IN THE SUPREME COURT OF OHIO

ORIGINAL

AMANDA HELWIG, et al.	:	On Appeal from the Franklin County Court of Appeals, 10th Appellate District
Defendant-Appellants,	:	
	:	09-0986
vs.	:	
HOMEWOOD HOMES, INC., et al.,	:	Court of Appeals Case No: 08 APE-05-406
Plaintiff-Appellees.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS AMANDA AND BRYAN HELWIG

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TABLE OF CONTENTS

	Page
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	4
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	7
PROPOSITION 1: The initiation of an action against a homeowner for violation of a restrictive covenant, with the ulterior motive of suppressing that homeowner's constitutionally protected freedom of speech, is a clear case of abuse of the legal process.....	7
PROPOSITION 2: When a homebuilder has, separate and apart from a contract to build a home, intentionally made fraudulent misrepresentations concerning the construction of the home, a separate tort action for fraud exists and the homeowner may recover damages in tort based on the cost of repair even if such costs parallel the repair costs for breach of contract	8
CONCLUSION	12
CERTIFICATE OF SERVICE	13

APPENDIX	Appx. Page
Opinion of the Franklin County Court of Appeals (9 April 2009)	1
Judgment Entry of the Franklin County Court of Appeals (17 April 2009)	21

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The efficacy of our American system of justice is nothing less than a testament to the genius of the country's Constitution. Jurors in trials across the country are advised that their service aids and preserves our uniquely American judicial system, and the quarters of this nation's highest judicial body proudly display the words "equal justice under law" and "justice, the guardian of liberty."

Unfortunately, the law has also recognized that our judicial process may be subject to perversion or abuse by malicious individuals seeking to use a criminal or civil action as a means of causing harm. In *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, this Court recognized the tort of abuse of process and set out the elements of such a claim. While the basic three-step analysis of *Yaklevich* has been cited in dozens of lower opinions since, the proper evaluation of an abuse of process claim remains essentially a case-by-case factual analysis. As such, there will be close cases. This fact pattern does not present one. Twisting an action involving a mere violation of a subdivision deed restriction to accomplish a complete denial of a fundamental individual liberty is the specific type of legal contortion the abuse of process claim was designed to prevent. Nevertheless, the trial court and court of appeals had considerable difficulty applying *Yaklevich*'s analysis to what seems to be a textbook case of abuse of process.

The trial court on the record made apparent that the law surrounding a claim for abuse of process is by no means clear. The elements of a prima facie case are delineated with clarity in *Yaklevich*, but factors to be taken into account when deciding if the elements exist seem conspicuously absent. This Court provided some elucidation in *Robb v. Chagrin Lagoons Yacht Club, Inc.* (1996), 75 Ohio St.3d 264, 271, but even those descriptions seemed more concerned

with clarifying the purpose of an abuse of process claim than providing distinct factors to be considered.

In dismissing the Helwigs' abuse of process claim, the trial court explained, and the court of appeals agreed, that a key factor in determining whether process had been abused was Homewood's claim for damages in defamation. In essence, the court found that because Homewood had requested damages and actually desired them, process could not have been abused because Homewood had a proper motive in filing suit. To allow this decision to stand would set a costly precedent for those attempting to bring an abuse claim, if not serve to essentially eliminate the claim in its entirety. The decision of the trial judge completely ignored the fact that a suit may be filed and damages sought notwithstanding a plaintiff's ulterior motive and desire to use the legal system as a club to force an outcome which the courts could not legally provide. A Plaintiff wishing to avoid a counter-claim for abuse of process under the holding of the Tenth Circuit would need only request damages that seem remotely appropriate under the circumstances.

The trial judge observed that the Helwigs' claims may square more appropriately with a claim for frivolous conduct, and, without conceding the point, the Helwigs acknowledge it is possible that may be so. There is simply not a clear enough delineation between the two causes, or uniform law supporting the elements of each. In making this point, the trial court judge, with over twenty years experience, specifically stated that a clearer definition of factors to be considered would be a welcome addition to Ohio case law. If our trial courts are to prevent abuse of the legal system, this Court must define with more clarity what it would consider such abuse to be. This case gives the Court such opportunity.

Even if this Court chooses not to clarify the abuse of process claim and decide this question of an individual's constitutionally protected right to express himself, this case involves an important question of contract law of particular interest to any potential homebuyers (a

growing segment of the population in light of recent economic trends and incentives). It has long been held that, in cases where a breach of contract is accompanied by a related but independent tort such as fraud, punitive damages may be recovered where appropriate. *Saberton v. Greenwald* (1946), 146 Ohio St. 414. In spite of this longstanding holding, the Ninth District has effectively eliminated any chance of such a recovery with its ruling in *Textron Financial Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 151. Because it requires that a plaintiff recover damages in fraud in addition to those recoverable under the contract before punitive damages may be awarded, *Textron* stands in implicit opposition to this Court's rule in *Saberton*. A holding that a plaintiff may recover damages for fraudulent misrepresentation even if such damages equal those due under a breach of contract would provide necessary clarification to an area of the law that is mired in confusion and would serve as a necessary disincentive to home manufacturers eager to capitalize on the relative inexperience of individual homeowners.

For these reasons, justice requires that this Court accept jurisdiction in this case.

STATEMENT OF THE CASE AND FACTS

Bryan and Amanda Helwig entered into a contract for the construction and purchase of a house with Trinity and/or Homewood Homes and closed on the purchase on March 11, 2005. Prior to closing, Mr. Helwig noticed that the Tyvek House Wrap that he had purchased did not appear to be installed correctly. To insure proper installation, Mr. Helwig scheduled a meeting with a Tyvek representative and Trinity/Homewood at the home site to inspect the installation. However, several days before the meeting, Trinity/Homewood began putting the siding and brick on the exterior of the home covering the Tyvek. As such, the meeting was cancelled; however, Mr. Helwig was given numerous assurances that the problems with the Tyvek installation were corrected.

