The Bullet Point: Ohio Commercial Law Bulletin

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Jim Sandy and Richik Sarkar

Does Caveat Emptor apply to my real estate sale?

Damages

***Lee v. Cooke,* 11th Dist. Lake No. 2018-L-045, 2019-Ohio-1163.**

This was an appeal of a trial court's decision to grant a directed verdict at trial. The issue centered on whether the appellant had met his burden of proving damages.

In February 2012, the defendant purchased a country club out of receivership. The country club consisted of a clubhouse and golf course which were run separately. The appellant orally agreed to keep the three individuals who had been running the golf course, including the plaintiff, on as salaried employees. The country club did not have a credit card or a credit card reader for purchases. Rather, the plaintiff owned a mobile credit card reader that he utilized to accept payment. The payments were then routed to an account owned by the plaintiff. He would routinely then route these funds into a country club bank account for certain payments to be made by check, including property taxes. This included lending $35,000 of his own money to payoff outstanding taxes owed by the club. A fire destroyed part of the club and an audit was done related to the fire investigation. The credit card system plaintiff had used was uncovered and he was promptly fired without being repaid the $35,000 loan. Plaintiff eventually filed suit and the defendant counterclaimed. At the close of trial, plaintiff moved for a directed verdict on the appellant's counterclaims, arguing that he failed to establish any damages. The trial court agreed and appellant appealed.

On appeal, the Eleventh District Court of Appeals affirmed.

The Bullet Point: A plaintiff bears the burden of proving the nature and extent of damages suffered by him or her. Damages must be established by a "reasonable certainty." In a breach of contract action, damages must be shown to a greater degree of certainty than for tort claims, and the amount of damages must not be speculative.

Shareholder Standing

***Slodov v. City of Mentor*, 11th Dist. Lake No. 2018-L-080, 2019-Ohio-1052.**

This appeal addressed the question of standing in the context of a declaratory judgment claim. Appellant, a tax payer, brought suit to challenge the re-zoning of property in his city that, he claimed, caused his company income to be diminished. The defendants moved to dismiss the declaratory judgment claim due to lack of standing and the trial court agreed.

On appeal, the Eleventh appellate district affirmed, finding that he lacked standing to sue on behalf of his company.

The Bullet Point: Any wrongful action by a third party to a corporation creates a potential cause of action for the corporation, not its shareholders. As such, a shareholder or employee of a corporation lacks standing to assert claims that belong solely to the corporation.

Caveat Emptor – Real Estate

***AE Property Servs., LLC v. Sotonji*, 8th Dist. Cuyahoga No. 106967, 2019-Ohio-786.**

This appeal centered around a real estate deal gone wrong. The parties had entered into a real estate transaction to purchase a home. A property disclosure form was provided that indicated while the seller knew of water damage, she had no knowledge of any termites or wood destroying insects. The property did in fact have termite damage and the buyer sued, alleging that the seller knew of this and fraudulently concealed the damage. The trial court ultimately granted the seller summary judgment and on appeal, the Eighth Appellate District affirmed based on the doctrine of caveat emptor.

The Bullet Point: Caveat emptor applies to "as is" residential real estate sales when: (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. An "as is" sale indicates that the buyer is "accepting the risk" associated with purchasing the property. In those situations, caveat emptor

applies unless the seller has engaged in fraud. While Ohio law now has statutory requirements for disclosure of latent defects in residential property sales, caveat emptor still applies, and only a showing of actual knowledge of the defect on the seller's part without disclosing it will suffice to avoid the doctrine.

[Cite as *Lee v. Cooke,* 2019-Ohio-1163.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

PETER M. LEE,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2018-L-045
- vs -	:	
ROLAND COOKE, III, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2016 CV 000159.

Judgment: Affirmed.

Mark A. Ziccarelli, Ziccarelli & Martello, 8754 Mentor Avenue, Mentor, OH 44060 (For Plaintiff-Appellee).

Charles A. Bakula, 30500A Euclid Avenue, 2nd Floor, Wickliffe, OH 44092 (For Defendants-Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Roland Cooke, III, and Madison Country Club ("MCC"), appeal from the March 19, 2018 judgment entry of the Lake County Court of Common Pleas granting a motion for directed verdict in favor of movants, Eagle Trading Company, LLC and Peter Lee. Mr. Lee is the sole appellee herein. At issue is whether appellants adequately met their burden of proving damages at trial such that a directed verdict was

not warranted. For the reasons set forth herein, we find they did not and affirm the judgment of the trial court.

{¶2} In February 2012, Mr. Cooke purchased the Madison Country Club ("MCC") out of receivership. MCC is comprised of a golf course and a clubhouse, located across the street from one another, each operating separately and distinctly. This appeal relates primarily to the golf course. Mr. Cooke orally agreed to keep on, as salaried employees, the three individuals who were operating the MCC golf course prior to its purchase: Mr. Lee, Kevin Leymaster, and Todd Bishop. Mr. Lee was responsible for finances, receivables and payables, Mr. Leymaster was the general manager, and Mr. Bishop handled all maintenance. Mr. Cooke did not involve himself in the operation of MCC and admitted he gave the three men "total control" over the operation of the golf course.

