The Bullet Point: Ohio Commercial Law Bulletin

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When can I challenge an arbitrator's decision and award?

Defamation Per Se

***JP v. TH,* 9th Dist. Lorain No. 19CA011469, 2020-Ohi0-320.**

In this appeal, the Ninth Appellate District affirmed in part and reversed in part the trial court's decision to deny a directed verdict on a claim for defamation, finding that the alleged defamatory statement was essentially true.

The Bullet Point: Defamation consists of the publication of a false statement made with "some degree of fault" that reflects injuriously upon the subject's reputation, exposes the subject to "public hatred, contempt, ridicule, shame or disgrace," or adversely affects the subject in his or her business, trade, or profession. Stated differently, the elements of a defamation claim are "(1) a false and defamatory statement, (2) about plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) that was either defamatory per se or caused special harm to the plaintiff." Defamation per se consists of a false statement that is defamatory on its face, without the need for interpretation or innuendo. Spoken words that falsely accuse the subject of a crime that exposes the accused to infamous punishment are defamation per se.

Challenge to Arbitrator Decision

***City of Columbus v. International Ass'n of Firefighters, Local 67*, 10th Dist. Franklin No. 18AP-486, 2020-Ohio-356.**

In this appeal, the Tenth Appellate District overruled various challenges seeking to overturn an arbitrator's decision and award.

The Bullet Point: Judicial review of arbitration awards is limited in order to encourage the resolution of disputes in arbitration. Notwithstanding this, a court can vacate an arbitrator's award in the following circumstances: (1) the

award was procured by fraud, corruption, or undue means, (2) there was evidence of partiality or corruption on the part of the arbitrator, (3) the arbitrator was guilty of some type of misconduct, or (4) the arbitrator exceeded its powers. An arbitrator does not exceed her authority so long as the award "draws its essence" from the underlying contract. Thus, "an arbitrator's award departs from the essence of a [contract] when: (1) the award conflicts with the express terms of the agreement, and/or (2) the award is without rational support or cannot be rationally derived from the terms of the agreement."

Caveat Emptor

***Mobley v. James*, 8th Dist. Cuyahoga No. 108470, 2020-Ohio-380.**

In this case, the Eighth Appellate District affirmed the trial court's decision to award the defendant summary judgment, finding that the concept of "caveat emptor" precluded Plaintiff's fraud claims related to a real estate transaction.

The Bullet Point: As a general rule, Ohio follows the doctrine of caveat emptor in real estate transactions, which precludes a purchaser from recovering for a defect if: "(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." "The doctrine of caveat emptor is designed to finalize real estate transactions by preventing disappointed real estate buyers from litigating every imperfection existing in residential property." However, a seller may still be liable to a buyer if the seller fails to disclose known latent conditions.

[Cite as *J.P. v. T.H.*, 2020-Ohio-320.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

J. P. Appellee v. T. H. Appellant	C.A. No. 19CA011469 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 15CV185623

DECISION AND JOURNAL ENTRY

Dated: February 3, 2020

CALLAHAN, Judge.

{¶1} Appellant, T.H., appeals a judgment that found him liable for assault, battery, defamation, and invasion of privacy. This Court affirms in part and reverses in part.

I.

{¶2} T.H. and J.P. used to be neighbors, but their relationship was strained, at best. T.H., who believed that J.P. made frequent video recordings of his neighbors, found J.P.'s behavior unusual. J.P. believed that T.H.'s movements around the neighborhood on foot, by bicycle, and by car were driven by a desire to harass him. On June 22, 2014, a confrontation between the two neighbors occurred. On that date, it is undisputed that J.P. noticed T.H. riding his bicycle in their cul de sac, a path that took him past J.P.'s residence; that J.P. began recording video of T.H. and announced in a loud voice that he was not intimidated by T.H.'s actions; and that J.P. ultimately pulled a gun and pointed it at T.H. What happened in between these events is less clear, and the implications that flow from those events form the basis for this case.

{¶3} Immediately after the date in question, J.P. petitioned for a civil protection order restraining T.H. *J.P. v. T.H.*, 9th Dist. Lorain No. 14CA010715, 2016-Ohio-243, ¶ 5 ("*J.P. I*"). A magistrate issued a temporary ex parte order, but after a full hearing, the trial court denied the petition on July 11, 2014. *Id*. at ¶ 5-6. Concluding that J.P. had failed to prove his case by a preponderance of the evidence, the trial court observed that with respect to the alleged assault, "the only independent witness testified that [J.P.], not [T.H.,] initiated the assault." This Court ultimately affirmed the trial court's decision. *Id*. at ¶ 37. In the meantime, J.P. also filed a complaint against T.H. for assault and battery, defamation, and invasion of privacy through intrusion upon his seclusion. In the context of that litigation, J.P. moved for an ex parte temporary restraining order arguing, again, that T.H. and his daughter M.H. were "continuing to stalk, menace, and/or harass" him. The trial court denied the motion without a hearing.

{¶4} T.H. moved for summary judgment on each of J.P.'s claims, arguing that the trial court's decision in the CPO case fully resolved all issues related to the June 22, 2014, incident and, consequently, that J.P.'s claims were res judicata. The trial court granted summary judgment to T.H., and J.P. appealed. This Court reversed the trial court's decision granting summary judgment on the basis of res judicata, concluding that "[J.P.'s] failure to assert his tort claims contemporaneously with his petition for a civil stalking protection order did not preclude [him] from subsequently bringing a civil action against [T.H.]." *J.P. v. T.H.*, 9th Dist. Lorain No. 15CA010897, 2017-Ohio-233, ¶ 28 ("*J.P. II*"). This Court also noted that J.P.'s civil claims against T.H. alleged facts that were not directly at issue in the earlier CPO case. *Id*. at ¶ 29.

{¶5} After this Court's remand, J.P.'s claims against T.H. were tried to a jury. T.H. moved for a directed verdict on the claims for invasion of privacy and defamation after J.P. presented his case-in-chief. The trial court denied the motion, which T.H. renewed at the close

of all of the evidence. T.H. also moved for a directed verdict on the assault and battery claims at that time. The trial court denied the motions again, and the jury returned verdicts in favor of J.P. and awarded him $13,326.99 in damages.

{¶6} T.H. appealed, raising five assignments of error.

II.

ASSIGNMENT OF ERROR NO. 1

> THE LOWER COURT COMMITTED ERRORS OF LAW WHEN IT FAILED TO ISSUE DIRECTED VERDICTS AS TO [J.P.]'S CAUSE[] OF ACTION FOR DEFAMATION IN LIGHT OF THE LOWER COURT'S DECISION IN CASE NO. 14CV183837 AND THIS HONORABLE COURT'S SUBSEQUENT DECISION UPHOLDING SAME IN CASE NO. 14CA010715.

{¶7} In his first assignment of error, T.H. argues that the trial court erred by denying his motion for a directed verdict on J.P.'s defamation claim. Specifically, T.H. argues that J.P. failed to demonstrate that T.H. made false statements and failed to present any evidence that T.H. acted with actual malice. With respect to the truth or falsity of T.H.'s statements, this Court agrees.

{¶8} A motion for directed verdict tests the legal sufficiency of the evidence supporting a claim. *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 68 (1982). Consequently, under Civ.R. 50(A)(4), a motion for directed verdict can only be granted when, having construed the evidence most strongly in favor of the nonmoving party, the trial court concludes that reasonable minds could only reach a conclusion upon the evidence submitted that is adverse to the nonmoving party. Conversely, if there is substantial and competent evidence supporting the position of the nonmoving party and reasonable minds might reach different conclusions, a trial court must deny the motion. *Hawkins v. Ivy*, 50 Ohio St.2d 114, 115 (1977). "The 'reasonable minds' test mandated by Civ.R. 50(A)(4) requires the court to discern only whether there exists

any evidence of substantive probative value that favors the position of the nonmoving party." *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶ 3. Nonetheless, this determination does not involve either weighing the evidence or evaluating the credibility of witnesses. *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119 (1996), quoting *Ruta* at 68-69. This Court must review a trial court's determination of a motion for a directed verdict de novo. *Goodyear* at 514.

{¶9} Defamation consists of the publication of a false statement made with "some degree of fault" that reflects injuriously upon the subject's reputation, exposes the subject to "public hatred, contempt, ridicule, shame or disgrace," or adversely affects the subject in his or her business, trade, or profession. *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, ¶ 9, quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995). Stated differently, the elements of a defamation claim are "(1) a false and defamatory statement, (2) about plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) that was either defamatory per se or caused special harm to the plaintiff." *Gosden v. Louis*, 116 Ohio App.3d 195, 206 (9th Dist.1996).

{¶10} Defamation per se consists of a false statement that is defamatory on its face, without the need for interpretation or innuendo. *Northeast Ohio Elite Gymnastics Training Ctr., Inc. v. Osborne*, 183 Ohio App.3d 104, 2009-Ohio-2612, ¶ 7 (9th Dist.). Spoken words that falsely accuse the subject of a crime that exposes the accused to infamous punishment are defamation per se. *Radcliff v. Steen Elec., Inc.*, 162 Ohio App.3d 596, 2007-Ohio-5117, ¶ 14 (1st Dist.), citing *Williams v. Gannett Satellite Information Network, Inc.*, 1st Dist. Hamilton No. C-040635, 2005-Ohio-4141, ¶ 8. Imprisonment is a form of "infamous punishment." *See State*

v. Uskert, 85 Ohio St.3d 593, 599 (1999), quoting *Hudson v. U.S.*, 522 U.S. 93, 104 (1997). When a statement constitutes defamation per se, the existence of actual malice and damages is presumed. *Webber v. Ohio Dept. of Pub. Safety*, 10th Dist. Franklin No. 17AP-323, 2017-Ohio-9199, ¶ 36.

