line asking for a description. Appellees state in their supplemental affidavit that the steel rods were installed to correct "step cracks" in the basement wall, and they experienced no further cracking after the repair. However, appellants' expert states in his affidavit that the wall had been subject to "significant long term water intrusion" and "extensive measures" had been taken to correct the problem. He described the wall as "compromised." From

this evidence, reasonable minds could conclude that appellees misrepresented the degree of the problems with the foundation, as they did not disclose the steel support structure or the degree of problems with the wall when asked specifically about deterioration of the basement.

{¶31} We further find that reasonable minds could differ on whether appellants justifiably relied on the representations in the disclosure form concerning the extent of repairs made in the basement and the condition of the basement wall. Appellants were placed on notice of the existence of a water intrusion problem, requiring replacement of floor tiles. They were also placed on notice that minor cracks had been repaired in the basement, although not specifically related to water intrusion.

{¶32} Appellants hired a home inspector who found no evidence of moisture intrusion in the basement, but slightly elevated moisture readings at various locations on the block walls. The inspector suspected the moisture could be reduced or eliminated if suggestions included in the exterior section of his report were implemented. These suggestions included cleaning out the gutters, as they are intended to direct water away from the foundation, trimming vegetation back from the foundation to limit moisture intrusion, and building up the level of earth at any low spots in the yard to direct water away from the foundation. The inspection did not disclose the steel support system in the wall, and the only suggestion made by the inspector with regard to the basement was that it had been partially waterproofed and appellants should check with the sellers regarding any warranty. The inspector did not disclose evidence that the water intrusion problem was significantly grater than represented in the disclosure form.

{¶33} From this evidence, reasonable minds could conclude that the existence of the compromised wall was not discoverable by inspection, because it was first discovered upon the installation of waterproofing. Therefore, there are disputed facts from which a jury could conclude that appellants justifiably relied on the representations in the disclosure form concerning the condition of the basement, as they took steps to investigate further and the problem was not discovered. This is not a case where the buyers were made aware of a problem and did not investigate further. The investigator failed to discover the extent of the water problem and the steel support structure in the wall was hidden from view. Because appellants took steps to investigate the problem and did not discover anything which would lead them to believe the water problem was significantly grater than represented, reasonable minds could conclude that they justifiably relied on the representations in the disclosure form.

{¶34} The assignment of error is sustained. The summary judgment of the Richland County Common Pleas Court is reversed, and this matter is remanded to the trial court for further proceedings according to law.

By: Edwards, J.

Farmer, P.J. and

Delaney, J. concur

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JUDGES

JAE/r0224

[Cite as *Ferguson v. Cadle*, 2009-Ohio-4285.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JESSE FERGUSON, et al.,	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
WILLIAM CADLE, et al.	:	
Defendants-Appellees	:	CASE NO. 2008 CA 0077

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellees.

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JUDGES