{¶3} Mr. Cooke did not utilize credit cards for purchases. Accordingly, he did not provide a company credit card for MCC and expected vendors to be paid by check. MCC memberships were often solicited off-site and prospective members wished to pay dues via credit card. However, MCC had no portable credit card reader and only one credit card reader on location at the golf course. Mr. Lee personally owned a Square, Inc. (the "Square") mobile credit card reader, which was connected to the account of Eagle Trading Company, a company owned by Mr. Lee. Since MCC membership dues were collected off-site, Mr. Lee primarily used the Square to accept payment. Although Mr. Lee had sole access to the Eagle Trading Company account, Mr. Leymaster knew and approved of its use. Mr. Lee would routinely transfer funds from the Eagle Trading Company account into the MCC Chase Bank account for certain payments to be made

by check, including payment of taxes. The funds not transferred to MCC is the primary focus on appeal.

{¶4} In late 2013 or early 2014, Mr. Lee informed Mr. Cooke that MCC did not have enough money to pay certain taxes that were due and offered to provide a short-term loan to cover the deficiency. Mr. Cooke accepted, and Mr. Lee transferred $35,000 from his personal account into the MCC Chase Bank account.

{¶5} Mr. Cooke's ex-wife, Laura Cooke, ran operations at the clubhouse across the street from MCC from April 2012 until approximately October 2013. In March 2015, a fire occurred in the clubhouse. Investigators determined the fire was caused by arson, which prompted an audit of MCC finances. Ms. Cooke was asked to return and facilitate the audit; she was given financial information for both the golf course and the clubhouse. When she saw the Eagle Trading Company account entries, she brought it to Mr. Cooke's attention, who said this was the first he heard of it. In April 2015, believing Mr. Lee had misappropriated funds, Mr. Cooke terminated Mr. Lee's employment. The $35,000 loan has not been repaid.

{¶6} In January 2016, Mr. Lee filed the initial suit in the Lake County Court of Common Pleas against Mr. Cooke and MCC seeking recovery of the $35,000 loan. Early in the trial, the parties stipulated to the following facts: Mr. Lee loaned MCC $35,000, which MCC agreed to repay; Mr. Lee has requested repayment, and MCC has not repaid the $35,000. Mr. Lee testified he believed Mr. Cooke was personally responsible for the loan. However, the court eventually found the loan was to MCC alone and Mr. Cooke was not personally responsible. Ultimately, the court granted a

directed verdict for Mr. Lee on the repayment of the loan, which is not at issue on appeal.

{¶7} In their answer to the complaint, Mr. Cooke and MCC joined Eagle Trading Company and brought a counterclaim for "breach, justifiable reliance, fraud, unjust enrichment, negligence, breach of fiduciary duty and for an accounting". The record shows the following undisputed numbers: Eagle Trading Company's account had a beginning balance of $41.46 as of February 1, 2013 and an ending balance of $25.00 the close of April 2015; from February 2013 to April 2015, the Eagle Trading Company account took in $208,030.31; during that time, approximately 40 checks totaling $123,432.89 were written and deposited directly into the MCC Chase Bank account. The remaining $84,597.42 exited the account by use of the debit card and was the focus at trial.

{¶8} Mr. Lee testified the Eagle Trading Company account was used only for MCC expenses. As to Mr. Cooke's knowledge of the Eagle Trading Company account, Mr. Lee testified he sent Mr. Cooke monthly statements of the Eagle Trading Company account, which indicated frequent transfers from Eagle Trading Company to the MCC Chase Bank account. At trial, Mr. Cooke admitted he did not pay much attention to these monthly statements. Mr. Lee also testified he never intentionally used any MCC funds for his own benefit but admitted there were several relatively low-dollar-amount personal expenses mistakenly paid out of this account that were promptly reversed and refunded to the account. Mr. Cooke offered no evidence to the contrary and the record confirms the refunds.

{¶9} Mr. Cooke alleges Mr. Lee owes him the entire $84,597.42 as damages. At trial, Ms. Cooke, who has no golf-course experience or first-hand information as to the operation of the MCC golf course, testified for Mr. Cooke as to which expenses on the Eagle Trading Company account record she thought may or may not be necessary to operation of a golf course. She freely and repeatedly admitted she did not have adequate information to determine which of the transactions on the Eagle Trading Company debit card were or were not MCC related. Moreover, both Mr. Cooke and Ms. Cooke acknowledged that at least some of the debit card charges were country club related expenses. Nevertheless, Mr. Cooke maintains he is entitled to $84,597.42 in damages because the funds should not have been funneled through Eagle Trading Company in the first place.