{¶11} J.P. alleged that T.H. was liable for defamation per se because he made statements to third parties that accused J.P. of striking him and pulling a gun on him during the June 22, 2014, incident. Because J.P. alleged defamation per se, his allegations focused on the extent to which T.H.'s statements related to the firearm. During the trial, T.H. testified regarding the events on June 22, 2014, as follows:

> It was in the afternoon. I was coming back from the pool. I had a towel around my neck, baseball cap on, glasses. I was on my bike. And [J.P.] was * * * standing in the driveway, yelling, with his camera. This was something that often occurred.
>
> And, foolishly, I stopped my bike. And I got off the bike, and I started walking towards, from the street to the sidewalk. And I just said, "What's the problem?" You know, "What's going on?"
>
> And that's when he launched at me, and he hit me about five or six times across the top of the hat, the bill of the hat. He didn't use fists. He just - - kind of like slapping event. But it startled me totally, and I fell back with my bike, kind of fell down on my bike. Popped a calf muscle.
>
> And, as I got up, and to just collect myself - - and I wasn't hurt, and I certainly didn't - - there were no blows on my end. None. Zero.
>
> And, as I got up, that's when he produced the gun, pointed it at me, then he quickly put it away. And this all happened within seconds.

T.H. acknowledged that he had told some people "the same story" that was the substance of his testimony and that, "[m]aybe, many months later, possibly[]" he told some people that J.P. had committed a crime against him. He explained that those statements would have been after he spoke with his attorney, who explained that "[a]ssault with a deadly weapon is a felony offense[.]" J.P. did not dispute that he pulled a gun on T.H. during the incident, but maintained

that he was legally privileged to do so because he was acting in self-defense. In other words, J.P. did not dispute that it was factually true that he pulled a gun on T.H., but he argued that he did not commit a crime in doing so.

{¶12} Even viewing T.H.'s testimony in the light most favorable to J.P., reasonable minds could only conclude that T.H. did not, with a level of culpability of at least negligence, make a false statement that accused J.P. of a crime that subjected him to infamous punishment. Although T.H. and J.P.'s testimony regarding the initial moments of the confrontation on June 22, 2014, differed, there is no dispute that J.P. did, in fact, draw a firearm and direct it toward T.H. J.P.'s arguments relate not to the truth or falsity of that statement, but to the legal privilege that may have attached in his favor. A reasonable trier of fact, however, could not conclude that T.H. was negligent in his representations to third parties based on J.P.'s subsequent assertion of a legal privilege. *See generally Cleveland Metro. Bar Assn. v. Berk*, 132 Ohio St.3d 82, 2012-Ohio-2167, ¶ 12, quoting *Black's Law Dictionary* 1133 (9th Ed.2009) (recognizing that "negligence is defined as '[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.'").

{¶13} In this respect, the earlier decision of the trial court in the CPO case, which was subsequently affirmed by this Court in *J.P. I*, was also relevant to the trial court's legal determination. As this Court concluded in *J.P. II*, these decisions did not have preclusive effect for purposes of res judicata. Nonetheless, they bear on whether T.H., with fault attaining at least the level of negligence, made a false statement that amounted to defamation per se because any such statements would have occurred well after the full hearing on J.P.'s petition for a CPO and the subsequent dismissal of that petition.

{¶14} The trial court erred by denying T.H.'s motion for a directed verdict on J.P.'s claim for defamation per se. His first assignment of error is sustained.

ASSIGNMENT OF ERROR NO. 2

> THE LOWER COURT ABUSED ITS DISCRETION AND COMMITTED CLEAR ERRORS OF LAW WHEN IT FAILED TO ISSUE A DIRECTED VERDICT AS TO [J.P.]'S CLAIM[] OF INVASION OF PRIVACY WHEN [J.P.] BOTH ADMITTED THAT [T.H.]'S SOLE INGRESS AND EGRESS REQUIRED HIM TO GO PAST [J.P.]'S RESIDENCE A SHORT DISTANCE AWAY; AND [J.P.] ALSO ADMITTED THAT [T.H.] HAD A CONSTITUTIONAL RIGHT OF FREE MOVEMENT; AND THE EVIDENCE OF STALKING CONSISTED SOLELY OF [J.P.] SERIALLY VIDEOTAPING GOING ABOUT NORMAL AND USUAL AFFAIRS WITHOUT A CLEAR LEGAL RIGHT TO DO SO. A DIRECTED VERDICT FOR [T.H.] SHOULD HAVE BEEN GRANTED.

{¶15} T.H.'s second assignment of error argues that the trial court erred by denying his motion for a directed verdict on J.P.'s claim for invasion of privacy. This Court disagrees.

{¶16} As noted above, a motion for a directed verdict tests the legal sufficiency of the evidence supporting a claim. *Ruta*, 69 Ohio St.2d at 68. Neither the credibility of witnesses nor the weight to be given the evidence are matters for consideration under Civ.R. 50(A). *Wagner*, 77 Ohio St.3d at 119, quoting *Ruta* at 68-69. The tort of invasion of privacy includes a claim for "'the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.'" *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, ¶ 15, quoting *Housh v. Peth*, 165 Ohio St. 35 (1956), paragraph two of the syllabus. The tort "is akin to trespass in that it involves intrusion or prying into the plaintiff's private affairs[]" including, for example, "wiretapping [and] watching or photographing a person through windows of his residence[.]" *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 166 (10th Dist.1985). A plaintiff must demonstrate that he or she had

a reasonable expectation of privacy in the area in which the alleged intrusion occurred. *Olson v. Holland Computers*, 9th Dist. Lorain No. 06CA008941, 2007-Ohio-4727, ¶ 18.

{¶17} T.H. argues that the trial court erred by denying his motion for a directed verdict because the evidence demonstrated that it was J.P.—not T.H.—who engaged in actions that would constitute an invasion of privacy, such as routinely video recording his neighbors' activities. He has also argued that the actions to which J.P. points as evidence of an intrusion upon his seclusion actually reflected T.H.'s normal, necessary movements in and around his own home. In other words, T.H. argues that the evidence at trial weighed against the conclusion that he was liable for an invasion of J.P.'s privacy by intruding upon his seclusion. Because a motion for a directed verdict tests the *sufficiency* of the evidence supporting a claim, however, this Court does not consider the weight of the evidence or evaluate the credibility of witnesses and must, instead, view the evidence in the light most favorable to J.P. *See Ruta* at 68; *Goodyear Tire & Rubber Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, at ¶ 3; *Wagner* at 119. T.H. has not argued that the evidence at trial was insufficient to demonstrate the elements of J.P.'s invasion of privacy claim, nor has he articulated what those elements are in the first instance.

{¶18} In that respect, this Court notes that a sustained pattern of behavior that can be considered "a systematic campaign of harassment" may constitute an actionable invasion of privacy. *See Housh* at 41; *Killilea* at 166. *See also Weaver v. Pillar*, 5th Dist. Tuscarawas No. 2012-CA-32, 2013-Ohio-1052, ¶ 29-31 (recognizing, as in *Housh*, that aggressive collection techniques by a debt collector may rise to the level of an invasion of privacy); *Irvine v. Akron Beacon Journal*, 147 Ohio App.3d 428, 2002-Ohio-2204, ¶ 28-34 (recognizing that a claim for invasion of privacy may be stated against a telemarketer based upon repeated telephone calls). Because T.H. has neither articulated the elements of a claim for invasion of privacy premised

upon intrusion upon seclusion nor argued that the evidence was insufficient to establish those elements in this case, this Court takes no position on the legal question of whether an action for invasion of privacy can be sustained based on a pattern of behavior such as the one identified by J.P. Nonetheless, this Court notes that other courts have limited application of this principle to circumstances involving debt collection and telemarketing activity, and one court has observed that Ohio does not recognize a claim for "civil harassment." *Misseldine v. Corporate Investigative Servs., Inc.*, 8th Dist. Cuyahoga No. 81771, 2003-Ohio-2740, ¶ 41.

{¶19} T.H.'s second assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 3

> THE LOWER COURT ABUSED ITS DISCRETION AND COMMITTED CLEAR PREJUDICIAL ERROR WHEN THE LOWER COURT REFUSED TO ALLOW [T.H.] TO CALL THE AVON LAKE, OHIO PROSECUTOR RUELBACH TO TESTIFY AS TO THE DISMISSAL OF THE UNDERLYING ASSAULT CHARGE AFTER HIS INDEPENDENT AND FIRST VIEW OF THE FILED CASE GIVEN THAT THE LOWER COURT THEN REPEATEDLY GAVE FREE REIN TO [J.P.] TO ARGUE AND ELICIT TESTIMONY THAT IT WAS TRUE THAT [T.H.] ASSAULTED HIM BECAUSE "THE POLICE" ARRESTED HIM.

{¶20} In his third assignment of error, T.H. argues that the trial court abused its discretion by excluding the testimony of the prosecutor who dismissed the charges filed against T.H. after the incident of June 22, 2014.

{¶21} As a general rule, this Court reviews the admission or exclusion of relevant evidence for an abuse of discretion. *M.S. by Slyman v. Toth*, 9th Dist. Medina No. 16CA0038-M, 2017-Ohio-7791, ¶ 43, citing *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Because trial courts enjoy broad discretion in the admission and exclusion of evidence, this Court will only conclude that there is reversible error when there has been a clear abuse of discretion that resulted in material prejudice. *See State v. Thompson*, 141 Ohio St.3d 254, 2014-

Ohio-4751, ¶ 111, citing *State v. Long*, 53 Ohio St.2d 91, 98 (1978) and *Sage* at paragraph two of the syllabus.

{¶22} T.H.'s brief does not explain under what Rules of Evidence, if any, the trial court erred, nor does it direct this Court to any other authority that would provide a framework for our analysis of this assignment of error. *See generally* App.R. 16(A)(7); Loc.R. 7(B)(7) of the Ninth District Court of Appeals. Because his brief focuses on the prejudice that he alleges to have suffered as a result of the trial court's ruling, this Court takes no position on whether the trial court's decision to exclude the prosecutor's testimony was substantively erroneous, and our discussion is limited to whether T.H. was prejudiced by that decision.