Around the same time frame, Mr. Helwig noticed that the Silverline windows installed in his home were done so without flashing tape. The Silverline installation procedures specifically required flashing tape and, if the windows are not installed in accordance with the manufacturer's recommendations, the warranty was void. Again, Mr. Helwig was given numerous assurances that the windows were installed properly.

In addition to the numerous assurances given to Mr. Helwig by Homewood, a week before closing, in an effort to address the Helwigs' concerns over the application of Tyvek House Wrap and installation of the windows, Trinity/Homewood provided the Helwigs with a letter representing the following:

> **"Per your request, please accept this letter as assurance that the Tyvek House Wrap installation on your home was performed using Tyvek's documented installation procedures".**
>
> * * *
>
> **"In addition, this letter offers assurance that the windows in your home were installed in a manner consistent with Silverline specifications and industry standards using flash tape."**

Both representations were completely false. A later inspection would show that the Tyvek was not installed properly and the windows were installed without flashing. Accordingly,

Trinity/Homewood blatantly misrepresented that the Tyvek was applied in accordance with the manufacturer's procedures and the windows were installed with flashing tape. Mr. Helwig testified that had he not received the letter of assurance, he would not have closed on the home.

In addition to the Tyvek and window installation concerns, the Helwigs had a number of problems associated with the construction of the home. Mr. Helwig tried to address these other concerns after closing on the home with Trinity/Homewood and received either inadequate responses or no response to many of the problems. Out of frustration and in an attempt to prompt Trinity/Homewood into addressing the construction problems, on Saturday April 1, 2006 around noon, to Monday April 3, 2006 around 5:00 pm, Mr. Helwig placed a sign in his front lawn that read:

> **"Do not build with Ambassador or Trinity! Look at my driveway and sidewalk then stop by and ask me why".**

On April 3, 2006 Mr. Helwig received a letter, hand delivered, from an attorney representing Trinity/Homewood demanding that he remove the sign from his property as it was a violation of the deed restrictions. Mr. Helwig's wife, Amanda, received the same letter, but it was served upon her at her place of employment. The letter threatened litigation and warned that: "**My clients highly value their reputation and will not allow their business relations to be improperly interfered with through the posting of signs or other violations of the Deed Restrictions.**" Once notified that the deed restrictions may prohibit the sign, Mr. Helwig immediately removed the sign.

In the days and weeks that followed, Mr. Helwig became more and more upset that Trinity/Homewood was trying to prevent him from expressing his opinion and not addressing his concerns. After closely reviewing the deed restriction, on Monday April 24, 2006 around 5:15 pm to 5:50 pm, Mr. Helwig attached the sign to the tailgate of his truck and parked the truck on

the street in front of (not on) his property. However, shortly thereafter, he placed the sign in the trash on the curb at his home intending to throw it out with the garbage.

Notwithstanding the fact that the sign was removed from the property, Trinity/Homewood sued the Helwigs. The lawsuit, in addition to alleging a violation of a deed restriction, alleged tortious interference with business relations. In addition, Trinity/Homewood amended their complaint against the Helwigs to add a claim of defamation. Pending at the time was the Helwigs' Motion for Summary Judgment on Trinity/Homewood's Business Interference claims. Moreover, discovery, including depositions of the parties, had been conducted.

On January 3, 2008, the trial court granted the Helwigs' Motion for Summary Judgment on the tortuous interference with business and defamation claims. The case came to trial on January 7, 2008, and resulted in the jury awarding the Helwigs damages on their contract and misrepresentation claims in the amount of $7,700.00 as well as a $32,000.00 award of punitive damages plus attorneys fees.

The Tenth Appellate District rendered its Opinion in the case on April 9, 2009. In the Opinion, Justices Bowman and Bryant sustained Homewood's first assignment of error, overruled the remaining three, and overruled all of the Helwigs' four cross-assignments of error. Justice Sadler, concurring in the decision to sustain Homewood's first assignment for reasons pertinent to this Memorandum, wrote separately. The case was remanded to the Franklin County trial court. An amended judgment entry was filed with the court on April 17, 2009.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION 1: The initiation of an action against a homeowner for violation of a restrictive covenant, with the ulterior motive of suppressing that homeowner's constitutionally protected freedom of speech, is a clear case of abuse of the legal process.

The trial court dismissed Bryan and Amanda Helwig's abuse of process claim, and the Court of Appeals affirmed the dismissal by overruling the Helwigs' Cross-Assignment of Error. In so doing, both courts have misinterpreted this Court's basic purpose in delineating the elements of abuse of the legal process in *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 298.

Any analysis of a claim for abuse of the legal process must necessarily start with this Court's decision in *Yaklevich*. The elements of an abuse of process claim are: "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Id.* In a subsequent decision, this Court further held that, "[s]imply, abuse of process occurs where someone attempts to achieve through the use of the court that which the court itself is powerless to order." *Robb v. Chagrin Lagoons Yacht Club, Inc.* (1996), 75 Ohio St.3d 264, 271.

Given the facts of the case in light of the three-step analysis of *Yalkevich*, it is unclear why the trial court dismissed the Helwigs' claim. Mr. Helwig placed a sign in his front yard for approximately two days, an admitted violation of the deed restrictions governing their subdivision. The lawsuit, initiated after Mr. Helwig had removed the sign from his yard, was ostensibly to enforce the provisions of the deed restriction, a purpose neither party disputes was valid under Ohio law. However, testimony at trial from Homewood's president made it clear that the lawsuit was initiated because he felt that Homewood had to do "whatever was necessary under the deed restrictions or otherwise to have the sign removed." The trial court specifically found that the words on the sign placed by Mr. Helwig were constitutionally protected free

speech. The courts have no power to stifle the Helwigs' fundamental right to free expression, and Homewood's attempts to remove the sign by any means necessary, including the lawsuit requesting a permanent injunction and claims for defamation tortuous interference in excess of $25,000.00, are a clear perversion of the legal process to use the law to do something that the courts could not constitutionally order. Simply put, Homewood's lawsuit, with its large request for damages, was intended to frighten the Helwigs into submission "by the use of the process as a threat or a club." *Robb*, 75 Ohio St.3d, at 271.