{¶10} After the parties rested, Mr. Lee and Eagle Trading Company, LLC, moved for directed verdict against Mr. Cooke and MCC, which the trial court granted citing Mr. Cooke's failure to establish damages. Mr. Cooke and MCC now appeal, assigning a single error for our review:

{¶11} "The Trial Court Committed Reversible Error by granting the Appellees' Motion for Directed Verdict at the conclusion of the trial."

{¶12} Civ. R. 50(A)(4) provides: "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue." The trial court 'must neither consider the

weight of the evidence nor the credibility of the witnesses in disposing of a directed verdict motion.' *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418 ¶31, quoting *Strotler v. Hutchinson*, 67 Ohio St.2d 282-284 (1981). "Thus, 'if there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied.'" *Cowling, supra,* quoting *Kellerman v. J.S. Durig Co.*, 176 Ohio St. 320, 199 N.E.2d 562 (1964). The "trial court's decision to grant a motion for a directed verdict involves a question of law [thus] our review de novo." *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, ¶22.

{¶13} Appellants' brief spends several pages listing the elements of fraud in the inducement, including a definition for the element of justifiable reliance; breach of fiduciary duty; negligence; and breach of contract. However, the crux of their argument is that the amount of damages in this case was not readily ascertainable and thus the case should have been submitted to the jury to determine the appropriate amount of damages. The trial court granted directed verdict based on its finding that Mr. Cooke and MCC failed to establish they were damaged. Thus, we assume arguendo the other elements of their claims have been met and focus our discussion on whether Mr. Cooke and MCC established the element of damages.

{¶14} Mr. Cooke and MCC asserted causes of action in both torts and contracts. As we have previously held, "[a] plaintiff bears the burden of 'proving the nature and extent of damages whether an action sounds in tort or contract.' *Adams v. Pitorak & Coenen Invests., Ltd*., 11th Dist. Geauga No. 2011-G-3019, 2012-Ohio-3015, ¶28,

quoting *Countywide Home Loans, Inc. v. Huff*, 11th Dist. Trumbull No. 2009-T-0044, 2010-Ohio-1164, ¶47.

{¶15} Mr. Cooke and MCC assert that the damages were unascertainable and thus it would be appropriate for the jury, as trier of fact, to determine the amount of damages. In support, appellants cite *Story Parchment Co. v. Patterson P. Paper Co.,* 282 U.S. 555 (1931), affirmed by *Bigelow v. RKO Radio Pictures,* 327 U.S. 251 (1946) and *Modic v. Modic,* 91 Ohio App.3d 775 (8th Dist.1993) for the principle: "once the *fact of damage* is established with reasonable certainty the plaintiff is given considerable latitude in proving the *amount* of the loss lest the wrongdoer escape his obligation to make restitution." (Emphasis original). *Id.* at 783. Moreover, appellants argue, "[t]he 'reasonable certainty' requirement applies only to the cause or fact of damages and not to the amount of damages." *Id., citing Kinetico, Inc. v. Indep. Ohio Nail Co.,* 19 Ohio App.3d 26, 33, (8th Dist.1984). We point out these cases dealt with actions in tort. However, even applying this rule to Mr. Cooke and MCC's tort claims, we find that they have failed to establish with reasonable certainty even that they were damaged. The only testimony regarding which debits from the Eagle Trading Company account were not spent on MCC expenses was pure speculation. In fact, Ms. Cooke, who was called as witness to establish which transactions were used for non-MCC purposes, testified:

{¶16} "Q: And you had told me that other than questioning some of these payments, that you don't have any direct knowledge as to whether in fact those are country club related expenses or not?"

{¶17} "A: Correct."

{¶18} As for his tort claims of fraud, negligence, and breach of fiduciary duty, Mr. Cooke and MCC had the burden to prove their right to damages with a reasonable degree of certainty and failed to do so.

{¶19} Mr. Cooke and MCC also failed to adequately prove damages for their breach of contract claim. Damages for breach of contract must be shown to a greater degree of certainty than for tort claims and the amount of damages must not be left to speculation. *James v. Sky Bank*, 11th Dist. Trumbull No. 2010-T-0116, 2012-Ohio-3883, ¶33. Mr. Cooke and MCC do not argue they pled damages with specificity. Indeed, Mr. Cooke testified:

{¶20} "Q: * * * [D]o you have any specific amounts that you are alleging that Mr. Lee took that should have belonged to Madison Country Club?"

{¶21} "A: Do I have exact numbers, as I said before, I don't."

{¶22} Thus, Mr. Cooke and MCC failed to adequately establish damages for any of their causes of action.

{¶23} In his brief, Mr. Cooke and MCC also alleged bias and partiality on the part of the trial court, which we now briefly discuss. Judicial bias or prejudice "implies a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and facts." *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463 (1956), paragraph four of the syllabus. Presumably in support of his assertion, appellants brief states Mr. Lee's wife is a current Magistrate with the Lake County Court of Common Pleas. However, Magistrate Lee played no part in the underlying proceedings. Without more,

her disqualification is not automatically imputed to other judges. *See In re Disqualification of Parker,* 135 Ohio St.3d 1216, 2012-Ohio-6307, ¶5.