{¶23} During trial, one of the officers who responded to the June 22, 2014, incident testified that he spoke to J.P. and a neighbor at the scene. The officer related the substance of J.P.'s statements and noted that T.H. was arrested, but J.P. was not charged. The officer also testified that the charges against T.H. were dismissed and that T.H. did not seek charges against J.P. arising from the incident. During a sidebar, T.H. summarized his purpose for calling the prosecutor to testify:

> I expect him to testify to what the procedures are for charging, who makes the charge; that would be the officer, not him. What he does after the charge is made. And what he reviewed in making his determination to dismiss the case.
>
> * * *
>
> Your Honor, I'm not going to ask him what his reasons were for dismissing. I'm going to ask him what he did, what he reviewed, before he dismissed the case.

Further clarifying his purposes in calling the prosecutor, T.H. emphasized the testimony would be limited to "procedures."

{¶24} The jury heard testimony that T.H. was charged, but that the charges were dismissed and, consequently, that neither T.H. nor J.P. was prosecuted for their actions on June

22, 2014. Given that the proffered substance of the prosecutor's testimony would have been limited to a description of procedural matters and not his reasons for dismissing the charges related to the June 22, 2014, incident, this Court cannot conclude that T.H. was materially prejudiced by its exclusion. His third assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 4

> THE LOWER COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO CURTAIL [J.P.]'S CLOSING ARGUMENT WHEREIN HE ARGUED THAT "THE POLICE DECISION" TO CHARGE [T.H.] WITH ASSAULT DEMONSTRATED WHO WAS TELLING THE TRUTH AS THE LOWER COURT HAD BEEN INFORMED BY [T.H.]'S PROFFER OF THE PROSECUTOR'S TESTIMONY THAT ONE OFFICER WHO INTERVIEWED [J.P.] SOLELY DECIDED TO ISSUE THE CHARGE BASED UPON THAT INTERVIEW.

{¶25} T.H.'s fourth assignment of error argues that he was prejudiced by improper statements made by J.P. during his closing argument.

{¶26} T.H. did not object to J.P.'s statements, so he has forfeited all but plain error in connection with this assignment of error. *See Rising v. Litchfield Bd. of Twp. Trustees*, 9th Dist. Medina No. 16CA0010-M, 2016-Ohio-6971, ¶ 16, citing *Katie L. v. Dennis M.*, 9th Dist. Medina No. 15CA0010-M, 2016-Ohio-338, ¶ 5. "In civil cases, like this one, the application of the plain error doctrine is reserved for the rarest of circumstances." *Katie L.* at ¶ 5, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus. As the Ohio Supreme Court has explained:

> In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

Goldfuss at syllabus. The application of the plain error doctrine in civil cases is "strictly limited to those occasions when the error impugn[s] the character and public image of the judicial process." *State v. Morgan*, 153 Ohio St.3d 196, 2017-Ohio-7565, ¶ 40.

{¶27} T.H. has acknowledged that his arguments are limited to plain error, but he has done so with reference to the standard of review applicable to criminal cases. *See generally Long*, 53 Ohio St.2d 91 at paragraph three of the syllabus. The civil and criminal standards for recognizing plain error on appeal, however, differ substantially. *See Morgan* at ¶ 35-41, 48-49. Although T.H. has argued that he was prejudiced by J.P.'s allegedly improper comments during closing argument, he has not argued that those comments "impugned the character and public image of the judicial process." *Id*. at ¶ 40. Nonetheless, we recognize that error is the starting point for this Court's analysis of plain error in civil cases as well as criminal cases. *See State v. Hill*, 92 Ohio St.3d 191, 200 (2001). *See also Morgan* at ¶ 36, 41. Because T.H. has not identified error on the part of the trial court, it follows that he cannot demonstrate plain error.

{¶28} Counsel enjoys significant latitude during closing argument, and the question of whether argument goes beyond the bounds of what is permissible is one entrusted to the discretion of the trial court. *Pesek v. Univ. Neurologists Assn., Inc.*, 87 Ohio St.3d 495, 501 (2000). *See also Pang v. Minch*, 53 Ohio St.3d 186 (1990), paragraphs two and three of the syllabus. A trial court "is not required to intervene sua sponte to admonish counsel and take curative action" regarding improper statements during closing argument in a civil case unless counsel "grossly and persistently abuses his privilege." *Snyder v. Stanford*, 15 Ohio St.2d 31 (1968), paragraph one of the syllabus, superseded by rule on other grounds as noted in *King v. Branch Motors Express Co.*, 70 Ohio App.2d 190, 197 (2d Dist.1980).

{¶29} In support of this argument, T.H. points to the following statement made by J.P. during closing argument:

> And, remember, those officers, they didn't just take statements. They observed for themselves what they saw at the scene, and they formed an opinion of the truth-telling or lack of truth-telling of the people who gave statements. They

> didn't just regurgitate what I told them. They observed my demeanor, the scene, their witnesses' demeanor, and, still, those seasoned officers arrested [T.H.].

J.P.'s statement—which is the sole incident to which T.H. directs this Court's attention—is a fair comment on the testimony of the police officer who responded to J.P.'s 911 call after the June 22, 2014, incident. The officer testified about his observations at the scene, including apparent injuries to J.P., and the conversation that he had with J.P. Although he testified that T.H. was arrested, he also acknowledged during his cross-examination that he did not witness the altercation and that the charges against T.H. were later dismissed.

{¶30} The inferences drawn by J.P. in this statement were not unwarranted given the testimony in evidence, nor were his statements beyond the bounds of acceptable professional conduct during closing argument. *See*, *e.g.*, *Pesek* at 501-502 (noting that counsel "made various assertions and drew many inferences that were simply not warranted by the evidence[]" and attacked opposing counsel and expert witness in a manner that was "inexcusable, unprincipled, and clearly outside the scope of final argument."). Even were we to conclude that J.P.'s statement was an improper comment on the evidence, a single statement during closing argument in isolation does not constitute the gross and persistent abusive conduct identified in *Snyder* and *Pesek*. *See Riechers v. Biats*, 9th Dist. Summit No. 25248, 2010-Ohio-6448, ¶ 13-14.

{¶31} The trial court did not err by permitting J.P.'s statements during closing argument. Because "error * * * [is] the starting point for a plain-error inquiry[,]" T.H.'s fourth assignment of error is overruled. *See Hill*, 92 Ohio St.3d at 200.

ASSIGNMENT OF ERROR NO. 5

THE LOWER COURT ERRED IN DENYING A NEW TRIAL.

{¶32} T.H.'s fifth assignment of error argues that the trial court erred by denying his motion for a new trial based on the trial court's decision to exclude the prosecutor's testimony and on J.P.'s comments during closing argument.

{¶33} Civ.R. 59(A) provides that a new trial may be granted based upon:

> (1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing party; [and]
>
> * * *
>
> (9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

A decision granting or denying a motion for a new trial under Civ.R. 59(A)(1), (2), or (9) is reviewed for an abuse of discretion. *See McMichael v. Akron Gen. Med. Ctr.*, 9th Dist. Summit No. 28333, 2017-Ohio-7594, ¶ 41 (Civ.R. 59(A)(1)); *Sheffield v. Estate of Bentley*, 12th Dist. Fayette No. CA2014-12-020, 2015-Ohio-3834, ¶ 10 (Civ.R. 59(A)(2)); *Javorsky v. Natl. RR. Passenger Corp.*, 9th Dist. Wayne No. 06CA0075, 2008-Ohio-342, ¶ 8 (Civ.R. 59(A)(9)).

{¶34} This Court has considered the substance of the arguments underlying T.H.'s motion for a new trial in our analysis of his third and fourth assignments of error. Having concluded that the trial court did not err in either respect, it follows that the trial court did not abuse its discretion by denying his motion for a new trial on those substantive grounds.

{¶35} T.H.'s fifth assignment of error is overruled.

III.

{¶36} T.H.'s first assignment of error is sustained. His second, third, fourth, and fifth assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas

is affirmed in part and reversed in part, and this matter is remanded to the trial court for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

LYNNE S. CALLAHAN
FOR THE COURT

TEODOSIO, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

GERALD WALTON and JOHN J. SCHNEIDER, Attorneys at Law, for Appellant.

J. P., pro se, Appellee.

[Cite as *Columbus v. Internatl. Assn. of Firefighters, Local 67*, 2020-Ohio-356.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellant,	:	
v.	:	No. 18AP-486 (C.P.C. No. 17CV-5569)
International Association of Firefighters, Local 67,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on February 4, 2020

On brief: *Zach M. Klein*, City Attorney, and *Jennifer L. Shea*, for appellant. **Argued:** *Jennifer L. Shea.*

On brief: *Thompson Hine LLP*, *Thomas Wyatt Palmer*, and *William C. Moul*, for appellee. **Argued:** *Thomas Wyatt Palmer.*

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Plaintiff-appellant, City of Columbus (the "City"), appeals from a decision of the Franklin County Court of Common Pleas declining to vacate an arbitrator's decision in favor of defendant-appellee, International Association of Firefighters, Local 67 ("Local 67" or "union local"). Because the arbitrator's decision is reasonably derived from and does not conflict with the collective bargaining agreement between the parties, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On October 19, 2015, a battalion chief representing the Office of the Fire Chief for the City of Columbus Division of Fire ("Division"), sent an e-mail to the President of Local 67. (Ex. JT2 at 4, exhibit to July 27, 2017 Local 67 Application to Confirm.) The e-mail indicated that the "directors office decided" to civilianize certain special assignments

then filled by uniformed firefighters. *Id.* Attached to the e-mail was a document listing 17 positions that the City intended to civilianize: "RMS," "Fitness Coordinator," "Special Events Coord," "EMS Supply Tech," "ES-1 Liaison," "Training Video," "FAO Radio Specialist," "Public CPR Trainer," "R&D Specialist," "R&D Specialist," "R&D Specification," "I.T. Coordinator," "Apprenticeship Asst.," "FAO Trainer," "Community Relations," "In Service Training," and "ES-1 Office Aid." *Id.* at 8. Of these, eight were described in greater detail:

> **RMS Special Assignment Firefighter:** * * * helps out with the Records Management of Fire Incident Reporting. * * *
>
> **Fitness Coordinator Firefighter:** Currently a vacant position being held from bid on the transfer list. * * * The Division would like to civilianize this position into an industrial hygienist * * * [who] would coordinate both the physicals being completed through Mt Carmel Health and work on issues regarding mold, bed bugs, and Ebola procedures, etc.
>
> * * *
>
> **Special Events Coordinator:** The current position prepares special duty medics for special events. The position stocks, cleans, and provides station level maintenance on the vehicles. * * *
>
> **EMS Supply Technician:** The current position handles all EMS supplies for the Division of Fire. The position orders, receives stocks and maintains secure storage of narcotic medications. * * *
>
> **ES-1 Liaison position:** This position coordinates annual and monthly vacations for the emergency services personnel. * * *
>
> **Training Video Firefighter:** This position helps out shooting videos for training and other fire department functions. * * *
>
> **Public CPR Trainer:** This position currently coordinates and teaches public citizens CPR and the Red Cross Life Saver classes through the Columbus Division of Fire. * * *
>
> **800 MHz Radio Coordinator:** [Currently coordinates t]he 800 MHz [radio] * * * [but will] eventually include the coordination of radios for both Police and Fire.