The lower courts essentially argued that, because Homewood wanted all that they requested in their complaint (monetary damages for defamation and interference and a permanent injunction), Homewood could not have had an ulterior motive. To allow such a holding to stand would be contrary to common sense and dangerous to our sacred individual liberties. Indeed, the large number of claims and sizeable damage request only bolster the evidence that Homewood intended to use their lawsuit to deny the Helwigs their fundamental right to express dissatisfaction with a commercial entity. First and foremost, Homewood wanted to silence the Helwigs. It is likely that Homewood would have been pleased with a jury verdict in their favor, just as the plaintiffs in *Robb* would have been pleased with a verdict in theirs. But simply desiring the requested relief in one's case should never constitute a bar to a court's finding that an ulterior motive exists or that a plaintiff has attempted to contort our legal system to serve its own desires.

PROPOSITION 2: When a homebuilder has, separate and apart from a contract to build a home, intentionally made fraudulent misrepresentations concerning the construction of the home, a separate tort action for fraud exists and the homeowner may recover damages in tort based on the cost of repair even if such costs parallel the repair costs for breach of contract.

The Court of Appeals found Homewood's first Assignment of Error (that they were entitled to prevail on the misrepresentation claim because the Helwigs failed to present evidence of a tort-based duty or damages distinct from those in contract) to be well taken. Such a decision

effectively ignores the long-standing acknowledgment by this Court that a claim for fraudulent misrepresentation may be actionable in addition to a breach of contract claim notwithstanding some related subject matter in the two actions.

This Court has previously held that, in certain cases where a breach of contract is accompanied by a connected but independent tort such as fraud, punitive damages may be recoverable. *Saberton v. Greenwald* (1946), 146 Ohio St. 414, 426. To summarize this exception:

> Where the acts constituting a breach of contract also amount to a cause of action in tort, there may be a recovery of exemplary damages upon proper allegations and proof. *As sometimes stated, exemplary damages are recoverable for a tort committed in connection with, but independently of, the breach of contract, where the essentials of an award of such damages are otherwise present, the allowance of such damages being for the tort and not the breach of contract.* In order to permit a recovery, however, the breach must be attended by some intentional wrong, insult, abuse or gross neglect which amounts to an independent tort.

Id (emphasis added, internal quotes omitted). In this case, the Helwigs had entered into a contract to purchase the house long before Homewood's fraudulent misrepresentations. In its March 4 letter, Homewood expressly stated that the letter constituted "assurance" that the windows and Tyvek were installed according to the terms of the purchase contract, "per [Mr. Helwig's] request." Because this assurance was related to yet substantively distinct from the promises concerning the installation of the windows and Tyvek in the home purchase contract itself, a separate cause of action for fraudulent misrepresentation exists and damages are appropriate.

Homewood has attempted to characterize the numerous fraudulent representations and the March 4 letter as a mere extension of the promises contained in the home purchase contract. Although a majority of the appellate judges chose to accept Homewood's interpretation, this Court should recognize that the actions taken by companies like Homewood to induce unknowing homebuyers to sign an unfair contract in the face of an initially concealed and falsely

represented breach amount to more than a simple contractual claim. This proposition is more eloquently set forth in Justice Sadler's concurring appellate opinion:

> Homewood's March 14 [sic], 2005 letter was a contract insofar as it contained mutual promises respecting arbitration of disputes about Tyvek installation. It also, superfluously, contained references to the manufacturer and builder warranties already set forth in paragraph nine of the home purchase contract. However, as noted in [the majority opinion], the letter also contained affirmative statements that the Tyvek and windows had been installed properly. These false statements of then-present fact are substantively distinct from both the exchange of promises concerning damages payable at the conclusion of any Tyvek-related disputes, and the exchange of promises concerning construction services contained in the home purchase contract.

App. Op., ¶ 3 (SADLER, J., concurring separately).

Despite her correct interpretation of the nature of the March 4 letter, Justice Sadler ultimately concurred with the majority because she believed that the Helwigs had failed to prove damages from the fraud distinct from those related to the breach of contract. In so doing, Justice Sadler relied on the oft-cited maxim laid out by this Court in *Linerode v. Rasumussen* (1900), 63 Ohio St. 545, 546, that the measure of damages where a sale is procured by a vendor's fraudulent representation is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented to be. See also *Gray v. Gordon* (1917), 96 Ohio St. 490; *Molnar v. Briswell* (1930), 122 Ohio St. 348, 352. This rule, commonly known as the "benefit of the bargain" rule, "often involves facts which indicate the difficulty and lack of mathematical precision that a strict application of the rule would yield." *Van Zant v. May-Coleman and Associates, Inc.* (10 Dist. 1983), 1983 WL 3486, at *2. In *Van Zant*, the Tenth District, quoting an Illinois case, *Posner v. Davis* (1979), 76 Ill. App.3d 638, 395 N.E.2d 133, stated the following:

> [a]n alternative measure of damages for fraudulent concealment is the cost of fixing the property to make it conform to the condition it would have had without the defects. <u>Such evidence may also be probative of the value the property actually had at the time of sale.</u> * * *

> Absolute certainty concerning the amount of damage is not necessary to justify a recovery where the existence of damage is established; the evidence need only tend to show a basis for the computation of damages with a fair degree of probability.

Van Zant, 1983 WL, at *2, 3 (emphasis in original, internal quotes and cites omitted). See also *Brewer v. Brothers* (12 Dist. Warren 1992), 82 Ohio App.3d 148, 154, 611 N.E.2d 492 (cost of repair is a fair representation of damages under the benefit of the bargain rule).