{¶24} Appellants also assert the trial court judge materially assisted opposing party at their expense. However, the record shows no evidence of material assistance in either party's favor, nor do they point to any specific statement or conduct. Moreover, it is well established that "a judge's adverse rulings * * * are not evidence of bias or prejudice." *In re Disqualification of Fuerst*, 134 Ohio St.3d 1267, 2012-Ohio-6344, ¶14. Moreover, "[a] judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions.'" *Fuerst, supra,* ¶20, quoting *In re Disqualification of George,* 100 Ohio St.3d 1241, 2003-Ohio-5489, ¶5. Mr. Cooke and MCC have failed to overcome that presumption. We find no bias, partiality, or material assistance on the part of the trial court.

{¶25} In light of the foregoing, we hold the trial court did not err in granting directed verdict for Mr. Lee. Mr. Cooke and MCC's assignment of error is without merit.

{¶26} The judgment of the Lake County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, P.J.,

TIMOTHY P. CANNON, J.,

concur.

[Cite as *Slodov v. Mentor*, 2019-Ohio-1052.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

LEONARD H. SLODOV, et al.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2018-L-080
- vs -	:	
CITY OF MENTOR, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2018 CV 000422.

Judgment: Affirmed.

Michael D. Slodov, Javitch Block LLC, 1100 Superior Avenue, 19th Floor, Cleveland, OH 44114 (For Plaintiff-Appellant).

John T. Pion and *Andrew D. Webster,* Pion Nerone Girman Winslow & Smith, PC, 1500 One Gateway Center, 420 Fort Duquesre Boulevard, Pittsburgh, PA 15222 (For Defendants-Appellees, Boldt Capital, LLC; Lake County Port and E.D. Authority; and Lake Mentor Properties, LLC).

Carl E. Cormany and *Frank H. Scialdone,* Mazanec, Raskin & Ryder Co., L.P.A., 100 Franklin's Row, 34305 Solon Road, Cleveland, OH 44139 (For Defendant-Appellee, City of Mentor).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Leonard H. Slodov, appeals from the judgment of the Lake County Court of Common Pleas, dismissing his complaint for declaratory judgment with prejudice for lack of standing. Appellant does not dispute the trial court's judgment that

he lacked standing to maintain the underlying action; rather, he maintains the trial court erred in dismissing the same with prejudice. We affirm.

{¶2} Appellant originally filed his complaint pro se on behalf of himself and KDL Real Estate, LLC, a company of which he is the owner and sole member, naming the city of Mentor, Lake Mentor Properties, LLC, and Lake County Port and Economic Authority as defendants. After realizing he could not maintain the action on behalf of KDL without hiring counsel, he dismissed the company and filed an amended complaint. The amended complaint dismissed KDL and added Lake Hospital Systems, Inc. and Boldt Capital as defendants. As a matter of background, KDL owned property on Tyler Blvd. in Mentor that it had leased to Lake Hospital, and in January 2017, Lake Hospital did not renew its lease.

{¶3} The amended complaint alleged appellant was a concerned citizen, Mentor taxpayer, and, as the owner of a KDL, a commercial lessor with Lake Hospital, and, as such, he had a personal interest in the issues raised in the complaint. Appellant asserted the real property on Tyler Blvd. was adversely affected by a municipal ordinance which re-zoned property on Market Street in Mentor; he claimed that even though the Tyler property was owned by KDL, he was the sole member of the company and his income was diminished when Lake Health relocated to property on Market Street after it was re-zoned.

{¶4} The ordinance described the property to be re-zoned then provided the Market Street property be re-zoned to general business as approved by the Municipal Planning Commission. And, according to appellant, the ordinance was subject to certain conditions; one of which is that it could be modified or supplemented by a

Development Agreement ("DA"), entered into between the city of Mentor and various other named defendants. The DA described the ultimate development of the Market Street property and set forth various prohibited uses, one of which was a hospital.

{¶5} As a result of the foregoing, appellant sought a declaration that, inter alia, (1) the Market Street property could not be used as a hospital open to the general public, as this use violated the ordinance and the DA; (2) the Market Street property was in fact being used as a hospital/urgent care business; (3) the current use of the Market Street property was a prohibited use; (4) the lease for the Market Street property was invalid and unlawful; (4) the ballot language for the re-zoning measure was deceptive and failed to inform the public that it created a conflict of interest and allowed for unfair economic advantage sanctioning the relocation of Lake Health to residential land; (5) the defendants engaged in official misconduct amounting to a felony in violation of R.C. 2901.13; and (6) the court refer the issues raised to the Lake County prosecutor for investigation.

