MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lynda Wilcox and John Wilcox,
Appellant-Defendants,

v.

Shannon Breeding and Michael Evans,
Appellee-Plaintiffs.

May 27, 2022

Court of Appeals Case No. 21A-CT-2454

Appeal from the Floyd Superior Court

The Honorable Marsha O. Howser, Judge

Trial Court Cause No. 22D01-1905-CT-801

Mathias, Judge.

[1] Lynda Wilcox appeals the trial court's entry of summary judgment for Shannon Breeding and Michael Evans.[1] Wilcox raises two issues for our review, but we need only consider the following dispositive issue: whether the trial court erred when it *sua sponte* entered partial summary judgment for Breeding and Evans.

[2] We reverse and remand for further proceedings.

Facts and Procedural History

[3] In 2016, Wilcox and her husband, John, owned certain real property in New Albany ("the property"). The Wilcoxes entered into a purchase agreement with Brandon and Angela Smith for the Smiths to buy the property, which agreement was contingent on the Smiths having the property inspected. The Smiths then had the property inspected, and, after receiving the inspection report, the Smiths withdrew their offer to purchase the property. The Smiths' inspection report is referred to by the parties as the Elite Report, but it is not in the record on appeal.

[4] About a month after the Smiths withdrew their offer to purchase the property, the Wilcoxes entered into a purchase agreement for the property with Breeding and Evans. In their Sellers' Residential Real Estate Sales Disclosure Form to Breeding and Evans, the Wilcoxes stated that there were "no" issues known to them with respect to "any foundation problems with the structure," "any structural

[1] Wilcox's husband, John, is also a named defendant, but he died during these proceedings and no estate has been opened on his behalf. We proceed in this appeal under Wilcox's representation that, "[t]o the extent [John or his estate] is a party to this appeal, he is represented by [Wilcox's counsel] and his interests align directly with Wilcox . . . ." Appellant's Br. at 6 n.2.

problems," any "moisture and/or water problems in the basement," and "any damage due to . . . rodents."[2] Appellant's App. Vol. 2, p. 43. The Wilcoxes also represented that there were "no" issues with respect to whether "any substantial additions or alterations [had] been made without a required building permit[.]" *Id.* The Wilcoxes further provided Breeding and Evans with a copy of the Elite Report. Breeding and Evans waived their right to have the property inspected, and, in September, the parties closed on the sale of the property.

[5] Breeding and Evans would later execute a joint affidavit in which they stated as follows:

> 5. After closing, we discovered several issues.
>
> 6. We began remodeling the basement and discovered evidence of previous construction.
>
> 7. More specifically, a header had been cut in order to run duct work.
>
> 8. Also, a load bearing wall was cut to install plumbing.
>
> 9. Because of the header being cut, there was instability in the structure which caused the joist beams to split.

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[2] Based on the date of their signatures, the Wilcoxes appear to have submitted the same Sellers' Disclosure Form to Breeding and Evans that they had submitted to the Smiths. *See* Appellant's App. Vol. 2, pp. 43, 107. However, it does not appear that the Wilcoxes amended their Disclosure Form in any material way when they submitted it to Breeding and Evans.

> 10. We later pulled up the floor in the kitchen where we found evidence of water damage.
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> 11. Mold had also resulted.
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> 12. This damage was in the same location as the header in the basement.
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> 13. There were also cracks in the floors which were not readily visible because of carefully placed items.
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> 14. There exist several holes in the exterior wood siding which allow squirrels to get into the wall cavities. These holes have existed since prior to closing.

Id. at 75-76.

[6] In May 2019, Breeding and Evans filed their complaint for misrepresentation against the Wilcoxes. Specifically, Breeding and Evans alleged that the Wilcoxes had knowingly executed a false sales disclosure form with respect to the "foundation problems," "structural problems," "substantial alterations . . . without a required permit," "moisture problems in the basement," and "squirrels living in the walls." *Id.* at 27. In January 2021, John died. Breeding and Evans had continued their action against Lynda (hereinafter, "Wilcox").

[7] Thereafter, Wilcox moved for summary judgment on Breeding and Evans' complaint. In support of her motion for summary judgment, Wilcox designated her own affidavit, in which she stated, in relevant part, as follows:

2. . . . John and I purchased the [property] in 1993 . . . .

3. At the time we purchased the [property], I was advised that the [h]ouse had been built in approximately 1976. I believe that we were the fourth or fifth owners.

* * *

17. [Breeding and Evans' c]omplaint alleges that John and I signed a Residential Sales Disclosure that was incorrect in the following respects:

a. there were foundation problems with the structure;

b. there were structural problems with the home;

c. there had been substantial alterations made without a required permit;

d. there were moisture problems in the basement; and

e. there were squirrels living in the walls.

18. At the time I signed the Residential Sales Disclosure, through the time of closing, I had no knowledge of any of these alleged conditions.

Id. at 57, 59-60. In their response, Breeding and Evans designated their own joint affidavit and argued only that a genuine issue of material fact precluded the entry of summary judgment for Wilcox.[3]

[8] Following a hearing, the trial court entered its order on Wilcox's motion for summary judgment. In that order, the court first adopted a prior order that struck certain portions of Wilcox's affidavit. The court also stated, citing paragraph 18 of her affidavit, that Wilcox had "admitted that each of [the] representations" in the Sales Disclosure Form "was incorrect."[4] *Id.* at 18. The court further stated that "the mere existence of the Elite Report leads to the reasonable inference that Wilcox had actual knowledge of any issue contained therein." *Id.* at 20 (emphases removed).