(Emphasis sic.) *Id.* at 6-7.

{¶ 3} The following day, Local 67 grieved the proposed action as a potential violation of Section 7.2 of the collective bargaining agreement ("CBA") between the City and the union local. *Id.* at 1-3.

{¶ 4} Ultimately, the matter was presented to an arbitrator, who issued a decision on March 23, 2017 finding in favor of Local 67. (Mar. 23, 2017 Arbitrator Decision, Ex. 3 to June 22, 2017 Compl.) According to the arbitrator's decision,[1] there was essentially no dispute among the parties about the facts underlying the grievance. *Id.* at 6. Several years before the dispute arose, Local 67 and the City had cooperated in identifying some departmental positions that could be filled by civilians in order to return uniformed firefighters then occupying those positions to street and firehouse positions. *Id.* at 5-6. In 2015, the City had "civilianized" outside of the terms of the CBA 6 of the 17 targeted special assignment positions. *Id.* at 6. These were identified in the hearing, but it is not apparent from the appellate record which 6 of the 17 listed positions were civilianized—that is—were being staffed with civilians in lieu of then current bargaining unit uniformed personnel. *Id.*

{¶ 5} The arbitrator reasoned that, notwithstanding previous indications that there was some consensus between City and union local that it might be appropriate to civilianize some positions, the relevant event triggering this grievance was the notice from the City on October 19, 2015 to the effect that it intended to *unilaterally* civilianize certain positions. *Id.* at 11-13. As the grievance was filed the following day, the arbitrator determined that it was timely. *Id.* at 13. The arbitrator then considered the merits of Local 67's grievance.

{¶ 6} The arbitrator found that language in Section 7.2 of the CBA, wherein the City "agree[d] to not civilianize any fire prevention, emergency medical services, or fire suppression services," read in context of the entire CBA, was broader than its exact terms might suggest. *Id.* at 14. (CBA at 10, Ex. 1 to June 22, 2017 Compl.) The arbitrator noted that the CBA otherwise deals exclusively with uniformed positions and that no right to civilianize is conferred on the City or Division, nor are civilian employees even mentioned in the agreement. (Mar. 23, 2017 Arbitrator Decision at 14.) In that context, the arbitrator concluded that the agreement in Section 7.2 was effectively intended as a promise not to civilianize any Division of Fire positions and that the terms "fire prevention, emergency

[1] No transcripts of the hearing held by the arbitrator were filed in the trial court or with this Court. Thus, we relate the facts as recounted by the arbitrator.

medical services, or fire suppression services" were, in essence, to be read as broad, "comprehensive" descriptors rather than limitations. *Id.*

{¶ 7} The arbitrator also relied on the long history of uniformed firefighters filling the targeted positions and the fact that the positions had always been part of the overall mission of the Division of Fire. *Id.* at 15. However, the historical detail that the arbitrator found to be "the most persuasive confirmation of the Union's position [wa]s that the [City] sought the approval of the Union" local when it previously sought to civilianize. *Id.* According to the arbitrator, the City previously sought the consent of Local 67 to study whether jobs could be civilianized and firefighters returned to the street in order to better protect inadequately served neighborhoods. *Id.* at 15. Though the City was arguing in this grievance process that it need not have sought Union permission to civilianize, in prior years (2006-07) it apparently held a different view and recognized that it could not unilaterally civilianize Division of Fire positions. *Id.* at 16.

{¶ 8} Based on this reasoning, the arbitrator in his decision concluded that the City must seek the consent and participation of the union local before civilianizing any of the other positions in the civilianization list. *Id.*

{¶ 9} Through a series of complaints filed on June 22, 2017, an application to vacate the arbitrator's decision four days later and at least one amendment, the City sought to vacate the arbitrator's decision. (June 22, 2017 Compl.; June 26, 2017 Application to Vacate; July 13, 2017 Am. Application to Vacate.) Local 67 responded in opposition and moved to confirm the arbitrator's decision on July 27, 2017. (July 27, 2017 Application to Confirm.) The parties fully briefed the issues, and on May 1, 2018, the trial court issued a decision in which it acknowledged the filings of the parties, reviewed the history of the case, and quoted the relevant standard of review. (May 1, 2018 Decision at 1-5.) Noting what it referred to as the "highly deferential" standard accorded to review of arbitration, it stated that the issue presented was "whether the arbitrator's award was rationally derived from the applicable terms of the collective bargaining agreement." *Id.* at 4-5. On this question it concluded:

> After reviewing the arguments and evidence submitted by the parties, the court finds that a rational nexus exists between the Agreement and the arbitrator's Award, and that there is not sufficient evidence from which this court can conclude that the arbitrator's interpretation of the agreement is not consistent

> with the Agreement. Nor does the court find that the Award is unlawful, arbitrary or capricious. Therefore, the court's inquiry pursuant to R.C. § 2711.10 is at an end, and the court finds the City's position not well taken.

Id. at 5.

{¶ 10} The City now appeals.

II. ASSIGNMENT OF ERROR

{¶ 11} The City presents a single assignment of error for review:

> The Trial Court erred in denying Appellant's Application and Motion to Vacate the Arbitration Award and not addressing the grounds upon which Appellant sought to vacate the Award.

III. DISCUSSION

{¶ 12} This Court has previously stated:

> Public policy in Ohio favors the resolution of labor disputes through arbitration. *Findlay Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129, 131, 551 N.E.2d 186 (1990); *Reynoldsburg City Sch. Dist. Bd. of Edn. v. Licking Hts. Local Sch. Dist. Bd. of Edn.*, 10th Dist. No. 11AP-173, 2011-Ohio-5063, ¶ 19; *Cincinnati v. Queen City Lodge No. 69*, 164 Ohio App.3d 408, 2005-Ohio-6225, ¶ 14, 842 N.E.2d 588 (1st Dist.). Judicial review of arbitration awards is limited in order to encourage the resolution of disputes in arbitration. *Wright State Univ. v. FOP*, 2d Dist. No. 2016-CA-35, 2017-Ohio-854, ¶ 12.

Franklin Cty. Sheriff v. Teamsters Local No. 413, 10th Dist. No. 17AP-717, 2018-Ohio-3684, ¶ 17. Notwithstanding such policies, a court of common pleas "shall" vacate an arbitrator's award upon the application of any party to the arbitration if:

> (A) The award was procured by corruption, fraud, or undue means.
>
> (B) There was evident partiality or corruption on the part of the arbitrators, or any of them.
>
> (C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

> (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

R.C. 2711.10.

{¶ 13} In this case, no corruption, fraud, partiality, or other misconduct or misbehavior were alleged. Thus, the question before the trial court was whether the arbitrator exceeded his authority as contemplated in division (D) of R.C. 2711.10. This Court has also thoroughly examined this question:

> An arbitrator does not exceed her authority so long as the award "draws its essence" from the underlying contract. *Thermal Ventures II, L.P. v. Thermal Ventures, Inc.*, Cuyahoga App. No. 85816, 2005 Ohio 3389, at P13, citing *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assoc.*, 49 Ohio St.3d 129, 132, 551 N.E.2d 186. "An arbitrator's award draws its essence from a collective bargaining agreement when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful." *Mahoning Cty. Bd. of Mental Retardation and Developmental Disabilities v. Mahoning Cty. TMR Educ. Assn.*, [22 Ohio St. 3d 80 (1986),] paragraph one of syllabus. Stated differently, "an arbitrator's award departs from the essence of a collective bargaining agreement when: (1) the award conflicts with the express terms of the agreement, and/or (2) the award is without rational support or cannot be rationally derived from the terms of the agreement." *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Employees Assn., Local 11, AFSCME, AFL-CIO* (1991), 59 Ohio St. 3d 177, 572 N.E.2d 71, syllabus.

Fraternal Order of Police Capital City Lodge No. 9 v. Columbus, 10th Dist. No. 04AP-1023, 2006-Ohio-1520, ¶ 9 ("*FOP*"); *see also, e.g., Teamsters Local No. 413* at ¶ 20.

{¶ 14} When reviewing a decision of a common pleas court confirming, modifying, vacating, or correcting an arbitration award, an appellate court should accept findings of fact that are not clearly erroneous but decide questions of law de novo. *Portage Cty. Bd. of Dev. Disabilities v. Portage Cty. Educators' Assn. for Dev. Disabilities*, 153 Ohio St.3d 219, 2018-Ohio-1590, syllabus (following *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)).

{¶ 15} The City argues that the arbitrator's decision conflicts with the CBA in that it ordered no further civilianization without the consent of the union local. (City Brief at 13-

14.) The City also urges us to find that the arbitrator's decision was without rational support from the CBA because the arbitrator found that Local 67's consent was required for the civilianization of any bargaining unit employee position, not strictly limited by the descriptors, "fire prevention, emergency medical services, or fire suppression services." (City Brief at 11-13.) Local 67 argues the fact that its consent is required for civilianization is simply the logical consequence of the CBA's broad prohibition on civilianization. (Local 67 Brief at 20-24.)