The court's holding in *Van Zant* compares favorably with this case. Homewood's counsel has made repeated claims that the Helwigs have not adduced any evidence of damages in tort separate from those caused by the breach of contract and, therefore, have no evidence of the value difference required under the benefit of the bargain rule. In fact, by proving the cost of repair with reasonable certainty, the Helwigs have specifically provided evidence of these damages. Although the damages for Homewood's fraud overlap partially with the damages the Helwigs suffered as a result of Homewood's contractual breach, such overlap should not, as Homewood suggests, present a total bar to recovery.

It is because of the Ninth District's holding in *Textron Financial Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, that Homewood claims the Helwigs are not entitled to compensatory or punitive damages on their fraudulent representation claim. In *Textron*, the court of appeals held that any recovery in a tort claim based on a contract must be *in addition to* any recovery the plaintiff would have been due under the contract itself. This holding, likely designed by the court in an effort to ensure that juries did not award a "double recovery", is poorly worded at best and nonsensical at worst. A plaintiff induced to sign a contract because of the other party's blatant fraud is left with no chance of recovery for the fraud, for what damages may such a plaintiff claim besides those resulting from the contract he was defrauded into signing? As such, the holding of *Textron* presents an implicit challenge to the venerable rule set forth by this Court in *Saberton*, *supra*. If the ability to sue another party in tort for fraud on a

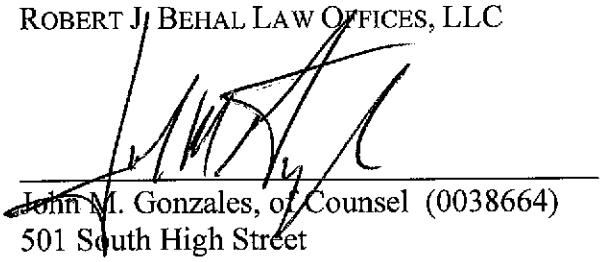
related contract is to mean anything, this Court must hold that damages for the fraud must be recoverable even if they equal the economic damages under the contract, and that punitive damages are available in particularly egregious cases. Such a holding would not permit a double recovery, but merely allow an alternate way for defrauded plaintiffs to be made whole. More importantly, this rule would provide needed clarity to the existing law and ensure that predatory home manufacturers are not permitted to promise the world to potential homebuyers and escape with no more harm than the cost of whatever defects the owners happen to find.

CONCLUSION

For the reasons stated above this case involves a question of great public or general interest and a substantial constitutional question. The appellant respectfully requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

ROBERT J. BEHAL LAW OFFICES, LLC



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The undersigned hereby certifies that a copy of the foregoing was sent by ordinary U.S. mail on 29 May 2009 to:

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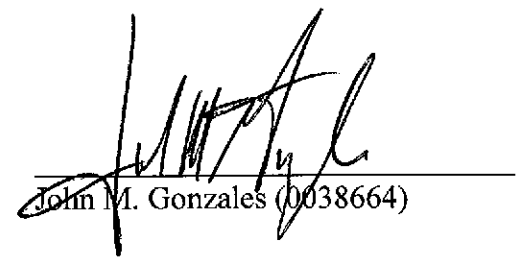

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Homewood Homes, Inc.,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	No. 08AP-406 (C.P.C. No. 06CVH-04-5523)
v.	:	(REGULAR CALENDAR)
Amanda Helwig et al.,	:	
Defendants-Appellees/ Cross-Appellants.	:	

O P I N I O N

Rendered on April 9, 2009

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Robert J. Behal Law Offices, LLC, and *John M. Gonzales*, for appellees/cross-appellants.

APPEAL from the Franklin County Court of Common Pleas.

BOWMAN, J.

{¶1} Ambassador Homes ("Ambassador"), a division of Homewood Homes, Inc., built a home for appellees, Amanda and Bryan Helwig, and the closing was March 11, 2005. During the building process, there were several problems with the construction that were not resolved to Bryan's satisfaction. The major issues included the Tyvek house wrap and the window installation. Bryan did not believe either was properly installed. In order to address his concerns, during the construction process Bryan scheduled a meeting with a Tyvek representative and an Ambassador

representative, but prior to the meeting, the exterior siding and brick was installed covering the Tyvek. Bryan voiced his concerns and was assured that the Tyvek installation was correct.

{¶2} Bryan was also concerned that the windows were not installed according to the manufacturer's recommendations, which required using flashing tape, and thus the manufacturer's warranty would be void. In an effort to address these concerns, immediately before closing, the Helwigs were provided a letter, dated March 4, 2005, which provided, as follows:

> Per your request, please accept this letter as assurance that the Tyvek House Wrap installation on your home was performed using Tyvek's documented installation procedures[.]
>
> * * *
>
> In addition, this letter offers assurance that the windows in your home were installed in a manner consistent with Silverline specifications and industry standards using flash tape.

(Joint Exhibit 1.) On Saturday, April 1, 2006, Bryan placed a sign in his front yard which read: "Do not build with Ambassador or Trinity! Look at my driveway and sidewalk then stop by and ask me why." (Tr. 64.) Initially, there was some confusion as to who had actually built the home because, although Ambassador had built the home, Trinity Builders Homes ("Trinity") is also a division of Homewood Homes. The first deposit checks the Helwigs wrote were to Trinity, and some employees of Trinity did work for Ambassador at times, and many of the forms had Trinity listed. Additionally, the CEO of Trinity was acting manager of Ambassador during the time that the Helwigs were building their home. Thus, the Helwigs had some confusion as to who was the actual

builder of their home and whether there was a distinction between Trinity and Ambassador.

{¶3} On Monday, April 3, 2006, Bryan and Amanda were each sent a letter from an attorney representing both Ambassador and Trinity informing them that they were violating the deed restrictions by placing the sign in their yard. Bryan removed the sign and placed it in his garage. On April 24, he put the sign on the back of his truck, which was parked in the street in front of the house, for approximately 30 minutes, but then removed it and placed it next to the trash at the end of his driveway, because his trash can was too full to put it inside. Since he placed it on the ground face up, Homewood argued that the Helwigs continued to violate the deed restrictions. After approximately two hours, he turned the sign over.