{¶6} Appellees filed motions to dismiss alleging, inter alia, appellant lacked standing. The trial court agreed and dismissed the complaint. In its judgment entry, the trial court determined that, to the extent appellant's claims of damage were based upon KDL's diminished income, he failed to establish direct injury. The trial court further determined that, to the extent appellant's claims were brought as a taxpayer or a concerned citizen for a violation of the DA, he lacked standing because he was not a party to the agreement. The court additionally determined appellant's claims for official misconduct failed because R.C. 2901.13, a statutory section creating a tolling period for the prosecution of an offense involving misconduct in office, does not define a criminal

offense. Moreover, the court concluded the statute does not create a private right of action. As such, the court concluded appellant failed to state a claim upon which relief could be granted. Appellant now appeals and assigns the following as error:

{¶7} "The trial court committed prejudicial error in reaching the merits and dismissing the complaint with prejudice after finding that appellant lacked standing to maintain the action."

{¶8} Appellant does not contest he lacked standing; instead, he claims the trial court erred when it analyzed the merits of his misconduct claims in light of its standing determination. He further maintains the trial court erred in dismissing the complaint with prejudice because the conclusion that a party lacks standing is not a decision on the merits.

{¶9} With respect to appellant's first contention, the trial court did not find appellant lacked standing to bring the official misconduct claim. Rather, the judgment entry simply indicates that the statute upon which appellant relied to assert his official misconduct claim does not create a private civil cause of action. A review of the statute, which defines limitations on criminal prosecutions, supports the trial court's judgment. A statute of limitation setting forth a period for which a prosecution for "an offense involving misconduct in office by a public servant," *see* R.C. 2901.13(C), is not a vehicle for a civil suit which generally alleges official misconduct. Appellant therefore failed to state a claim upon which relief could be granted on this issue.

{¶10} Next, we recognize that, in general, the dismissal of an action because a party lacks standing is not a dismissal on the merits. *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, ¶51. This general rule is to avoid the application

of the doctrine of res judicata in a subsequent suit where a standing defect is cured. *Id.* citing *A–1 Nursing Care of Cleveland, Inc. v. Florence Nightingale Nursing, Inc.*, 97 Ohio App.3d 623, 627 (8th Dist.1994) (dismissal for lack of standing "terminates the action other than on the merits and affords proper parties the opportunity to refile without fear of the effects of res judicata"); *Asher v. Cincinnati*, 1st Dist. Hamilton No. C–990345, 2000 WL 955617 (Dec. 23, 1999) (dismissal for lack of standing is not on the merits for purposes of res judicata).

{¶11} In this case, appellant was not a party to the DA and was not a third-party beneficiary to the same. Moreover, any alleged wrongful action by third parties to a corporation creates a potential cause of action for the corporation, not its shareholders. *Adair v. Wozniak*, 23 Ohio St.3d 174, 178 (1986). Appellant cannot, therefore, assert the potential rights of KDL, the owner of the Tyler property, because his alleged injury is indirect and duplicative of KDL's alleged damages. *See Id.* Unless appellant is alleging that, at some point, he will not be himself, a position he cannot seriously maintain, the claims based upon alleged violations of the DA or purported injuries suffered by KDL cannot be re-filed. In short, appellant will invariably lack standing to assert the foregoing claims and therefore the specter of a res judicata bar will never realistically loom. We therefore conclude the trial court did not err in dismissing appellant's claims for declaratory judgment vis-à-vis his concerns surrounding the DA or his allegations premised upon alleged damages suffered by KDL with prejudice.

{¶12} Alternatively, if appellant is concerned about the potential preclusive effect the lower court's judgment might have on a future suit KDL might file, such concerns are hypothetical and would require an improper advisory opinion. Assuming, arguendo,

KDL files a similar action, the defendants raise the affirmative defense of res judicata based upon the underlying judgment, and the trial court concludes KDL is barred from litigating the issues by operation of res judicata. At that point, the issue of the propriety of applying the doctrine will be properly before us. Currently, however, the foregoing scenario is mere possibility and this court, in this matter, must refrain from engaging in exploratory analysis based upon hypotheticals.

{¶13} Appellant's assignment of error lacks merit.

{¶14} For the above reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, P.J.,

TIMOTHY P. CANNON, J.,

concur.

[Cite as *AE Property Servs., L.L.C. v. Sotonji*, 2019-Ohio-786.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106967

AE PROPERTY SERVICES, L.L.C.

PLAINTIFF-APPELLANT

vs.

EMILIJA SOTONJI

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-873295

BEFORE: Laster Mays, J., E.T. Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: March 7, 2019

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ANITA LASTER MAYS, J.:

I. Introduction

{¶1} The sole issue presented by plaintiff-appellant AE Property Services, L.L.C. ("AE") in this appeal is whether the trial court erred by granting summary judgment in favor of defendant-appellee Emilija Sotonji ("Sotonji") on all claims arising from a residential real estate transaction between the parties. We find that the trial court did not err and affirm the trial court's judgment.