{¶ 16} Leaving aside for a moment the question of how broad the prohibition on civilianization is, we agree with Local 67 that its consent is required to civilianize protected positions. The CBA, at Section 7.2, expressly prohibits "civilianiz[ation] [of] any fire prevention, emergency medical services, or fire suppression services." (CBA at 10.) That the City must reach a new agreement with Local 67 if it wants to civilianize protected positions is a completely "rational[] deriv[ation] from the terms of the agreement." *FOP*, 2006-Ohio-1520, ¶ 9.

{¶ 17} Whether the scope of the CBA's prohibition on civilianization extends beyond positions specifically named in the CBA, "fire prevention, emergency medical services, or fire suppression" and reaches positions that support those functions is not before us on appellate review. (CBA at 10.) We review the trial court's decision de novo and like the trial court must determine whether the arbitrator's resolution of that question "drew its essence" from the CBA. In other words, we like the trial court must decide whether the arbitrator's decision was "without rational support or c[ould not] be rationally derived from the terms of the agreement." *FOP* at ¶ 9.

{¶ 18} The CBA nowhere asserts, affirms, or implies a broad right of the City to civilianize bargaining unit positions. The CBA provides no general right to civilianize the City. Nor do the terms of the CBA, taken as a whole, suggest that Section 7.2 should be read as a narrow exception to a general right to civilianize. Rather the CBA contains, and the arbitrator found, a broad prohibition on civilianizing positions within the Division. It also bears note that "emergency dispatching duties performed by the bargaining unit" are listed within those services that the City may not contract-out but are not listed within those service positions that cannot be civilianized. (CBA at 10.) One reasonable interpretation of this difference is that dispatching services are contemplated as a limited exception to an

otherwise broad civilianization ban. That is, the CBA's language could be read (as the arbitrator read it) as a broad prohibition of civilianization with respect to positions related to all the major tasks accomplished by the bargaining unit employees (fire prevention/suppression and EMS) and excepting from it only dispatching.

{¶ 19} We cannot say that the arbitrator's interpretation in this case is "without rational support" in the CBA. *FOP* at ¶ 9. Nor can we fault the arbitrator's consideration of the parties' prior conduct. The fact that the City previously sought Local 67's cooperation in civilianizing positions could have been interpreted simply as a wise action to foster good relations. But it could also reasonably have been interpreted (as the arbitrator interpreted it) to mean that the City understood that it was prohibited from civilianizing division positions held by bargaining unit members and that Local 67's cooperation or support was therefore necessary.

{¶ 20} The City's assignment of error is overruled.

IV. CONCLUSION

{¶ 21} The arbitrator's decision is drawn from the CBA and there is rational support for it. While it is not the only possible view of the CBA, it is not an unreasonable or irrational one, and it does not conflict with any part of the CBA. We therefore affirm the Franklin County Court of Common Pleas' decision to confirm the arbitrator's judgment.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.

McGRATH, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of Ohio Constitution, Article IV, Section 6(C).

[Cite as *Mobley v James*, 2020-Ohio-380.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MICHAEL MOBLEY, ET AL., :

Plaintiffs-Appellants, :

No. 108470

v. :

RONALD JAMES, :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 6, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-17-890671

Appearances:

Bradley Hull, IV, *for appellants*.

Raymond J. Schmidlin, Jr., *for appellee*.

EILEEN A. GALLAGHER, P.J.:

{¶ 1} This case involves a dispute arising out of a residential real estate transaction between plaintiffs-appellants Michael Mobley ("Mobley") and AnnieRose Mobley (collectively, "buyers") and defendant-appellee Ronald James ("seller"). Buyers appeal from the trial court's decision granting seller's motion for summary judgment on buyers' claims for fraud, breach of contract and unjust

enrichment arising out of seller's alleged failure to disclose a history of sewer backups and "water intrusion" involving the property.

{¶ 2} For the reasons that follow, we affirm the trial court.

Factual Background and Procedural History

The Purchase Agreement, Seller's Disclosures and Buyers' Inspection

{¶ 3} On October 27, 2016, buyers executed a purchase agreement to purchase a single-family home located at 17606 Schenely Avenue, Cleveland, Ohio (the "property") from seller. Seller purchased the property in 1996 and lived on the property continuously for the 20 years prior to the sale.

{¶ 4} The purchase agreement incorporated an Ohio residential property disclosure form that seller had completed on October 8, 2016 (the "RPDF"). In the RPDF, seller denied knowledge of any of the following conditions with the property:

- "any current leaks, backups or other material problems with the water supply system or quality of the water";
- "any previous or current leaks backups or other material problems with the sewer system servicing the property";
- "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";
- "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" and
- "other known material defects in or on the property."

{¶ 5} The purchase agreement stated that the property was "being purchased in its 'AS IS' PRESENT PHYSICAL CONDITION" and was contingent upon the results of a professional general home inspection by buyers. Buyers signed the RPDF and acknowledged "that it is BUYER'S own duty to exercise reasonable care to inspect and make diligent inquiry of the SELLER or BUYER'S inspectors regarding the condition and systems of the Property." Buyers further acknowledged that "[o]wner makes no representations with respect to any offsite conditions. Purchaser should exercise whatever due diligence purchaser deems necessary with respect to offsite issues that may affect purchaser's decision to purchase the property."

{¶ 6} Seller testified that at some point prior to the closing, buyers' real estate agent contacted his real estate agent requesting further information regarding several items buyers had observed in the house, including why a sump pump had been installed in the basement and an explanation of the "controls" in the upstairs bathroom. Seller's real estate agent, in turn, contacted seller about these issues. Seller prepared a written response to buyers' inquiries, which he emailed to his real estate agent (the "supplemental disclosure"). With respect to the sump pump, seller stated:

> Many years before I bought this house, the previous owner, who was a "tinkerer," added the pump after there was a storm sewer backup in the neighborhood. It is NOT in use in order to keep the basement dry on a daily basis. It operated one or two times several years ago, when the storm sewers were overwhelmed again. The City has since cleaned them out and I have had no problems since.

> On occasion I run water into the sump and let the pump run for exercise. It was replaced about 5 years ago.

{¶ 7} Seller testified that, based on his communications with his real estate agent, he believed his real estate agent had forwarded the supplemental disclosure to buyers' real estate agent and that buyers' real estate agent, in turn, had forwarded the supplemental disclosure to buyers because "we never had anymore [sic] communication regarding it, saying where is this document."

{¶ 8} Buyers hired Jagger Enterprises, Inc. d.b.a. Buckeye Home Inspections to perform a general home inspection of the property. James Jagger a.k.a. James Jiknialis, a certified home inspector, (the "home inspector") performed the home inspection on October 29, 2016. Mobley and buyers' real estate agent attended the home inspection. Seller was not present during the home inspection. The home inspector made a digital audio recording of his inspection, contemporaneously recording his observations and discussions with Mobley and buyers' real estate agent during the inspection.

{¶ 9} The home inspector testified that he had some questions about the upstairs bath thermostat and why there was a sump pump in the basement, which he raised with buyers' real estate agent. He stated that, in response, buyers' real estate agent emailed him a copy of seller's supplemental disclosure. The home inspector testified that he assumed that buyers' real estate agent had given buyers a copy of the supplemental disclosure because "that's what the agent told [him]."

{¶ 10} According to the home inspector, immediately following the inspection, while everyone was still on-site at the property, he gave Mobley and buyers' real estate agent (1) a CD containing the audio recording of the home inspection and (2) a carbon copy of a handwritten "material defects list" he had prepared during the inspection. He stated that later that day, he emailed a typewritten, PDF version of the material defects list (with "a few more pieces of information") to Mobley and buyers' real estate agent along with photos he had taken during the inspection (collectively, the "inspection report").[1]

{¶ 11} In the material defects lists, the home inspector identified a number of potential issues with the property, including the following:

> The following were noted as material defects. These items affect either health, safety, or utility of the inspected property and/or may cost more than $500.00 to correct by repair or replacement. * * *
>
> 4) Elevated moisture levels (100 points per *Tramex Moisture Encounter* electronic moisture meter) noted in red clay tiles at bottom of basement steps. No active water entry noted at time of inspection. Future leaks are possible.
>
> Please note — Basement appears to have been waterproofed. Recommend obtaining any warranties or other documents re: waterproofing.
>
> * * *
>
> 8) Seller has disclosed a history of backed up sewers.

---

[1] The home inspector testified that he considers the audio recording of the inspection to be his "inspection report" because it is more detailed than the material defects list. In their brief, however, appellants refer to the typewritten material defects list and photos from the inspection as the "inspection report." To avoid confusion, we follow appellants' lead and refer to the typewritten material defects list and photos from the inspection as the "inspection report" here.

* * *

*Please listen to the audio recording since that is your detailed inspection report.

{¶ 12} The home inspector indicated that he "noted" in his report that "[s]eller has disclosed a history of backed up sewers" because (1) buyers' real estate agent had informed Mobley, during the home inspection, that seller had disclosed a history of sewer backups and (2) the home inspector had "verified" this information through the supplemental disclosure buyers' real estate agent had forwarded to the home inspector. The home inspector testified that he saw nothing during the inspection to suggest that seller was attempting to conceal evidence of prior sewer backups.

{¶ 13} On November 2, 2016, buyers agreed to remove the inspection contingency in the purchase agreement provided seller had the boiler and water heater serviced and made certain other repairs. On December 21, 2016, title on the property transferred from seller to buyers.

Post-Sale Sewer Backups

{¶ 14} Ten-and-one-half months later, on November 5, 2017, the city's storm sewers backed up and water infiltrated the basement of the property. Buyers testified that five to six inches of sanitary sewage and water entered the basement through the basement's shower and sink drains after a "very heavy rain" that caused a "severe flood in the neighborhood." Buyers experienced a second "significant

water intrusion into the basement" in 2018[2] during a storm. Following these incidents, buyers learned that other residences in the neighborhood had had prior, ongoing problems with sewer backups. As a result of the incidents, buyers allegedly sustained over $25,000 in property damage, decreased property value and other expenses.