{¶4} Plaintiff-appellant, Homewood Homes, Inc. ("Homewood"), dba Ambassador Homes ("Ambassador"), and Trinity Home Builders, LLC, dba Trinity Homes, filed a complaint against appellees, Amanda and Bryan Helwig, alleging they violated the deed restrictions related to their house and tortiously interfered with Homewood's business relations by erecting a sign in their yard.[1] Homewood sought a temporary restraining order, which was granted and the parties agreed to a preliminary injunction containing the same prohibitions as the temporary restraining order.

{¶5} The Helwigs filed an answer and a counterclaim, alleging breach of contract and misrepresentation. After a jury trial, the jury returned a verdict awarding the Helwigs damages on their contract and misrepresentation claims, and awarding attorney fees and punitive damages. The jury interrogatories indicated that the jury found that the Helwigs had been directly and proximately damaged as a result of

[1] Trinity was dismissed as a party by the trial court. (Tr. 716.)

Homewood breaching its warranties in the amount of $200; that the Helwigs were directly and proximately damaged as a result of misrepresentations by Homewood regarding the installation of the Tyvek in the amount of $3,750; that the Helwigs were directly and proximately damaged as a result of misrepresentations of Homewood regarding the installation of the windows in the amount of $3,750. The jury found that Homewood acted with malice, egregious fraud, oppression or insult in making representations to the Helwigs about the installation of the Tyvek and the windows. The jury further found, by a preponderance of the evidence, that Homewood made a false representation of fact that was made with knowledge of its falsity or with utter disregard and recklessness about its falsity. The jury found that it may be concluded that the representation was material to the transaction and was made with the intent of misleading the Helwigs into relying on it and, thus, the Helwigs were justified in relying on it. It further found that the Helwigs were injured and that the injury was directly and proximately caused by their reliance on this representation. The jury found the Helwigs were entitled to their attorney fees and awarded $32,000 in punitive damages. The jury awarded $7,700 in damages for the warranty and misrepresentation claims. The jury also found that Homewood was entitled to recover the costs of enforcing the deed restrictions, including reasonable attorney fees through April 3, 2006.

{¶6} Homewood filed a motion for judgment notwithstanding the verdict, which was denied. The trial court granted Homewood's motion for remittitur. Homewood filed a notice of appeal and raised the following assignments of error:

> I. The trial court erred in failing to grant Ambassador's Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict on the Helwigs' claim of misrepresentation. Ambassador is entitled to prevail on the misrepresentation claim because the Helwigs failed to

> present any evidence of tort-based duties and damages beyond those provided by the contract.
>
> II. The trial court erred in permitting Gerald Barker to testify as a construction expert under Evid.R. 702 as he does not have the requisite skill set or knowledge of the applicable standards of care.
>
> III. The trial court erred in permitting the jury to determine Ambassador's cost of enforcement of the deed restrictions.
>
> IV. The trial court erred in permitting the jury to consider and award damages, pertaining to the Tyvek, which were greater than the $1,100.00 provided by the Contract.

{¶7} The Helwigs filed a notice of cross-appeal, raising the following cross-assignments of error:

> 1. The trial court erred by limiting appellees claims and evidence to only those defects set forth in the counterclaim.
>
> 2. The trial court erred by dismissing appellees' counter-claims against Trinity.
>
> 3. The trial court erred by dismissing appellees' abuse of process claims.
>
> 4. The trial court erred by failing to award sanctions pursuant to R.C. 2323.51 for appellant's frivolous conduct.

{¶8} Homewood filed a motion to strike the cross-appeal, arguing that it was untimely and that it did not state that it was conditioned on granting relief to appellant. Appellees filed a motion to amend the notice of cross-appeal to reflect that the cross-appeal is conditioned upon granting relief to appellant. This court granted the motion to amend on October 17, 2008; thus, the motion to strike the cross-appeal is rendered moot.

{¶9} By the first assignment of error, Homewood contends that the trial court erred in failing to grant Homewood's motion for directed verdict and motion for judgment notwithstanding the verdict on the Helwigs' claim of misrepresentation. Homewood

argues that it is entitled to prevail on the misrepresentation claim because the Helwigs failed to present any evidence of tort-based duties and damages beyond those provided by the contract.

{¶10} Homewood made a motion for directed verdict and filed a motion for judgment notwithstanding the verdict based upon the punitive damages award, arguing that the punitive damages were based upon breach of contract, not an independent tort or damages stemming from that independent tort. Thus, Homewood contended the punitive damages award was inappropriate, and the attorney fees that were connected to the punitive damages award was also inappropriate.

{¶11} Civ.R. 50(A)(4) governs the standard for directed verdicts and provides that:

> When a motion for 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.

{¶12} In ruling on a motion for a directed verdict, a trial court is required to construe the evidence most strongly in favor of the nonmovant. Civ.R. 50(A)(4); *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284. The motion must be denied where there is substantial evidence to support the nonmoving party's case and reasonable minds may reach different conclusions. *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon the motion. Id. A motion for directed verdict tests whether the evidence presented is legally sufficient to take the case to the jury. *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St.3d 287, 294.

"The standard for granting a motion for judgment notwithstanding the verdict or in the alternative for a new trial pursuant to Civ.R. 50(B) is the same as that for granting a motion for a directed verdict pursuant to Civ.R. 50(A)." *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 679.

{¶13} Homewood's argument is based upon Joint Exhibit 1, which is the letter from the managers of Ambassador to the Helwigs assuring them that the Tyvek House Wrap and the windows were installed using the manufacturer's installation procedures and according to industry standards and the warranties applied. Homewood argues that the Helwigs did not prove a tort duty independent from the contract, and a party cannot recover through tort law for losses resulting from a breach of contract. " '[T]he existence of a contract action * * * excludes the opportunity to present the same case as a tort claim.' " *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 151, quoting *Wolfe v. Continental Cas. Co.* (C.A.6, 1981), 647 F.2d 705, 710, discretionary appeal not allowed (1996), 78 Ohio St.3d 1425. "A breach of contract claim does not create a tort claim, and a tort claim based upon the same actions as those upon which a breach of contract claim is based exists only if the breaching party also breaches a duty owed separately from that duty created by the contract, that is, a duty owed even if no contract existed." *Prater v. Three-C Body Shop, Inc.*, Franklin App. No. 01AP-950, 2002-Ohio-1458, citing *Textron*, at 151. The evidence must show damages attributable to the wrongful acts which are in addition to the damages attributable to the breach of contract. Id.