II. Standard of Review

{¶2} We review a trial court's entry of summary judgment de novo, using the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment may only be granted when the following is established: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and the conclusion is

adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in its favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978); Civ.R. 56(E).

{¶3} The party moving for summary judgment bears the initial burden of apprising the trial court of the basis of its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact on an essential element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264. "Once the moving party meets its burden, the burden shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue of material fact exists." *Willow Grove, Ltd. v. Olmsted Twp.*, 2015-Ohio-2702, 38 N.E.3d 1133, ¶ 14-15 (8th Dist.), citing *Dresher*. "To satisfy this burden, the nonmoving party must submit evidentiary materials showing a genuine dispute over material facts." *Willow Grove* at ¶ 15, citing *PNC Bank, N.A. v. Bhandari*, 6th Dist. Lucas No. L-12-1335, 2013-Ohio-2477.

III. Discussion

{¶4} On March 27, 2014, AE and Sotonji entered into a residential purchase agreement for property located at 2030 Quail Street, Lakewood, Ohio 44107 ("Lakewood Property"). Sotonji provided an Ohio Residential Property Disclosure Form dated January 5, 2013, that included a representation that Sotonji had knowledge of water damage, but had no knowledge of termites or wood-destroying insects in the premises. AE claims that Sotonji actively concealed holes in the wood caused by termite damage by filling the holes and painting over them, and installing a peg board ceiling in the basement to conceal the damaged wooden support beams.

{¶5} On August 6, 2015, AE filed suit against Sotonji in *AE Property Servs., L.L.C. v. Emilijo Sotonji*, Cuyahoga C.P. No. CV-15-849369. The case was dismissed without prejudice on April 14, 2016.

{¶6} On December 16, 2016, AE filed a new complaint against Sotonji for fraud, fraudulent concealment, negligence, and negligent misrepresentation. AE claimed that the damage was so extensive that the repairs will exceed $35,000 or demolition may be necessary.

{¶7} Sotonji responded on January 17, 2017. The case was set for trial on January 30, 2018. On October 31, 2017, after the June 30, 2017 discovery deadline and the September 1, 2017 expert deadline had passed, Sotonji moved for summary judgment on all claims.

{¶8} Sotonji denied liability because the agreement stated that the Lakewood Property was sold "as is." Sotonji, who was born in Croatia and moved to the United States in 1969, averred in her supporting affidavit that she and her late husband purchased the Lakewood Property in 1975. Her husband handled all maintenance and care for the Lakewood Property until he passed away in 2003. Sotonji recalled that her husband obtained permits to build an additional unit at the front of the house in the 1980s and that, at one point, the couple thought that cockroaches were entering the Lakewood Property through the sewer lines.

{¶9} Sotonji denied knowledge of any termite damage or other undisclosed issues with the house and her husband never mentioned it. Sotonji did not have any work done to remodel or reconstruct the Lakewood Property to conceal termite damage and filled out the disclosure form with the assistance of her realtor. The realtor also informed Sotonji that the house was

being sold "as is" and that the purchaser[1] waived the right to inspect the Lakewood Property. As a result, Sotonji sought judgment based on the doctrine of caveat emptor or buyer beware.

{¶10} AE's owner and manager, Edward Salim ("Salim"), provided the affidavit in support of AE's opposition to summary judgment along with photographs of the damaged areas. AE is in the business of buying houses, remodeling houses, and property management. Salim stated that he had more than 20 years of experience in the construction trades including commercial and residential remodeling. Salim claimed that AE relied on the disclosure form in purchasing the Lakewood Property.

{¶11} Salim also said that he inspected the Lakewood Property on three occasions, that it was clear that all rooms had been freshly painted and claimed that Sotonji confirmed that fact. AE rented the Lakewood Property to a family approximately one month after the purchase. The galvanized pipes burst and, while making the repairs, Salim reportedly discovered extensive termite damage in various areas of the Lakewood Property. Salim averred that concealment of the termite damage was extensive and purposeful. The opposing memorandum also pointed out that Sotonji had failed to produce evidence of her defense because the agreement and disclosure form were not entered into evidence.

{¶12} Sotonji attached the agreement and disclosure form to her reply brief, observing that the documents were referenced in AE's complaint but were not attached as required by Civ.R. 8(A) and 10(D). Sotonji also admitted to referencing the documents in her answer but also failed to attach them, and requested leave to file an amended answer if necessary. Further, Sotonji argued that Salim's affidavit should be stricken from the record because it was not accompanied by an expert report and the attached photographs are blurred and unclear. Finally,

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[1] The affidavit erroneously lists the term "seller" as accepting the house "as is" and waiving inspection.

Sotonji replied that, even if AE's assertions are accepted as true, AE still did not prove the allegations of the complaint.

{¶13} Review of the agreement reveals at line 6 that the buyer accepts the Lakewood Property "in it's 'AS IS' PRESENT PHYSICAL CONDITION." A section entitled "Inspection" is on page 3 of the agreement.