{¶ 15} Mobley acknowledged that the incidents occurred because the city's sewers were too small and lacked the capacity to handle large amounts of water during excessive rains. After the second incident in 2018, buyers had a back flow valve installed. After they installed the back flow valve, buyers had no further problems with sewer water backups in the basement.

{¶ 16} Buyers claimed that they did not receive a copy of the handwritten material defects list, the inspection report or any of the photographs from the home inspection prior to closing. Although Mobley confirmed, during his deposition, that the home inspector's October 29, 2016 email forwarding a copy of the inspection report to Mobley and buyers' real estate agent had his correct email address, he testified that he had never seen the email prior to his deposition and that he had never had any conversations with his real estate agent regarding the email. Mobley further testified that the "only thing" he had received from the home inspector prior to closing was a "hard CD," "delivered" to him after the inspection, "which didn't operate properly." Mobley stated that "it wasn't until after [buyers] went through

[2] There is some confusion in the record as to when this second incident occurred. In some of the materials, it is stated that the second incident occurred in April 2018; in other materials, it is stated that the second incident occurred in August 2018.

* * * all the things with the house," that the home inspector sent him a "drop box file that had all the additional information regarding the inspection."

{¶ 17} Mobley testified that when he first saw the inspection report sometime after November 5, 2017, he was surprised to learn that the seller had disclosed a history of sewer backups because he "never received a history of any sewer backup" and was "never told that the house actually flooded."

Buyers' Lawsuit against Seller

{¶ 18} On December 20, 2017, buyers filed a complaint, asserting claims of fraud, breach of contract and unjust enrichment against seller. Buyers alleged that seller had made false representations and/or concealed material facts from buyers because "[i]ssues involving water intrusion," "[i]ssues with plumbing," "[i]ssues with sewer backup," "substantial damage to the basement" and the "substantial vulnerability of the property to damage" were not disclosed on the RPDF. Buyers claimed that seller had made the misrepresentations knowing that they were false, or with reckless disregard for their truth or falsity, to induce buyers to purchase the property. Buyers further alleged that they had justifiably relied on seller's misrepresentations when purchasing the property. Buyers sought to recover compensatory and punitive damages, plus interest, costs and attorney fees, from seller. Seller filed an answer in which he denied the material allegations of buyers' complaint and asserted various affirmative defenses.[3]

---

[3] On August 20, 2018, buyers filed an amended complaint, naming Jagger Enterprises, Inc. d.b.a. Buckeye Home Inspections and James A. Jiknialis as additional defendants (the "home inspector defendants"). Buyers asserted claims of fraud and

{¶ 19} In discovery responses submitted in June 2019, seller stated:

> INTERROGATORY NO. 27: Identify all instances during which there was backup, water seepage, water intrusion, or other intrusion of liquids into any part of the interior of 17606 Schenely Avenue, Cleveland, Ohio 44119 during the time you owned the Schenely Avenue residence.
>
> RESPONSE: As previously disclosed, approx. 10-12 years ago, after an exceptionally hard rain, water backed up under the laundry tub and shower drain. It rose to only a small area (approx. 6 sq. ft), then sump pump kicked in and water receded.

{¶ 20} During his deposition, seller testified that this was the same incident he had described in his supplemental disclosure, i.e., in which the sump pump "operated one or two times several years ago, when the storm sewers were overwhelmed." Seller stated that he "couldn't put a specific date on it," but that he believed the incident occurred "four to five years prior to his retirement" in 2012, i.e., "maybe in '08, sometime around in there." He further testified that although he had referenced the incident in his supplemental disclosure, he did not disclose it in the RPDF because the RPDF had only a "five-year look back" for sewer backups and the incident had occurred more than five years before he completed the RPDF. As he explained:

---

breach of contract against the home inspector defendants, alleging that the home inspector (1) had failed to disclose information to buyers that he had received as part of the home inspection and (2) had failed to provide a "true and accurate copy" of the home inspection report to buyers before buyers purchased the property. In March 2019, after the trial court granted the home inspector defendants' motion to stay litigation and compel arbitration of the claims against them (based on an arbitration provision in the home inspection agreement), buyers dismissed their claims against the home inspector defendants without prejudice.

Q. * * * What history of water intrusion into this house on Schenely was there during the time that you owned it?

A. I sent a document to them per the request of their realtor and explained one time I had a sewer backup, the sump pump was in place, the sump pump activated and drained it back down.

Prior to that I had nothing, post that I had nothing. After the sewer backup that time the city came and cleaned all the sewers out. For like two weeks they were working all over the neighborhood and after that I had no problems.

* * *

Q. * * * At least one or two times that you're aware of the sump pump was running?

A. It ran, correct and handled the backup.

Q. Okay. Now was there backup of water that literally came into the basement?

A. Yes, a small area, three, four feet.

Q. How many times?

A. I can recall one specific time, but I wrote in here one or two times I think just to be generous and say that it did happen, if that makes sense.

* * *

Q. * * * And when you used the term several years ago, you're talking about several years prior to 2016, of course?

A. Yes.

Q. Okay. Can you identify approximately what year this backup occurred?

A. * * * I retired in 2012, I was writing this in '16 and I know it was several, and I'm going to say four to five years previous to my retirement that this had occurred. So based on that, it's over five years by several, but I couldn't put a specific date on it.

{¶ 21} Seller stated that when this sewer backup occurred, water came up through the basement drain and went "[j]ust in the general surrounding area," "three or four feet," and that the water receded when the sump pump activated. Seller testified that no "flooding" of the basement occurred and that he did not sustain any property damage as a result of the sewer backup. Seller further testified that he "ran water through" the sump pump periodically "to make sure that it worked" and that he had previously replaced the sump pump after he discovered, during one of these checks, that it was not working. Seller also stated that he had the basement waterproofed in or around November 2012 "to relieve moisture on the walls."

Seller's Motion for Summary Judgment

{¶ 22} On January 31, 2019, seller filed a motion for summary judgment. Seller argued that there were no genuine issues of material fact and that he was entitled to judgment as a matter of law on all buyers' claims because (1) buyers had agreed to purchase the property "as is"; (2) the basement flooding was "caused by the fact that the city sewers lacked the capacity to accommodate heavy rainfall" and not due to some "defect with respect to the subject property"; (3) seller's representations on the RPDF were not fraudulent because the sewer backup seller had experienced occurred eight years before the sale and seller had no duty to disclose sewer backups on the RPDF that occurred more than five years earlier; (4) seller had referenced the prior sewer backup in the supplemental disclosure and (5) Mobley was aware of the "history of sewer backups" affecting the property and the

risk of future water intrusion based on his participation in the home inspection and his receipt of the handwritten material defects list, inspection report and audio recording of the home inspection. [4]

{¶ 23} Buyers opposed the motion, arguing that there were genuine issues of material fact that precluded summary judgment on each of their claims. Pointing to (1) seller's statements in the supplemental disclosure that the sump pump had "operated one or two times several years ago, when the storm sewers were overwhelmed again," (2) evidence that seller had previously replaced the sump pump and waterproofed the basement in 2012 and (3) evidence that the basement flooded twice after buyers purchased the property, buyers argued that seller's representation in the RPDF that he was "unaware of any history of water intrusion into the property" was "misleading and false." Buyers also argued that "given the widespread scope of floodings and the history of floodings throughout the neighborhood," seller was "on notice of water intrusion into his residence and generally in the neighborhood" that he had a duty to disclose. Buyers claimed that they had justifiably relied on seller's representations in the RPDF and that their inspection of the property did not preclude them from prevailing on their fraud

[4] In support of his motion for summary judgment seller submitted (1) an affidavit from the home inspector; (2) copies of the handwritten material defects list, the inspection report and the email from the home inspector forwarding the inspection report to Mobley and buyers' real estate agent; (3) a flash drive containing the audio recording of the home inspection; (4) copies of the purchase agreement, addenda to the purchase agreement and related documents; (5) a copy of the RPDF; (6) a copy of the transcript of Mobley's deposition; (7) a copy of seller's supplemental disclosure and (8) copies of documentation relating to buyers' alleged damages.

claim because (1) "the property's and neighborhood's history of sewer backups was not clearly and concisely identified to [buyers] by the home inspector or any third party" and (2) "independent evidence was not visible to them that would have reasonably put them on notice of the issue of water intrusion into the house."

{¶ 24} With respect to their contract claim, buyers argued that the seller's disclosures on the RPDF were a material part of the purchase agreement and that buyer breached that agreement when he "failed to deliver a house that met the specifications" of that agreement, i.e., "a house without a history of water intrusion over the preceding five years." With respect to their unjust enrichment claim, buyers contended that seller had been unjustly enriched "to the extent of more than $20,000" (i.e., the damages they sustained from the 2017 and 2018 floods) when he sold the property to buyers knowing that they were unaware of the "severe problems" with the house. [5]

The Trial Court's Decision

{¶ 25} On April 21, 2019, the trial court granted seller's motion for summary judgment on all buyers' claims. Although the trial court indicated that it believed

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[5] In support of their opposition, buyers submitted: (1) an affidavit from Michael and AnnieRose Mobley; (2) documentation reflecting the transfer of the property from seller to buyers; (3) copies of the purchase agreement and related documents, including various addenda, and the removal of contingencies to the purchase agreement; (4) a copy of the RPDF; (5) copies of the inspection report and seller's supplemental disclosure regarding the sump pump; (6) a copy of seller's responses to buyers' discovery requests; (7) copies of the transcripts of the depositions of seller and the home inspector and (8) copies of communications with and by Councilman Michael Polensek from November 2017 and January 2018 regarding street and basement flooding in portions of Ward 8.

seller had not been candid in his representations in the RPDF, the trial court nevertheless found that, after construing the evidence in the light most favorable to the buyers, there was no genuine issue of material fact that seller was entitled to judgment as a matter of law on buyers' claims. The trial court explained:

> Although the Court is dismayed with Defendant James' apparent lack of candor on the disclosure form, the law is clear. Plaintiffs not only had the opportunity to inspect the property, they completed an inspection. That inspection disclosed the exact issue(s) for which they filed suit. Defendant James cannot be accused of actively concealing unfavorable conditions when those same conditions were discovered through a reasonable inspection. By completing the inspection, the law alleviates Defendant James of his prior deception.
>
> Further, the Court finds it improbable that the Plaintiffs paid for a home inspection, attended the actual inspection, were given verbal warnings of potential problems with the basement, failed to follow-up with the inspector Defendant Jiknialis to receive the written inspection prior to sale, proceeded with the sale regardless, and now ask this Court to find they had no knowledge of the issues. Especially considering Plaintiff Michael Mobley was orally advised of potential problems during the inspection itself. Although Defendant James' conduct is certainly dubious at the best, the law is clear under these circumstances.