{¶14} In this case, Homewood and the Helwigs were already contractually obligated to build/buy the home. While Homewood may have misrepresented to the Helwigs how the Tyvek and windows were installed, the letter did not change the

contractual duties. The parties were still obligated by the original contract. The trial court ruled that the letter constituted a contract. (Tr. 694.) The court then decided that the jury could determine whether Homewood made a material misrepresentation or committed a breach of contract/warranty, and if a material misrepresentation, the Helwigs could then recover punitive damages, but not damages for both. (Tr. 698.)

{¶15} Homewood did not breach a duty separate from the original contract, and even in closing argument, the Helwig's counsel admitted the letter was a contract (Tr. 761) and admitted they asked for "basically the same damages but two different ways to get there." (Tr. 764.) The Helwigs proved no duty or damages other than those stemming from the breach of the original contract. The trial court erred in not granting Homewood's motion for directed verdict on the claim of misrepresentation. Given that the trial court should have granted Homewood's motion for directed verdict, the award of attorney fees and punitive damages based upon the jury's finding of misrepresentation also fail. Homewood's first assignment of error is well-taken.

{¶16} By Homewood's second assignment of error, it contends that the trial court erred in permitting Gerald Barker to testify as a construction expert under Evid.R. 702 as he does not have the requisite skill set or knowledge of the applicable standards of care. The admission of expert testimony is governed by Evid.R. 702, which provides, as follows:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;
>
> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

{¶17} Homewood argues that Barker was not qualified to testify as an expert because he did not know the industry standards for builders in central Ohio; however, he was not testifying regarding the industry standards but, rather, the manufacturer's directions. Barker testified regarding his personal observations of the house and the installation procedures in regards to the manufacturer's directions.

{¶18} Homewood also argues that Barker lacked the qualifications of an expert. However, he has worked part-time since 1977 and full-time since 1996 in the home construction business. He testified he has remodeled bathrooms, kitchens, basements, and has put on additions. He has installed new windows and worked with flashing tape and caulking. He has installed Tyvek House wrap. Generally, an expert witness is not required to be the best witness on the subject. *Alexander v. Mt. Carmel Med. Ctr.* (1978), 56 Ohio St.2d 155, 159. The test is whether the expert testimony will aid the trier of fact in its search for the truth. Id. The determination of whether a witness possesses the qualifications necessary to allow his expert testimony lies within the sound discretion of the trial court, and such determinations will not be reversed by an appellate court without a showing of an abuse of discretion. *Ayers v. DeBucci* (2000),

137 Ohio App.3d 145, 148. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Homewood's objections go to the weight, rather than the admissibility of the testimony. Homewood's second assignment of error is not well-taken.

{¶19} By their third assignment of error, Homewood contends that the trial court erred in permitting the jury to determine Ambassador's cost of enforcement of the deed restrictions. Homewood took several steps to enforce the deed restrictions in this case. Initially, the attorney sent the Helwigs a letter, then a temporary restraining order was obtained, and thereafter the parties entered into an agreed preliminary injunction. Homewood sought the cost of enforcement, including reasonable attorney fees. The trial court permitted the jury to determine the date that Homewood was entitled to recover its costs of enforcement, and the jury determined it was through April 3, 2006 or the costs to recover for the cease and desist letter. Homewood argues that permitting the jury to determine the scope of damages violated principles of equity. Not only did Homewood not object to the jury determining the date, the parties agreed the jury would determine whether Homewood was entitled to costs as a result of the breach of deed restrictions but the court would determine how much, if any, of those costs Homewood would recover. (Tr. 49.)

{¶20} It is well-settled that issues not raised in the trial court may not be raised for the first time on appeal because such issues are deemed waived. *State v. Burge* (1993), 88 Ohio App.3d 91, 93, citing *State v. Comen* (1990), 50 Ohio St.3d 206, 211. Homewood's third assignment of error is not well-taken.

{¶21} By its fourth assignment of error, Homewood contends that the trial court erred in permitting the jury to consider and award damages, pertaining to installation of the Tyvek, which were greater than the $1,100 provided by the contract. Homewood argues that remittitur is required to reduce the damages to $1,100, the amount that the Helwigs paid for the Tyvek option because of the contract language provided in the letter to the Helwigs from the Ambassador managers on March 4, 2005 (Joint Exhibit 1), which provides, as follows:

> In the event that a third-party arbitrator, agreeable to both parties, finds that the installation does not conform to the above standards, Ambassador Homes and/or the responsible party will refund the one thousand one hundred dollars ($1,100) paid for the purchase and installation of this product.

{¶22} This provision is contingent upon the finding of a third-party arbitrator; however, rather than submitting the issues to arbitration, Homewood commenced this lawsuit. Waiver can be either express or inferred when the party seeking arbitration acts inconsistently with its right to proceed with arbitration. See *Standard Roofing Co. v. John G. Johnson & Sons Constr. Co.* (1977), 54 Ohio App.2d 153. Clearly, filing and proceeding with a lawsuit rather than seeking arbitration is a waiver of arbitration, and since there was no finding of an arbitrator on which to base the damages, the contract provision does not apply to limit the damages. Homewood's fourth assignment of error is not well-taken.

{¶23} The Helwigs have raised cross-assignments of error which are contingent upon this court granting Homewood relief. By the first cross-assignment of error, the Helwigs contend that the trial court erred by limiting their claims and evidence to only those defects set forth in the counterclaim. On the eve of trial, on January 4, 2008, Homewood filed three motions, one to exclude the Helwigs' expert, one to exclude any

testimony as to any allegations beyond those listed in the Helwigs' amended counterclaim, and a motion to strike the jury demand. The trial started on January 7, 2008 and was transferred to a visiting judge. The motions were ruled on before the case was transferred to the visiting judge. Thus, the Helwigs were not given a chance to respond to the motions.

{¶24} The Helwigs now contend that the trial court erred in limiting their claims of defects with their newly built home to the defects that were listed in their counterclaim. Although Bryan had testified regarding many defects in his deposition almost a year before the trial and filed with the motion for summary judgment, the Helwigs did not include an exhaustive list in the counterclaim and did not amend the counterclaim. On the first day of trial, the Helwigs requested leave to amend the counterclaim, which was denied. The Helwigs argue that Homewood was aware of the full extent of the issues regarding the construction of the home and had a fair opportunity to defend against the allegations; thus, there was no basis to limit the evidence or deny the amendment of the counterclaim. However, Homewood counters with the contention that it did not have notice of the other claims, and any testimony regarding such would be irrelevant.

{¶25} Even though Homewood filed the motions in an untimely manner and the Helwigs did not have an opportunity to respond, in this case, the error was not prejudicial because, even with a response, the trial court would not have abused its discretion in limiting the testimony to the claims in the counterclaim. The Helwigs had a duty to amend the counterclaim before the beginning of the trial to put Homewood on notice of their claims in order to prepare for trial.

{¶26} The Helwigs also contend that the trial court erred in denying their oral motion to amend their counterclaim on the first day of the trial. Civ.R. 15(A) provides

that a party may amend its pleading by leave of court and that such leave "shall be freely given when justice so requires." *Turner v. Cent. Loc. School Dist.* (1999), 85 Ohio St.3d 95, 99. If there is a showing of bad faith, undue delay or undue prejudice to the opposing party, the amendment should not be allowed. Id. The trial court needs to consider whether there is actual prejudice to the opposing party because of the delay. *Schweizer v. Riverside Methodist Hosp.* (1996), 108 Ohio App.3d 539. Absent an abuse of discretion, a trial court's decision whether to grant or deny a motion to amend a pleading will not be reversed on appeal. *State ex rel. Askew v. Goldhart* (1996), 75 Ohio St.3d 608, 610. As stated above, an abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore*, supra.

{¶27} Although the Helwigs claim that Homewood was aware that there were other problems with the construction of the house because Bryan testified to them in his deposition and affidavit, and that the parties understood the extent of the problems from discovery, the trial court did not abuse its discretion when the Helwigs did not move to amend their counterclaim until the first day of trial. In *American Contractors Indemn. Co. v. Nicole Gas Prod. Ltd.*, 10th Dist. No. 07AP-1039, 2008-Ohio-5056, this court found that the trial court did not abuse its discretion in denying leave to amend an answer and assert a counterclaim less then two weeks prior to trial. The Helwigs' first cross-assignment of error is not well-taken.

{¶28} By their second cross-assignment of error, the Helwigs contend that the trial court erred by dismissing the Helwigs' counterclaims against Trinity. Although there was much confusion as to whether Trinity was involved in this case, as there were Trinity employees working for Ambassador during the building of this home, the

contracts involved are with Homewood and Ambassador, not Trinity. Thus, the trial court properly dismissed Trinity as a party, and the second cross-assignment of error is not well-taken.

{¶29} By their third cross-assignment of error, the Helwigs contend that the trial court erred by dismissing their abuse of process claims. The elements of an abuse of process claim are: "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 298. In *Robb v. Chagrin Lagoons Yacht Club, Inc.* (1996), 75 Ohio St.3d 264, 271, the Supreme Court of Ohio stated that abuse of process is an action initiated for improper purposes and the " '[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.' " Id., quoting Prosser & Keeton on Torts (5 Ed.1984) 898, Section 121. "Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order." *Robb*, supra, at 271.

{¶30} In this case, the Helwigs argue that although Homewood filed the legal proceeding regarding the deed restriction violation properly because there was indeed a violation, Homewood had an ulterior motive which was to prevent the Helwigs from using their free speech rights and criticizing Homewood's building process. In the initial letter from Homewood's attorney informing the Helwigs to remove the sign from their yard, it stated: "My clients * * * will not allow their business relations to be improperly

interfered with through the posting of signs or other violations of the Deed Restrictions." (Joint Exhibit 1.) Once the sign was removed from the yard, Homewood sought a preliminary injunction, permanent injunction, and claimed interference with business relations and defamation. The CEO and president of Homewood testified that the deed restriction is used to "control the signage that might be put up in a community that would reflect negatively on the developer." (Tr. 107.)

{¶31} The trial court found that Homewood had a legitimate purpose in filing the deed restriction action in preventing any more signs and more violations of the deed restrictions. (Tr. 686.) The trial court also found a legitimate purpose in the defamation claim in that Homewood was seeking damages, not necessarily attempting to silence the Helwigs. (Tr. 687-88.) While the Helwigs assert that Homewood may have had more than one purpose in filing the actions, there was no evidence that the action was perverted to attempt to accomplish an ulterior purpose for which it was not designed. Thus, we agree with the trial court's finding, and the third cross-assignment of error is not well-taken.

{¶32} By the last cross-assignment of error, the Helwigs contend that the trial court erred by failing to award sanctions pursuant to R.C. 2323.51 for Homewood's frivolous conduct by amending the complaint to add a claim for defamation which was without factual support. R.C. 2323.51(A)(2)(a) defines frivolous conduct as:

> Conduct of an inmate or other party to a civil action, * * * or other party's counsel of record that satisfies any of the following:
>
> i) It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation.

> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
>
> (iv) The conduct consists of denials or factual contentions that are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.

{¶33} The Helwigs argue that since the defamation claim was ultimately dismissed, they should have been awarded attorney fees because Homewood did not have a good-faith basis to pursue its defamation claim. While there was no evidence that Amanda made any statements to existing or potential customers, Bryan testified that he did talk to several people explaining that he believed the builders were dishonest and lacked integrity. (Tr. 460-61; 472.) While there was not enough evidence to survive a motion for summary judgment this does not necessarily translate into a frivolous claim as Homewood had a basis to file the claim. The Helwigs' fourth cross-assignment of error is not well-taken.

{¶34} For the foregoing reasons, Homewood's motion to strike cross-appeal is moot. Homewood's first assignment of error is sustained, its second, third, and fourth assignments of error are overruled, and the Helwigs' four cross-assignments of error are overruled. The judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this opinion.

Motion to strike cross-appeal moot;
judgment reversed and cause remanded.

BRYANT, J., concurs.
SADLER, J., concurs separately.

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

SADLER, J., concurring separately.

{¶1} I concur in the disposition of the parties' assignments of error. However, I write separately because I concur in sustaining Homewood's first assignment of error for reasons different than those expressed in the lead opinion.

{¶2} I agree that the Helwigs cannot twice recover the same compensatory damages caused by the defects in the construction of their home; they may seek recovery for these damages through their claim for breach of the warranties and other promises contained in the home purchase contract. *Kishmarton v. William Bailey Constr.*, 93 Ohio St.3d 226, 228-29, 2001-Ohio-1334. I also agree that punitive damages are never recoverable on a claim for breach of contract. *Ketcham v. Miller* (1922), 104 Ohio St. 372, paragraph two of the syllabus. However, I disagree that Homewood was entitled to a directed verdict on the Helwigs's fraudulent misrepresentation claim because "Homewood did not breach a duty separate from the original contract * * *." (Ante, at ¶15.)

{¶3} Homewood's March 14, 2005 letter was a contract insofar as it contained mutual promises respecting arbitration of disputes about Tyvek installation. It also, superfluously, contained references to the manufacturer and builder warranties already set forth in paragraph nine of the home purchase contract. (Plaintiff's Exhibit "I".) However, as noted in paragraph 14, ante, the letter also contained affirmative statements that the Tyvek and windows had been installed properly. These false statements of then-

present fact are substantively distinct from both the exchange of promises concerning damages payable at the conclusion of any arbitration of Tyvek-related disputes, and the exchange of promises concerning construction services contained in the home purchase contract.

{¶4} The vendor of real estate has a duty to refrain from engaging in fraud and deceit, and may not make any "representations or concealment of a matter of fact which relates to the present or past, and which is material to the transaction; * * * falsely, with knowledge of its falsity * * * with the intent of misleading another into relying upon it * * *." *Klott v. Assoc. Real Estate* (1974), 41 Ohio App.2d 118, 120-21. Upon evidence of such facts, and proof that the other relied upon the representations and sustained resulting injury, the vendor will be liable for fraud. Id.

{¶5} If a plaintiff has a claim for fraudulent misrepresentation that is connected to, but factually independent of, his contract claim, and proves all elements of the tort, including compensatory damages distinct from those caused by the breach of contract, then he may seek punitive damages, and receive them upon the requisite proof. *Textron Financial Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 151; *R & H Trucking, Inc. v. Occidental Fire & Cas. Co. of N. Carolina* (1981), 2 Ohio App.3d 269, paragraph two of the syllabus; *Sweet v. Grange Mut. Cas. Co.* (1975), 50 Ohio App.2d 401; *Stockdale v. Baba*, 153 Ohio App.3d 712, 2003-Ohio-4366; *Goldfarb v. The Robb Report, Inc.* (1995), 101 Ohio App.3d 134, 140.

{¶6} The Helwigs adduced sufficient evidence that Homewood made a false representation about the already-completed installation of the Tyvek and windows in their home, and did so with the intention of inducing the Helwigs to rely on these representations. They also proved that they in fact relied on the representations. Mr.

Helwig testified that he and his wife would not have closed on the home if Homewood had not made representations that the Tyvek and windows had been installed properly, and he communicated this to Homewood when he stated his concerns about improper installation. (Tr. 289.) After being informed that the Helwigs would not go forward with the transaction absent assurances of proper installation, Homewood provided the Helwigs with the March 4, 2005 letter. They closed seven days later.

{¶7} The reason that I ultimately agree that the trial court should have directed a verdict in Homewood's favor on the fraud claim is that, as Homewood argued in its brief, there is no evidence that the Helwigs suffered damages proximately caused by the fraud that were distinct from their damages caused by Homewood's breach of contract. In order to survive the motion for directed verdict, they were required to put on evidence of damages attributable to Homewood's fraud that were distinct from those attributable to its breach of contract. *R & H Trucking*, supra. "[T]he measure of damages, where a sale is procured by a vendor's fraudulent representation, 'is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented to be.' " *Molnar v. Berlswell* (1930), 122 Ohio St. 348, 352. (Citation omitted.) The Helwigs do not point to, and I am unable to find, any such evidence in the record of this case.

{¶8} In their breach of contract claim, the Helwigs sought and received compensatory damages relating to the cost to repair the substandard Tyvek and window installation in their home. But they cannot recover these damages again, under their fraud claim. *Kishmarton*, supra. Because the record lacks evidence of damage proximately caused by Homewood's fraudulent misrepresentations that is distinct from that caused by its breach of contract, the Helwigs did not adduce sufficient evidence on

the last element of their fraud claim. It is for this reason that I concur in sustaining Homewood's first assignment of error and in reversing the judgment.

{¶9} In all other respects, I concur with the analysis set forth in the lead opinion.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Homewood Homes, Inc.,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	No. 08AP-406
	:	(C.P.C. No. 06CVH-04-5523)
v.	:	(REGULAR CALENDAR)
Amanda Helwig et al.,	:	
Defendants-Appellees/ Cross-Appellants.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on April 9, 2009, appellant's motion to strike cross-appeal is moot, appellant's first assignment of error is sustained, its second, third and fourth assignments of error are overruled, and appellees' four cross-assignments of error are overruled. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs shall be assessed against appellees.

BOWMAN, BRYANT & SADLER, JJ.

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

SADLER, J., concurs separately.