> Buyer(s) acknowledges that it has been recommended to him/her that he/she engage, at his/her expense, the services of professional inspectors to Inspect the premises to ascertain that the condition of the premises is as called for in this agreement. This agreement shall be subject to the following inspection(s) by a qualified inspector of Buyer's choice within the specified number of days from acceptance of binding agreement. Buyer(s) assumes sole responsibility to select and retain a qualified inspector for each requested inspection and releases Broker of any and all liability regarding the selection or retention of the inspector(s). If Buyer(s) does not elect inspections, Buyer(s) acknowledges that Buyer(s) is acting against the advice of Buyer's agent and broker. Buyer(s) understands that all real property and improvements may contain defects and conditions that are not readily apparent and which may affect a property's use or value. Buyer(s) and Seller(s)agree that the Broker(s) and their agent(s) do not guarantee and in no way assume responsibility for the property's condition.
>
> Buyer(s) acknowledges that it is Buyer's own duty to exercise reasonable care to inspect and make diligent inquiry of the Seller(s) or Buyer's inspectors regarding the condition and systems of the property. Buyer(s) further acknowledges that the entire house was open for observation and that Buyer(s) had an unimpeded opportunity to inspect the entire house and did inspect said house. The Buyer(s) further understands and agrees that it is not the responsibility of the brokerage firms or real estate agents to inspect the property and agrees to waive all liability and hold harmless any brokerage firm or real estate agent connected with this transaction.

{¶14} AE indicated by check mark a refusal to hire an inspector for all of the listed categories, including for "termite/wood destroying insect inspection by a licensed inspector." The agreement is signed by Amy Salim on behalf of AE. The "as is" and inspection sections are also initialed on behalf of AE. Pursuant to the addendum, the parties agreed to conduct a walk-through inspection prior to depositing funds in escrow.

{¶15} The disclosure form is required by Ohio law at R.C. 5302.30 and Ohio Adm.Code 1301:5-6-6 and is initialed and signed by both parties. Sotonji disclosed an issue of water intrusion in the west wall of the Lakewood Property during heavy rain and minor cracks in that wall. Sotonji responded "no" to the question of whether she had knowledge of current or previous wood-destroying insects or termites at the Lakewood Property or any existing damage due to them.

A. Fraud and Fraudulent Concealment

{¶16} AE argues that caveat emptor does not apply to claims of fraud and fraudulent concealment. We disagree.

{¶17} We previously addressed the applicability of the doctrine of caveat emptor in an "as is" residential sale in *McDonald v. JP Dev. Group, L.L.C.*, 8th Dist. Cuyahoga No. 99322, 2013-Ohio-3914.

> As a general rule, Ohio follows the doctrine of caveat emptor in all real estate transactions, which precludes a purchaser from recovering for a structural 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.

Id. at ¶ 11.

{¶18} To establish fraud, AE must show

> (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

Id. at ¶ 13, citing *Burr v. Stark Cty. Bd. of Commrs*., 23 Ohio St.3d 69, 491 N.E.2d 1101 (1986), paragraph two of the syllabus.

{¶19} To establish fraudulent concealment, AE must demonstrate

> "'(1) actual concealment of a material fact; (2) with knowledge of the fact concealed; (3) and intent to mislead another into relying upon such conduct; (4) followed by actual reliance thereon by such other person having the right to so rely; (5) and with injury resulting to such person because of such reliance.'"

Lewis v. Marita, 8th Dist. Cuyahoga No. 99697, 2013-Ohio-5431, ¶ 15, citing *Thaler v. Zorvko*, 11th Dist. Lake No. 2008-L-091, 2008-Ohio-6881, ¶ 39, quoting *Massa v. Genco*, 11th Dist. Lake No. 89-L-14-162, 1991 Ohio App. LEXIS 867 (Mar. 1, 1999).

{¶20} In *McDonald*, 8th Dist. Cuyahoga No. 99322, 2013-Ohio-3914, the residential purchasers filed suit against the seller claiming fraud and fraudulent inducement due to a basement water problem that was not disclosed. The seller owned the property for approximately one year before repairing it and selling it to the purchaser and never resided in the residence. The agreement indicated that the sale was "as is" and a property inspection was permitted prior to transfer. *Id*. at ¶ 2-3.

{¶21} The purchasers walked through the property several times and their property inspector recommended a basement dehumidifer explaining that humidity is common in the basement of older homes. *Id*. at ¶ 5. The purchasers observed fresh paint in the basement but did not notice a problem. The seller did not make any statements about the basement. *Id*. at ¶ 5.