{¶ 26} Buyers appealed, raising the following assignment of error for review:

> The Trial Court erroneously determined that no genuine issue of material fact exists, and that reasonable minds can come to only one conclusion after construing the evidence in the light most favorable to Michael Mobley and AnnieRose Mobley, that summary judgment should be granted in favor of Ronald James on all claims asserted by the Mobleys against him.

Law and Analysis

Standard of Review

{¶ 27} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671

N.E.2d 241 (1996). We accord no deference to the trial court's decision and conduct an independent review of the record to determine whether summary judgment is appropriate.

{¶ 28} Under Civ.R. 56, summary judgment is appropriate when no genuine issue exists as to any material fact and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party, entitling the moving party to judgment as a matter of law.

{¶ 29} On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

Buyers' Motion for Summary Judgment on Fraud Claim against Sellers

{¶ 30} Buyers contend that the trial court erred in granting summary judgment in favor of seller on buyers' fraud claim[6] because seller fraudulently "failed to disclose a history of water intrusion into the property." Specifically, buyers argue that because seller was "actually deceptive, as found by the [c]ourt," "[t]he mere fact that [buyers] had a home inspection does not relieve [seller] of his dishonesty and fraudulent conduct in the real property disclosure forms."

{¶ 31} As a general rule, Ohio follows the doctrine of caveat emptor in real estate transactions, which precludes a purchaser from recovering for a defect if: "(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*, 35 Ohio St.3d 176, 519 N.E.2d 642 (1988), syllabus. "'The doctrine of caveat emptor is designed to finalize real estate transactions by preventing disappointed real estate buyers from litigating every imperfection existing in residential property.'" *Psarras v. Rayburn*, 11th Dist. Geauga No. 2018-G-0181, 2019-Ohio-2168, ¶ 54, quoting *Thaler v. Zovko*, 11th Dist. Lake No. 2008-L-091, 2008-Ohio-6881, ¶ 31. However, a seller may still be liable to a buyer if the seller fails to disclose known latent conditions. *See, e.g., Binns* at 178 ("a vendor has a duty to disclose material facts

[6] Buyers do not dispute that the trial court properly entered summary judgment on their breach of contract and unjust enrichment claims. Accordingly, we do not address those claims here.

which are latent, not readily observable or discoverable through a purchaser's reasonable inspection").

{¶ 32} The elements of fraud are: (1) a representation of fact (or where there is a duty to disclose, concealment of a fact); (2) that is material to the transaction at issue; (3) made falsely, with knowledge of its falsity or with utter disregard and recklessness as to whether it is true or false; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the misrepresentation (or concealment) and (6) resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984).

{¶ 33} While caveat emptor still applies, R.C. 5302.30 requires that a seller of residential property complete and deliver to a prospective purchaser a residential property disclosure form disclosing "material matters relating to the physical condition of the property" and "any material defects in the property" that are "within the actual knowledge" of the seller. R.C. 5302.30(C), (D); *see also Hendry v. Lupica*, 8th Dist. Cuyahoga No. 105839, 2018-Ohio-291, ¶ 7 ("'R.C. 5302.30 requires sellers of real estate to disclose patent or latent defects that are within their actual knowledge on a residential property disclosure form.'"), quoting *Wallington v. Hageman*, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181, ¶ 17. R.C. 5302.30(E)(1) provides that "[e]ach disclosure of an item of information that is required to be made in the property disclosure form * * * and each act that may be performed in making any disclosure of an item of information shall be made or performed in good faith." "Good faith" means "honesty in fact." R.C. 5302.30(A)(1).

{¶ 34} If a seller fails to disclose a material fact on the disclosure form with the intention of misleading the buyer and the buyer relies on the disclosure form, the seller may be liable for a resulting injury. *Wallington* at ¶ 18; *Pedone v. Demarchi,* 8th Dist. Cuyahoga No. 88667, 2007-Ohio-6809, ¶ 31. However, where, a party "'has had the opportunity to inspect the property, he is charged with knowledge of the conditions that a reasonable inspection would have disclosed.'" *Pedone* at ¶ 33, quoting *Nunez v. J.L. Sims Co., Inc.*, 1st Dist. Hamilton No. C-020599, 2003-Ohio-3386, ¶ 17. Sellers of residential real property have no duty to inspect their property or to otherwise acquire additional knowledge regarding defects on their property. *Roberts v. McCoy*, 2017-Ohio-1329, 88 N.E.3d 422, ¶ 17 (12th Dist.). "[T]he duty to conduct a full inspection falls on the purchasers and the disclosure form does not function as a substitute for such careful inspection." *Id.*

{¶ 35} In this case, the purchase agreement states that the property is being sold in its "'as is' present physical condition." "An 'as is' sale indicates that the buyer has agreed to 'make his or her own appraisal' 'and accept the risk' of making the wrong decision." *AE Prop. Servs., L.L.C. v. Sotonji*, 8th Dist. Cuyahoga No. 106967, 2019-Ohio-786, ¶ 23, quoting *McDonald v. JP Dev. Group, L.L.C.*, 8th Dist. Cuyahoga No. 99322, 2013-Ohio-3914, ¶ 15. An "as is" clause in a real estate purchase agreement relieves a seller of the duty to disclose latent defects and precludes a claim against a seller based on "passive" nondisclosure. *See, e.g., Pedone* at ¶ 34; *McClintock v. Fluellen,* 8th Dist. Cuyahoga No. 82795, 2004-Ohio-58, ¶ 18; *Brown v. Lagrange Dev. Corp.*, 6th Dist. Lucas No. L-09-1099, 2015-Ohio-

133, ¶ 20. It does not, however, protect a seller from liability for "positive" acts of fraud, i.e., "'a fraud of commission rather than omission,'" such as fraudulent misrepresentation or fraudulent concealment, including fraudulent misrepresentations in an RPDF. *Brown* at ¶ 20, quoting *Majoy v. Hord*, 6th Dist. Erie No. E-03-037, 2004-Ohio-2049, ¶ 18; *Pedone* at ¶ 34; *McClintock* at ¶ 18. In other words, an "as is" clause is "inapplicable if the property disclosure form contains misrepresentations." *Diemert v. Binstock*, 8th Dist. Cuyahoga No. 107893, 2019-Ohio-3368, ¶ 22.

{¶ 36} Buyers' fraud claim is based on the following representations made by the seller in the RPDF:

> B) SEWER SYSTEM:
>
> * * *
> Do you know of any previous or current leaks, backups or other material problems with the sewer system servicing the property?
> ☐ Yes ☒ No If "Yes," please describe and indicate any repairs completed (but not longer than the past 5 years): _____ * * *
>
> D) WATER INTRUSION:
>
> Do you know of any previous or current water leakage, water accumulation, excess moisture or other defects to the property, including but not limited to any area below grade, basement or crawl space? ☐ Yes ☒ No If "Yes," please describe and indicate any repairs completed: _____ * * *
>
> 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? ☐ Yes ☒ No If "Yes," please describe and indicate any repairs completed: _____ * * *

{¶ 37} Buyers contend that seller misrepresented the condition of the property in the RPDF because he failed to disclose the existence of one or more incidents "several years" prior to the sale where the city's sewers exceeded their capacity, the sewers backed up and water from the sewers backed up into the basement.

{¶ 38} We need not decide whether seller's representations in the RPDF relating to the sewer system or "water intrusion" were knowingly false (or whether a genuine issue of material fact exists as to whether seller's representations in the RPDF were knowingly false) to resolve this appeal. Even if seller had knowingly misrepresented the condition of the property in the RPDF, there is no genuine issue of material fact that buyers could not have justifiably relied on those misrepresentations when purchasing the property based on (1) Mobley's receipt of seller's supplemental disclosure prior to closing and (2) the information the home inspector provided Mobley regarding the "history of sewer backups disclosed by the seller," the history of sewer backups in the neighborhood generally and the potential for future sewer backups and water intrusion on the property during the home inspection.

{¶ 39} In determining whether a party justifiably relied on a representation, courts must consider all of the relevant circumstances, including the nature of the transaction, the form and materiality of the representation, the relationship of the parties and their respective knowledge and means of knowledge. *See, e.g., Kovacic v. All States Freight Sys.,* 8th Dist. Cuyahoga No. 69926, 1996 Ohio App. LEXIS

3474, 18 (Aug. 15, 1996); *McDonald v. Fogel*, 11th Dist. Trumbull No. 2018-T-0079, 2019-Ohio-1717, ¶ 20. Justifiable reliance reflects "a balance between reliance and responsibility":

> "The rule of law is one of policy and its purpose is, while suppressing fraud on the one hand, not to encourage negligence and inattention to one's own interests. There would seem to be no doubt that while in ordinary business transactions, individuals are expected to exercise reasonable prudence and not to rely upon others with whom they deal to care for and protect their interests, this requirement is not to be carried so far that the law shall ignore or protect positive, intentional fraud successfully practiced upon the simple-minded or unwary."

AmeriFirst Sav. Bank v. Krug, 136 Ohio App.3d 468, 495-496, 737 N.E.2d 68 (2d Dist.1999), quoting 50 Ohio Jurisprudence 3d, Fraud and Deceit, Section 132 (1984).

{¶ 40} Generally, "[t]he 'question of justifiable reliance is one of fact.'" *Mar Jul, L.L.C. v. Hurst*, 4th Dist. Washington No. 12CA6, 2013-Ohio-479, ¶ 61, quoting *Crown Property Dev., Inc. v. Omega Oil Co.*, 113 Ohio App.3d 647, 657, 681 N.E.2d 1343 (12th Dist.1996). Where, however, no genuine issue of material fact exists as to whether a party justifiably relied on a misrepresentation, "summary judgment on that issue is appropriate." *March v. Statman*, 1st Dist. Hamilton No. C-150337, 2016-Ohio-2846, ¶ 22.

{¶ 41} First, with respect to seller's supplemental disclosure, although buyers submitted an affidavit in support of their motion for summary judgment in which they averred that the supplemental disclosure "was not disclosed to the Mobleys and[/]or they never received this report from [buyer] or [the home

inspector] prior to closing on the residence," Mobley testified at his deposition that he had, in fact, received a copy of the supplemental disclosure before buyers closed on the property:

> Q. Mr. Mobley, I'm showing you what has been marked as Defendant's Exhibit-B, Mobley Exhibit B. Are you familiar with that document, sir?
>
> A. Yes.
>
> Q. Did you see that document before you closed on the house sir?
>
> A. Yes, I did.
>
> Q. It's my understanding that Mr. James prepared this and sent it to his realtor on or about October 27th, October 28th, 2016. Does that sound about right to you, sir?
>
> A. Yes.
>
> Q. And then either his realtor or your realtor gave it to you before closing; is that correct, sir?
>
> * * *
>
> A. I do remember this, yes.
>
> Q. So you remember seeing that before the property closed?
>
> A. Yes.

{¶ 42} In addition, the audio recording of the inspection indicates that the home inspector specifically referenced seller's supplemental disclosure during the home inspection, when explaining the operation of the basement sump pump to Mobley:

> *According to that piece of paper from the owner*, this old ancient old sump was installed years ago by somebody else and it was designed that when the sewers backed up, the sump pump was supposed to capture

> the water and pump it out of the building. That is what this is reportedly about, ok?

(Emphasis added.)

{¶ 43} A party cannot create a genuine issue of material fact to defeat summary judgment simply by submitting a self-serving affidavit that contradicts other facts and evidence in the record. *See, e.g., Byrd v. Smith*, 110 Ohio St.3d 24, 30, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 28 ("'Ordinarily, under [Civ.R.] 56(C), when an affidavit is inconsistent with affiant's prior deposition testimony as to material facts and the affidavit neither suggests affiant was confused at the deposition nor offers a reason for the contradictions in her prior testimony, the affidavit does not create a genuine issue of fact which would preclude summary judgment.' * * * [A]n affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment."), quoting *Lemaster v. Circleville Long Term Care, Inc.*, 4th Dist. Pickaway No. 87 CA 2, 1988 Ohio App. LEXIS 566, 3 (Feb. 22, 1988); *see also Davis v. Snack Shack (Open Pantry)*, 8th Dist. Cuyahoga No. 107376, 2019-Ohio-1887, ¶ 27.

{¶ 44} As this court has explained:

> "[W]hen the moving party puts forth evidence tending to show that there are no genuine issues of material fact, the nonmoving party may not avoid summary judgment solely by submitting a self-serving affidavit containing no more than bald contradictions of the evidence offered by the moving party. To conclude otherwise would enable the nonmoving party to avoid summary judgment in every case, crippling the use of Civ.R. 56 as a means to facilitate the early assessment of the merits of claims, pre-trial dismissal of meritless claims, and defining and narrowing issues for trial." (Citations omitted.)

Telecom Acquisition Corp. I, Inc. v. Lucic Ents., Inc., 2016-Ohio-1466, 62 N.E.3d 1034, ¶ 92 (8th Dist.), quoting *Bank One, N.A. v. Burkey*, 9th Dist. Lorain No. 99 CA007359, 2000 Ohio App. LEXIS 2517, 14-15 (June 14, 2000).

{¶ 45} In this case, buyers have not even acknowledged, much less offered any explanation for, the inconsistencies between Mobley's deposition testimony and the averments made in his subsequent affidavit.

{¶ 46} Buyers also claim that they never received a copy of the handwritten list of material defects or the inspection report from the home inspector prior to closing and, therefore, were never advised that "[s]eller has disclosed a history of backed up sewers" or that "there were elevated moisture levels * * * in red clay bricks at the bottom of the basement steps," such that "future leaks are possible."

{¶ 47} As the trial court observed, this claim is not credible. First, it is highly unlikely that a party who paid for a home inspection would close on the property without seeing or receiving the inspection report. Second, several of the "conditions" to the removal of the inspection contingency were items specifically identified in the handwritten material defects list and inspection report.

{¶ 48} Nevertheless, even assuming a reasonable factfinder could find that buyers did not receive a copy of the handwritten material defects list or inspection report prior to closing, we would still conclude that there is no genuine issue of material fact that buyers could not have justifiably relied on any alleged misrepresentations in the RPDF relating to the matters at issue based on the information Mobley received from the home inspector during the home inspection.

{¶ 49} Although buyers contend that they were defrauded because "the property's and neighborhood's history of sewer backups was not clearly and concisely identified to [them]" prior to closing, it is clear from listening to the audio recording of the home inspection that the home inspector mentioned the potential for a sewer backup affecting the property to Mobley at least three times during the inspection.

{¶ 50} At the outset of the inspection, the home inspector stated:

> I work and live in this neighborhood. * * * We've had sewer problems over the years. Allegedly they're supposed to be resolved with all this sewer stuff going on around here, but I cannot predict the future. One thing I do know is that not all insurance policies cover sewer backups so if you are buying your insurance * * * make sure you get the coverage you are comfortable with.

{¶ 51} During the inspection of the basement, the home inspector addressed the issue of moisture in the basement and the potential for water leaks or sewer backups affecting the property with Mobley as follows:

> Home Inspector: We've had a fair amount of rain lately. To give some perspective, I don't see active water leaking. I think there is some potential to see a leak in this basement again. The walls primarily at the bottom of the basement stairs have some high moisture meter readings based on my Tramex meter. Common in these older homes. * * * This is what you find in these older homes, you have moisture in the walls. May leak, may not. * * *
>
> Let me continue with perspective. If I had to give the basement a rating like 0 is totally bone dry and 10 is really wet, I'd say you're about a 1 to a 2. * * * And we also talked about the potential for a sewer backup here.
>
> [Mobley]: Because of the city, what's going on outside.
>
> Home Inspector: Because of the infrastructure of the city, right. You got it. So if you buy these older places, and I own one, you take a certain chance, okay?

{¶ 52} At the conclusion of the inspection, the home inspector once again mentioned to Mobley that the seller had disclosed a history of sewer backups and that there was a potential for future water leaks or sewer backups affecting the property:

> I would say, if I had to give this house a grade like you get in school, this would be an A-minus house. In other words, real good, solid house; needs a few things to raise it up to an A level.
>
> * * *
>
> Item 4. Elevated moisture levels 100 points per Tramex meter noted in red clay tile walls at the bottom of the basement steps. No active water entry and the time of inspection. Future leaks, however, are possible so there is some element of risk.
>
> * * *
>
> Number 8. The seller has disclosed a history of backed up sewers. * * *

{¶ 53} As such, there is no genuine issue of material fact that buyers were on notice that (1) there was a history of sewer backups affecting both the property specifically and the neighborhood generally and (2) there was a risk of additional sewer backups and water intrusion affecting the property in the future — the very issues buyers contend seller failed to disclose to them. "Buyers cannot justifiably rely on alleged misrepresentations in a disclosure form if they are later put on notice of the potential defect." *Petroskey v. Martin*, 2018-Ohio-445, 104 N.E.3d 1021, ¶ 23, 27 (9th Dist.) (where buyers received information from inspection that was "inconsistent" with seller's representations on disclosure form, buyers were not justified in relying on earlier statements contained in disclosure form), citing *Ponder v. Culp*, 9th Dist. Summit No. 28184, 2017-Ohio-168, ¶ 14-15 (buyers could

not have justifiably relied upon sellers' alleged nondisclosures and misrepresentations in disclosure form where home inspector warned sellers that there was a risk of future water intrusion into basement laundry room due to the slope of the driveway and buyers elected to purchase the property "as is," without further investigation); *see also Riccardi v. Levine*, 8th Dist. Cuyahoga No. 76215, 2000 Ohio App. LEXIS 2025, 10 (May 11, 2000) ("[A] buyer who has obtained a negative home inspection cannot rely on statements made by a seller prior to the home inspection.").

{¶ 54} To the extent that the information buyers received regarding these issues was not as "clear" and "concise" as buyers may have liked, buyers had a duty to further inquire. *Petroskey* at ¶ 23 ("'[O]nce alerted to a possible defect, * * * the buyer 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.'"), quoting *Tipton v. Nuzum*, 84 Ohio App.3d 33, 38, 616 N.E.2d 265 (9th Dist.1992); *Li-Conrad v. Curran*, 2016-Ohio-1496, 50 N.E.3d 573, ¶ 34 (11th Dist.) (where the buyer had "notice of potential crack problems in the * * * foundation wall," but "did not take any steps to investigate the issue or enter into further negotiations with the [sellers]," buyer was "preclude[d] * * * from asserting that she justifiably relied upon any false statements made by [sellers]"). Buyers, however, did not further inquire regarding these issues prior to closing.

{¶ 55} Seller met his burden under Civ.R. 56(C), presenting evidence of specific facts in the record demonstrating his entitlement to summary judgment on buyers' fraud claim. Buyers, however, did not meet their reciprocal burden, i.e., pointing to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial, to defeat summary judgment. Because it cannot be said, based on the record before us, that buyers justifiably relied on any alleged misrepresentations by seller with respect to the matters at issue, the trial court properly granted seller's motion for summary judgment on buyers' fraud claim. Buyers' assignment of error is overruled.

{¶ 56} Judgment affirmed.

It is ordered that appellee recover from appellants the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga 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.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MICHELLE J. SHEEHAN, J., and
MARY EILEEN KILBANE, J., CONCUR