[9] Based on its review of the designated evidence, the court concluded that "there truly is an issue of material fact which disqualifies this action from resolution through summary judgment," and it denied Wilcox's motion for summary judgment. *Id.* at 19. However, the court then further concluded, based in part on its reading of paragraph 18 of Wilcox's affidavit, that the designated evidence showed as a matter of law that Wilcox "had actual knowledge of the defects and did not disclose the same." *Id.* at 20. The court then *sua sponte* entered summary judgment

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[3] Breeding and Evans further designated a post from Wilcox's Facebook page in which Wilcox asked for a structural engineer in New Albany shortly before Wilcox put the property on the market. However, Wilcox responded to that designation with a supplemental affidavit in which she stated that she had asked that question on behalf of a third party.

[4] The trial court's mistake in reading paragraph 18 of Wilcox's affidavit is discussed in greater detail below.

for Breeding and Evans on the question of Wilcox's liability, and the court set a hearing on damages.[5] The court then directed its order on summary judgment to be entered as a final judgment, and this appeal ensued.

Standard of Review

[10] Wilcox appeals the trial court's entry of summary judgment for Breeding and Evans. Notably, Wilcox does *not* appeal the trial court's denial of her motion for summary judgment.

[11] Our standard of review in summary judgment appeals is well established. As our Supreme Court has made clear, "[w]e review summary judgment *de novo*, applying the same standard as the trial court." *G&G Oil Co. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 86 (Ind. 2021). "Indiana's distinctive summary judgment standard imposes a heavy factual burden on the movant." *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016). We draw all reasonable inferences in favor of the non-moving party and affirm summary judgment only "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting Ind. Trial Rule 56(C)). And we "give careful scrutiny to assure that the losing party is not

[5] The trial court's *sua sponte* entry of summary judgment was permitted under Indiana Trial Rule 56(B), which states, "[w]hen any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party."

improperly prevented from having its day in court." *Id.* (quoting *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 203 (Ind. 2003)).

Discussion and Decision

[12] The dispositive issue in this appeal is whether the trial court erred when it entered summary judgment for Breeding and Evans.[6] In entering summary judgment, the trial court relied in significant part on its reading of paragraph 18 of Wilcox's affidavit. In context, that paragraph stated as follows:

> 17. [Breeding and Evans' c]omplaint alleges that John and I signed a Residential Sales Disclosure that was incorrect in the following respects:
>
> a. there were foundation problems with the structure;
>
> b. there were structural problems with the home;
>
> c. there had been substantial alterations made without a required permit;
>
> d. there were moisture problems in the basement; and
>
> e. there were squirrels living in the walls.

[6] The parties spend significant time in their briefs disputing the merits of the trial court's decision to strike certain portions of Wilcox's affidavit. We need not decide any issues with respect to the court's decision to strike those portions of the affidavit to resolve this appeal, and for purposes of deciding this appeal we do not consider any portions of the affidavit that were stricken by the court.

> 18. At the time I signed the Residential Sales Disclosure, through the time of closing, I had no knowledge of any of these alleged conditions.

Appellant's App. Vol. 2, pp. 59-60. The trial court read paragraph 18 to be an admission by Wilcox to the allegations in Breeding and Evans' complaint.

[13] The trial court misread paragraph 18 of Wilcox's affidavit.[7] Contrary to the trial court's reading, in that paragraph Wilcox disclaimed having had any knowledge of the alleged defects. Thus, the trial court erred when it read paragraph 18 to be an admission by Wilcox. The court likewise erred when it relied on its erroneous reading of that paragraph to enter summary judgment for Breeding and Evans.

[14] The parties' designated evidence demonstrates a genuine issue of material fact precluding the entry of summary judgment for either party on Breeding and Evans' complaint. On the one hand, Wilcox, in her affidavit, stated that she is the fourth or fifth owner of the property and that she had no knowledge of the alleged defects, which is consistent with her representations in the Sales Disclosure Form.

[15] On the other hand, the designated evidence shows that Wilcox had a prior agreement for the sale of the property with the Smiths, that the Smiths had the property inspected, and that the results of that inspection were significant enough to cause the Smiths to withdraw their offer to purchase the property. The

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[7] The court's erroneous reading of paragraph 18 seems to be based on Breeding and Evans' own erroneous reading of that paragraph in their summary judgment brief to the trial court, which error they repeat in their brief to our Court. *See* Appellees' Br. at 6.

designated evidence also makes clear that Wilcox was aware of the basis for the Smiths' concerns and the contents of the Elite Report. Then, shortly after taking possession of the property, Breeding and Evans discovered substantial defects with the structure. Part of those defects included cracks that had been made "not readily visible because of carefully placed items." *Id.* at 76.

[16] A reasonable inference from that evidence could support a fact-finder's finding that Wilcox had actual knowledge of the alleged defects and misrepresented her knowledge to Breeding and Evans in the Sales Disclosure Form. *See, e.g.*, *Hays v. Wise*, 19 N.E.3d 358, 362 (Ind. Ct. App. 2014) ("actual knowledge can be inferred or may be proven by circumstantial evidence . . . .") (quotation marks omitted). Accordingly, the trial court erred when it entered summary judgment for Breeding and Evans, and we reverse and remand for further proceedings.[8]

[17] Reversed and remanded for further proceedings.

Brown, J., and Molter, J., concur.

[8] Both sides have asked for appellate attorneys' fees. We decline their requests. Further, insofar as Wilcox asserts that she is entitled to her attorneys' fees should she ultimately prevail at a trial on the merits, that question is not ripe for our review, and we decline to consider it.