{¶22} Pertinent to the current case, we advised

> if a seller fails to disclose a material fact on a residential property disclosure form with the intention of misleading the buyer, and the buyer relies on the form, the seller is liable for any resulting injury. *Wallington v. Hageman*, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181, ¶ 18, citing *Pedone v. Demarchi*, 8th Dist. Cuyahoga No. 88667, 2007-Ohio-6809, ¶ 31. *When a buyer has had the opportunity to inspect the property, however, "he is charged with knowledge of the conditions that a reasonable inspection would have disclosed*." *Wallington*; *Pedone* at ¶ 33.

(Emphasis added.) *Id*. at ¶ 14.

{¶23} 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. *Id*. at ¶ 15, citing *Kern v. Buehrer*, 8th Dist. Cuyahoga No. 97836, 2012-Ohio-4057, ¶ 5, citing *Tipton v. Nuzum*, 84 Ohio App.3d 39, 616 N.E.2d 265 (9th Dist.1992). It is true that "[a]n 'as is' clause" "does not prevent recovery where a buyer has demonstrated that a seller has engaged in fraud." *Id*. at ¶ 15, citing *Kern*, citing *Brewer v. Brothers*, 82 Ohio App.3d 148, 151, 611 N.E.2d 492 (12th Dist.1992).

{¶24} The agreement here clearly indicated that the Lakewood Property was being sold "as is." "'While the doctrine of caveat emptor still applies, R.C. 5302.30(A)(1) requires sellers of real estate to disclose'" on the statutory disclosure form any "'patent or latent defects that are within'" the seller's "'*actual knowledge*.'" (Emphasis added.) *Hendry v. Lupica*, 8th Dist. Cuyahoga No. 105839, 2018-Ohio-291, ¶ 7, quoting *Wallington v. Hageman*, 8th Dist. Cuyahoga No. 94763, 2010-Ohio-6181, ¶ 15-18. *See also Legg v. Ryals*, 8th Dist. Cuyahoga No. 103221, 2016-Ohio-710, ¶ 9.

{¶25} As required by R.C. 5302.30(D)(1), the disclosure form advises,

> Purpose of Disclosure Form: This is a statement of certain conditions and information concerning the property actually known by the owner. Any owner may or may not have lived at the property and unless the potential purchase is informed in writing, the owner has no more information about the property than could be obtained by a careful inspection of the property by a potential purchaser. Unless the potential purchaser is otherwise informed, the owner has not conducted any inspection of generally inaccessible areas of the property. This form is required by Ohio Revised Code Section 5302.20.

{¶26} The disclosure form also cautions in bold print

> **THIS FORM IS NOT A WARRANTY OF ANY KIND BY THE OWNER OR BY ANY AGENT OR SUBAGENT REPRESENTING THE OWNER. THIS FORM IS NOT A SUBSTITUTE FOR ANY INSPECTIONS.**

POTENTIAL PURCHASERS ARE ENCOURAGED TO OBTAIN THEIR OWN PROFESSIONAL INSPECTION(S).

{¶27} Sotonji averred that she had no knowledge of any termite issues but disclosed the water issue that she was aware of. Salim averred that he considered himself to be an expert in the construction field and had extensive experience in residential and commercial remodeling. Salim observed that the rooms had been freshly painted and walked through the Lakewood Property three times but did not hire a professional inspector to examine for termites, plumbing, electrical, or other issues. AE expressly declined to hire inspectors to inspect the Lakewood Property.

{¶28} The discovery and expert deadlines passed several months prior to the summary judgment filing. The record is devoid of evidence that Sotonji acted knowingly, recklessly, or intentionally, or with such utter disregard as to truth or falsity that knowledge may be inferred, with the intent of misleading AE into reliance. AE said that it relied on the disclosure form and the disclosure form is based on "actual knowledge." R.C. 5302.30(D)(1).

B. Negligence and Negligent Misrepresentation

{¶29} We also affirm the trial court's findings on AE's claims for negligence and negligent misrepresentation. "'An "as is" clause in a real estate contract places the risk upon the purchaser as to the existence of defects and relieves the seller of any duty to disclose.'" *Moreland v. Ksiazek*, 8th Dist. Cuyahoga No. 83509, 2004-Ohio-2974, ¶ 56, quoting *Rogers v. Hill*, 124 Ohio App.3d 468, 471, 706 N.E.2d 438 (4th Dist.1998). "Therefore, as long as a seller does not engage in fraud, these two principles, caveat emptor and the 'as is' clause, bar any claims brought by a buyer." *Id.* at ¶ 57. *See also Kossutich v. Krann*, 8th Dist. Cuyahoga No.

57255, 1990 Ohio App. LEXIS 3449, at 8 (Aug. 16, 1990) ("[t]he doctrine of caveat emptor bars a cause of action based upon negligent misrepresentation. [Citations omitted.]")

IV. Conclusion

{¶30} Construed in a light most favorable to AE, and based on our review of the entire record, we find that the trial court did not err in its determination that there are no genuine issue of material fact and Sotonji is entitled to judgment as a matter of law.

{¶31} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court 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.

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ANITA LASTER MAYS, JUDGE

EILEEN T. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR