STATE OF IDAHO)
County of KOOTENAI)ss
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AT 8:15 O'Clock A. M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

CATHERINE BILYARD AS TRUSTEE OF THE BILYARD FAMILY TRUST, *Plaintiff,* vs. **PAUL T. ANDREOLA AND KARLENE R. ANDREOLA, husband and wife, individually, and as Co-Trusttes of the 2005 Paul T. and Karlene R. Andreola Revocable Trust,** *Defendants.*	Case No. **CV28-20-7096** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on a Motion for Summary Judgment brought by defendants Paul T. Andreola and Karlene R. Andreola, individually and as Co-Trustees of the 2005 Paul T. and Karlene R. Andreola Revocable Trust ("Andreolas Trust") (collectively "Andreolas"), filed on January 5, 2022, against plaintiff Catherine Bilyard as Trustee of the Bilyard Family Trust ("Ms. Bilyard"). Andreolas' motion requests this Court grant its Motion for Summary Judgment because the alleged misrepresentations were not made by the Andreolas, but rather by third-party defendant Matt Afana of Polar Construction, and, if the representations were made, they are true. Mem. in Supp. of Defs.' Mot. for Summ. J. 2.

On November 10, 2020, Ms. Bilyard filed a Complaint against Andreolas. Ms. Bilyard is suing for injuries (damages) to her property from mold growth, both caused by the alleged absence of curtain drains or a properly sealed "conditioned crawl space". Complaint ¶¶ 4, 41, 48. On January 6, 2021, defendant Andreolas filed their Answer to

Complaint. Neither party requested a trial by jury. On March 10, 2021, the Court granted leave to file a third-party complaint, and on March 11, 2021, Andreolas filed a Defendants' Third Party Complaint ("Third Party Complaint") against Polar Company, LLC d/b/a Polar Construction ("Polar Construction") and Matthew J. Afana, individually ("Mr. Afana"). Andreolas are seeking indemnification from Polar Construction and their employee and project manager, Mr. Afana, for: "any judgment and damages awarded against Third Party Plaintiffs on Plaintiff Catherine Bilyards's claims." Defs.' 3d Party Complaint ¶¶ 15, Prayer for Relief at 5. Mr. Afana and Polar Construction filed their joint Third Party Defendants' Answer to Third Party Plaintiffs' Complaint, Affirmative Defenses, and Demand for Jury Trial on May 19, 2021. On August 20, 2021, the Court reset the court trial to a jury trial.

Ms. Bilyard is a resident of Kootenai County, Idaho. Complaint ¶ 1. Andreolas are residents of Kootenai County. Answer ¶ 2. The 2005 Paul T. and Karlene Andreola Revocable Trust is registered in the state of Nevada. *Id.* Polar Construction is an Idaho limited liability company. Third Party Complaint ¶ 2; Answer to Third Party Complaint ¶ 1. Mr. Afana is a resident of Kootenai County, Idaho. Third Party Complaint ¶ 3; Answer to Third Party Complaint ¶ 1. On May 3, 2018, Andreolas Trust purchased real property located at 4778 E. Hayden Lake Rd., Hayden, Idaho 83835 (the "Subject Property"). Third Party Complaint ¶ 6. "The Trust decided to build a home on the Subject Property, and sell the Subject Property as a lot/home package." *Id.* Andreolas, through the Trust, contracted with Polar Construction to build the home on the Subject Property. *Id.* ¶ 7; Answer ¶ 9. On February 27, 2019, Andreolas entered into a Purchase and Sale Agreement ("PSA") with Ms. Bilyard for the purchase of the newly constructed home located on the Subject Property for a purchase price of $552,500. Complaint, ¶ 4, Ex. A. Ms. Bilyard alleges that, on February 27, 2019,

Andreolas made "an unusual request" when making its counteroffer prior to closing, whereby they "required that [Bilyards] complete their physical inspection contingency within just five (5) days". *Id.* ¶ 6. Bilyards signed the PSA the following day. *Id.* ¶ 7. On March 1, 2019, "Bilyards did the primary inspection walkthrough as required under the PSA". *Id.* ¶ 8. Mr. Afana performed the walkthrough of the property with Ms. Bilyard and her now-deceased husband. Complaint ¶¶ 9, 15; Afana Decl. ¶¶ 2-3. Ms. Bilyard alleges that Stefan Smith, Andreola's listing agent, was present at the walkthrough, to which Andreolas claim to have no knowledge. *Id.* ¶ 9; Answer ¶ 9. Ms. Bilyard alleges that she believed Polar Construction was the owner of the property, rather than Andreolas. Complaint ¶ 11. She also alleges that Stefan Smith believed the same. *Id.* Ms. Bilyard alleges the following:

> During the primary inspection walkthrough, Mr. Afana expressly represented to the Bilyards that the home had curtain drains. Installation of curtain drains is necessary at the Subject Property, and was an important feature to the Bilyards, as the home there sits at the bottom of a steep hillside that had been cleared of vegetation and was, at the time of the primary inspection walkthrough, covered in snow.
>
> Because of the snow on the hillside and the positioning of the house relative to the hillside, the Bilyards asked Mr. Afana about whether the new construction home had curtain drains to deal with the eventual snow melt from the hillside and Mr. Afana expressly stated that curtain drains were installed in the backyard and along the sides of the new construction home at the Subject Property.
>
> Had the Bilyards known prior to closing that the home did not have curtain drains, given the home's positioning relative to the hillside, the Bilyards would not have gone through with the purchase of the Subject Property.
>
> During the primary inspection walkthrough, Mr. Afana also expressly represented to the Bilyards that the home had a "conditioned crawl space." The listing information for the Subject Property also indicated that the new construction home at the Subject Property featured a "conditioned crawl space" (*see* **Exhibit B**). Mr. Afana represented to the Bilyards that the new construction home had a "conditioned crawl space."

However, the Bilyards discovered after moving in that neither of these representations were true.

The "conditioned crawl space" had not been installed correctly. The liner, which seals the crawl space from outside moisture, an essential part of any conditioned crawl space, was not sealed in multiple spots throughout the crawl space.

After the primary inspection walkthrough on March 1, 2019, but prior to closing on March 28, 2019, snowmelt from the hillside behind the house ran down the hill and flooded the crawl space. Due to the crawl space not being properly sealed in multiple spots, water from the snowmelt was able to get inside the crawl space, allowing moisture to get in, causing eventual mold growth throughout the crawl space.

The flooding of the crawl space was able to occur because, as the Bilyards would discover after closing, the new construction home did not have any curtain drains at all, despite the home being situated at the bottom of a steep hillside. In fact, in a conversation on April 21, 2019, after the Bilyards closed on the new construction home, another representative of Polar Construction, Mike Afana (unclear relation to Mr. Afana), confirmed to the Bilyards that curtain drains were never installed at the Subject Property, although a dry creek bed was installed by Polar Construction to act as a drain.

The Bilyards were never informed prior to closing that the crawl space had flooded, despite Mr. Afana being aware of the flooding and the extent of the flooding. The night before closing, the Bilyards received a phone call from Mr. Afana stating there was a "little problem" at the new construction home but that he would fix it. At that time, Mr. Afana did not disclose to the Bilyards that the Subject Property did not have curtain drains, nor did he disclose that water had gotten inside the "conditioned crawl space," and downplayed the "little problem" which in reality was an [sic] recurring and ongoing problem which had been known to Mr. Afana and the Andreolas. Believing Mr. Afana would fix the "little problem," the Bilyards closed on the new construction home the next day.

After closing, and upon being told about the flooding, Mr. Afana suggested installing a sump pump.

Unfortunately, the sump pump did not pump all the water in the crawl space out as the pump was installed at a high point in the crawl space. To make matters worse, Polar Construction had not graded the crawl space and the uneven grading meant water pooled in low spots and did not get pumped out, contributing to the growth of mold. Further, Mr. Afana installed the sump pump to discharge into the sewer, which is a violation of the Hayden Lake Sewer District's Ordinances.

Further, when the Bilyards arrived at the Subject Property after closing, they discovered that a patio slab had cracked because water from the snowmelt had gotten under the patio slab and frozen, which then heaved the slab upward

and cracked it. Mr. Afana showed the Bilyards the cracked patio slab and stated that water from the snowmelt had gotten under the slab.

Complaint ¶¶ 21-32 (paragraph numbers omitted). Ms. Bilyard is suing Andreolas for fraud by misrepresentation, fraud by omission/non-disclosure, violation of the Idaho Consumer Protection Act, and Breach of Implied Covenant of Good Faith and Fair Dealing.[1] Complaint 7-10. All of these claims against Andreolas depend on Mr. Afana being Andreolas' agent. *See id.* Andreolas assert that they are not responsible for any statements made by Mr. Afana and that if such statements were made, they were true, and Andreolas are seeking indemnification from Polar Construction if they are found liable. Mem. in Supp. of Mot. for Summ. J. 5-6, Third Party Complaint ¶ 15.

On January 5, 2022, Andreolas filed their Defendant's/Third Party Plaintiff's Motion for Summary Judgment and Memorandum in Support of Defendant's Motion for Summary Judgment and declarations of David Stewart and Matt Afana in support of their motion. On January 19, 2022, Ms. Bilyard filed her Plaintiff's Memorandum in Opposition to Defendants Andreolas' Motion for Summary Judgment ("Memorandum in Opposition to Motion for Summary Judgment") and declarations of Donna Schwenk, David Pearson, Catherine Bilyard, and Brian T. Daniels in support of her motion. On January 26, 2022, Andreolas filed a Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment ("Reply in Supp. of Mot. for Summ. J.").

A hearing on Andreolas' Motion for Summary Judgment was held on February 2, 2022. At the hearing, Andreolas objected to eighteen different paragraphs of the Declaration of Brian T. Daniels, which the Court overruled. The Court indicated it would likely be denying Andreolas' motion for summary judgment, but took that motion under

[1] In the February 1, 2021, hearing, the Court granted Ms. Bilyard's motion to file an amended complaint, permitting her to add a claim of Breach of Implied Warranty of Habitability against Mr. Afana and Polar Construction.

advisement and indicated it would detail its decision and reasoning in a written opinion. This opinion only addresses the motion for summary judgment.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to that Rule, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
>
> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

Id. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving

party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478). "A material fact is one upon which the outcome of the case may be different." *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998). "For a factual issue to be material on a motion for summary judgment, it must be placed in dispute by the pleadings." *Country Cove Development, Inc. v. May*, 143 Idaho 595, 603, 150 P.3d 288, 296 (2006) (citing *Frazier v. J.R. Simplot Co.,* 136 Idaho 100, 105, 29 P.3d 936, 941 (2001) (citation omitted)).

Once the moving party meets their burden of establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16

> P.3d 915, 919 (2000). When a jury is to be the finder of fact,[2] summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

III. ANALYSIS

Andreolas move for summary judgment because (1) the alleged misrepresentations "were not made by the Andreolas at all", as the Andreolas did not speak with the Bilyards until after closing; and (2) if any of the alleged representations were made, they were in fact true. Mem. in Supp. of Mot. for Summ. J. 2. Although Andreolas argue in their reply brief that agency is not at issue here, it appears to be crucial to this case since they argue they should not be held liable for the statements Mr. Afana made in Andreolas' absence. The Court will therefore address the issue of agency in addition to Andreolas' arguments on summary judgment.

A. There are genuine issues of material fact on Bilyards' claims of fraud by misrepresentation and fraud by omission/non-disclosure, as well as to agency.

1. Ms. Bilyard's Fraud by misrepresentation claim.

Andreolas' primary argument is that the statements were true and thus cannot as a matter of law support a claim of fraud by misrepresentation. Andreolas argue that there was likely a misunderstanding between the parties because both the curtain drains and conditioned crawl space were present on the Subject Property when the

[2] Because neither of the original parties to this action requested a jury, a bench trial was originally scheduled. However, after Mr. Afana and Polar Construction were added as third-party defendants (and will be subsequently added as co-defendants pending Ms. Bilyard's filing of an amended complaint), have requested a jury trial, the bench trial has been modified to a jury trial. Consequently, although Ms. Bilyard and Andreoas are the only parties to this motion, the standard of review for jury trials will be applied here. As the non-moving party, Ms. Bilyard is entitled to the benefit of reasonable inferences drawn from the evidentiary facts. *Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Ct. App. 1994).

Bilyards purchased the home in question, thus making Ms. Bilyard's fraud claim fail because the element of falsity is not met. Mem. in Supp. of Mot. for Summ. J. 5-6.

The Idaho Supreme Court, in *G & M Farms,* stated, "traditional I.R.C.P. 56(c) summary judgment principles and standards govern the granting of summary judgment on the issues of fraud and intentional misrepresentation." 119 Idaho 514, 518, 808 P.2d 851, 855 (1991). Thus, to prevail, a party need only show that they have presented sufficient evidence to create a material issue of fact as to each element. *Country Cove Development, Inc. v. May,* 143 Idaho 595, 600, 150 P.3d 288, 293 (2006).

> Nine elements must be proved to sustain an action for fraud: (1) a statement of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent to induce reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) the hearer's right to rely; and (9) consequent and proximate injury. *Lettunich v. Key Bank Nat'l Ass'n,* 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005). The party alleging fraud must plead with particularity the factual circumstances constituting fraud, I.R.C.P. 9(b), and ultimately each of the elements must be proven by clear and convincing evidence. *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 518, 808 P.2d 851, 855 (1991).

County Cove Development, Inc., 143 Idaho 595, 600, 150 P.3d 288, 293 (2006). However, the burden of clear and convincing evidence upon a party alleging fraud does not apply at summary judgment; rather, a party must only meet the traditional summary judgment principles and standards. *G & M Farms, v. Funk Irr. Co.,* 119 Idaho 514, 518, 808 P.2d 851, 855 (1991). The Idaho Supreme Court has held that:

> Fraud may be predicated upon an equivocal, evasive or misleading answer calculated to convey a false impression even though it may be literally true as far as it goes. A partial and fragmentary disclosure accompanied by willful concealment of material and qualifying facts is not a true statement and is often as much a fraud as is an actual misrepresentation.

Morrow v. Wm. Berklund Forest Products Co., 81 Idaho 428, 437-38, 346 P.2d 623, 628-29 (1959) (quoting 55 Am. Jur., *Vendor and Purchaser,* § 88, pp. 563-64). This is equally as relevant to the issue of fraud by omission, discussed below.

Ms. Bilyard's claim of fraud by misrepresentation pertains to two separate statements, one involving curtain drains and one involving a conditioned crawl space. The Court will address each statement in turn.

a. Curtain drains

Ms. Bilyard's first claim of fraud is based on the alleged statements made by Mr. Afana regarding the existence of curtain drains. Complaint ¶ 21. Specifically, she alleges the following:

> The Andreolas granted Mr. Afana access to the Subject Property for the purpose of showing the Subject Property to the Bilyards and answering questions. To that end, Mr. Afana was present during the inspection walkthrough and was presented to the Bilyards as an authority figure regarding the Subject Property.
>
> During the inspection, Mr. Afana told the Bilyards that he would be with them for a year to a year and a half to address any issues with the Subject Property. The Bilyards believed Mr. Afana to be the seller. Also, during the inspection walkthrough, Mr. Afana expressly represented to the Bilyards that the home was equipped with curtain drains. At that time, the sloped backyard was covered in snow. Due to the apparent snow cover, Gordon Bilyard asked Mr. Afana if the house had curtain drains to deal with the eventual snow melt. Mr. Afana stated that curtain drains would protect the house by diverting water away from it.

Pls.' Mem. in Opp'n to Mot. for Summ. J. ¶¶ 5-6.

Ms. Bilyard and Andreolas both retained experts to determine whether curtain drains were in fact installed, and both offer differing definitions of what constitutes a curtain drain. Andreolas and their construction expert, Mr. David Stewart, assert that:

> While Bilyards allege curtain drains do not exist/operate, that is likely a result of Bilyards' decision to landscape **over** the curtain drains with a brick walkway, fountain/pond, and retaining walls. While curtain drains are present, Bilyards' landscaping efforts likely damaged, destroyed, or even removed the

> curtain drains. Nonetheless, . . . there were curtain drains present when Bilyards purchased the Property.

Mem. in Supp. of Mot. for Summ. J. 7.

Ms. Bilyards responds that "there are material issues of genuine fact regarding the Andreolas [sic] claims that they are not responsible for Defendant Afana [sic] conduct, and that Mr. Afana made no fraudulent representations or omissions." Pls.' Mem. in Opp'n to Summ. J. 2. She offers testimony from three witnesses.

First, she argues that Eric Christen, the landscape architect from New Leaf she hired to "perform landscaping services, which included the installation of curtain drains on the Subject Property to redirect water away from the house", found that "the lateral drain curtain Ms. Afana installed by Polar[ ] likely does not exist[; . . . although] a curtain drain system was necessary for the backyard due to his knowledge of the water migration issues in the Subject Property's area." *Id.* ¶ 15. Further, Mr. Christen "is of the opinion that the [sic] whatever drainage system was installed was 'woefully inadequate' to protect the Bilyards' home from water migration." *Id.*

Next, Ms. Bilyard's neighbor, David Pearson, who happens to be a retired construction worker in the roofing industry,[3] asserts that he:

> observed the construction workers installing a three-inch diameter corrugated flexible pipe in the drainage trench[, . . . which] he did not believe . . . to be adequate to drain water away for a project of that size, and in an area with such profound water runoff problems, the pipe must be a larger rigid pipe with holes along the side to actually catch and disperse water. The pipe he observed being installed did not appear to have holes or slits along the side. He did not see any other drainage piping installed in the Bilyard's backyard.

Id. ¶ 16 (citations omitted).

Finally, her retained construction expert, Brian Daniels, asserts the following:

[3] Andreolas have raised no objection to the qualifications of this witness under I.R.E. 702, so this Court will not address the matter at the summary judgment stage.

The purpose of a curtain drain is to divert water away from the residence and towards a proper water collection point. Curtain drains are deeply excavated trenches that break up a drainage slope and provide an area where water can be collected that would otherwise continue moving downhill on (or through) soils. The water is then diverted through drainage rock and special drainage-collecting pipes. These pipes are made of rigid PVC, and have perforations on the lower sides to allow water to enter the pipe, which then flows downhill within the pipe to a proper discharge location. These special PVC pipes for curtain drains are wrapped in filter cloth to keep dirt and debris from entering them and reducing their effectiveness in facilitating drainage. The drainage rock must also be covered in filter cloth to help keep fine soils from filling in the gravel. If soil fills in the spaces between the gravel/rocks, it greatly reduces the effectiveness of the curtain drain over time.

. . . .

In my professional opinion, and according to my experience, the drainage ditch which appears to have been installed along the westerly edge of the Property would not prevent water from draining down the hillside directly in line with the foundation. Additionally, the westerly edge of the drain appears to terminate at a point where water could still migrate towards the home.

Decl. of Brian Daniels ¶¶ 47-49 (paragraph numbers omitted). Ms. Bilyard further argues, based on Mr. Daniels' testimony:

> . . . [T]he drainage ditch which appears to have been installed along the westerly edge of the Property would not prevent water from draining down the hillside directly in line with the foundation. Additionally, the westerly edge drain appears to terminate at a point where water could still migrate towards the home. Mr. Daniels testified that he did not see filter cloth or the proper PVC pipe installed [as required].
>
> Instead, . . . the pipe shown is COREX corrugated pipe and is used for *diffusing* water, not *collecting and transporting* water. The pipe shown would fail to adequately collect and transport water away from Mrs. Bilyard's home. The proper pipe for a curtain drain according to industry standards is a four-inch schedule 30 or 40 PVC pipe with holes at the five and seven o'clock positions. That pipe would need to be surrounded by drainage rock, which would all then need to be wrapped in a drain filter fabric to prevent soil intruding into the rocks and pipe. The perforated pipe would terminate to an underground sealed pipe to be protected and would discharge by gravity or mechanical means to an approved drainage system. Daniels testified that none of that is shown in the pictures attached to Mr. Afana's Declaration.
>
> . . . [The pictures] do not show the exact depth of the alleged curtain drains, but they appear to be undersized and of inadequate depth. It therefore does not appear that they would be effective or meet industry standards.

Further, if the piping shown was actually installed, the drainage ditch would fail to adequately collect and transport water, and it could not be classified as a curtain drain.

Mr. Daniels testified that the photos . . . also do not show a *lateral* curtain drain. At the most, they show a slight ditch at the base of the hillside where it levels out, leading down to the side drainage ditch filled with rock. However, no picture shows perforated piping was installed in the lateral location, nor is it shown that the lateral ditch was backfilled with drainage rock. In fact, the photos which do show the westerly trench filled with drainage rock show the slight lateral ditch to no longer be present.

. . . The pictures attached to Mr. Stewart's Declaration do not support that a curtain drain was installed. Instead, they demonstrate that no proper curtain drain was constructed.

. . . .

Finally, Mr. Daniels testified that in his professional opinion, there was no true curtain drain installed to protect Plaintiff's residence from water migrating down towards her foundation from the hillside.

Pls.' Mem. in Opp'n to Summ. J. 26-28 (citations omitted) (emphasis in original).

Andreolas' retained civil engineer and construction management expert, David Stewart, responds:

In general terms, a curtain drain is a combination surface/subsurface drainage feature used to redirect water away from an effected area on a property. It is common for curtain drains to be installed using perforated pipe and/or drainage rock.

I have reviewed photographs taken during construction of the backyard and spoken with Matt Afana of Polar Construction. It appears that curtain drains were in fact installed to redirect water from the backyard along the south westerly (right side) side of the home. Particularly, curtain drains were trenched and installed along the south-westerly (right side) boundary of the property, and laterally at the base of the hillside. Photographs taken during construction show the exposed trenching (bedded with drainage rocks) and perforated pipe awaiting installation. Additionally, photographs taken during construction show drainage rock was also installed along the south-westerly boundary line for the curtain drains to feed into. Attached hereto as ***Exhibits A-1 through A-4*** shows construction of the curtain drains on the property. In my opinion, these photographs demonstrate all the necessary components for curtain drains.

> Thus, based on my education, training, and experience as a construction professional, the Bilyard Residence contains **does** contain [sic] curtain drains along the right/westerly edge of the Bilyard Residence.
>
> At the time Bilyards purchased the property, the backyard was graded and landscaped with grass, and other natural vegetation. The backyard did not have any hardscape pavers, ponds/fountains, or retaining walls at the time. With the exception of added grass, I understand the photographs attached hereto as ***Exhibit B*** demonstrates the general landscaping features at the time of the sale.
>
> After moving into the Bilyard Residence, the Bilyards have since landscaped the backyard by constructing a shed, installing hardscape pavers, rocks, a fountain/pond, and other features. Attached hereto as ***Exhibit C-1 through C-4*** are true and accurate photographs of the Bilyard's backyard that were taken during my site inspection.
>
> The hardscaped pathway, fountain/pond, and retaining walls were installed in generally the same location as the curtain drains shown in Exhibits A-1 through A-4. In my opinion, the Bilyards' improvements inhibited the efficiency or the curtain drains. It is likely (although not confirmed) that the curtain drains were damaged or destroyed when Bilyards landscaped the backyard.

Decl. of David Stewart in Supp. of Defs.' Mot. for Summ. J. ("Stewart Decl.") ¶¶ 12-17 (paragraph numbers omitted) (emphasis in original).

Ms. Bilyard's expert and Andreolas' expert have differing opinions of what constitutes a "curtain drain." Ms. Bilyard's expert states that curtain drains must have a specific kind of pipe in order to fulfil its purpose of draining water from the property. He also states it must be surrounded by drainage rock and wrapped in a drain filter fabric. He claims none of these requirements are present. He thus claims it simply cannot be classified as a curtain drain because it is so lacking from industry standards. In contrast, Andreolas' expert states that curtain drains can be installed using "perforated pipe and/or drainage rock." *Supra*. He claims there were both drainage rocks installed in the trenching and perforated pipe (or at least the photographs showed that the pipe was "awaiting installation"). He states that because these features are there, there are curtain drains on the Subject Property.

These experts clearly differ on the requirements to classify such a trench as a "curtain drain" and whether or not sufficient aspects to qualify the construction as a curtain drain were present here. Andreolas cannot expect to prevail on summary judgment by simply asserting that curtain drains were present if industry experts disagree on what constitutes a curtain drain. A reasonable jury could find that curtain drains were not present if they did not meet the industry standard. A reasonable jury could find that a claim of fraud by misrepresentation exists here. Accordingly, since the Andreolas' and Ms. Bilyard's experts disagree about whether curtain drains existed, a genuine issue of material fact exists.

b. Conditioned crawl space

Ms. Bilyard's second claim of fraud is based on the alleged statements made by Mr. Afana regarding the existence of a conditioned crawl space. Complaint ¶ 24. Ms. Bilyard's and Andreolas' retained experts have also determined whether a conditioned crawl space was in fact installed and both offer differing definitions of what they consider to be a conditioned crawl space. Andreolas argue that, although a conditioned crawl space was not required for the Subject Property,

> . . . Polar Construction elected to upgrade the Property with a conditioned crawlspace. That includes the presence of a sealed foundation, insulated walls, a polyurethane barrier on the crawlspace floor, and venting to allow the HVAC system to flow into the crawlspace – thus 'conditioning' the crawlspace. All of these features existed at the time Bilyards purchased the property, according to Afana (Polar Construction) and a construction expert. As such, any statement that the Property had a conditioned crawlspace, was true.
>
> For the foregoing reasons, Bilyards cannot show that *either* of these statements (even if made) are false.

Mem. in Supp. of Mot. for Summ. J. 7-8 (citations omitted). Specifically, Andreolas' expert asserts the following:

> In general terms, a conditioned crawl space is a sealed, unvented, or closed crawl space that does not vent through the foundation walls like

unconditioned crawlspaces that are more traditionally found in residential construction. Rather than traditional venting, a conditioned crawlspace vents to the inside of the home which allows conditioned (heated or cooled) air to flow through it in a sealed space, which then vents the used air to the outside of the warm air from inside the home down to the crawl space. This air is drier than the air outside the home, and therefore helps prevent mold and rot.

In addition to venting between the crawlspace and living quarters, a conditioned crawlspace is also lined and sealed with a durable polyethylene barrier on the ground of the crawl space and up the walls of the foundation. Lastly, insulation is applied to the foundation walls, providing protection from the weather outside. This stops cold or hot air from seeping in through the floors, saving money in heating and cooling costs.

The building plans for the Bilyard Residence called for the crawl space to not be conditioned. However, the contractor engaged to build the house, Polar Construction, elected to upgrade the crawlspace to a conditioned space. Accordingly, the foundation walls were insulated, and Polar Construction engaged Bills Heating to design and install an HVAC system to circulate warm air into the crawl space. At the time of my site inspection, there was a white polyurethane barrier lining the crawlspace. I understand that this white barrier was not installed at the time Bilyard purchased the home, and was installed by Bilyard sometime after closing. However, photographs from Bilyard's home inspection pre-dating the Bilyard's purchase show that a similar clear polyurethane barrier existed at the time Bilyards purchased the home from Andreola that lined the crawlspace. Thus, I am of the opinion that the crawlspace was lined with a polyurethane barrier at the time Bilyards purchased the home.

Thus, based on my education, training, and experience as a construction professional, the crawlspace in the Bilyard Residence contains all of the necessary components, and therefore qualifies as a conditioned crawlspace.

Stewart Decl. ¶¶ 8-11 (paragraph numbers omitted).

Andreolas add:

A 'conditioned crawlspace' is a term of art in the construction industry. It identifies the specifications by which a crawlspace is constructed, not a warranty to be free from water intrusion. Whether a crawlspace is conditioned (or not) has no effect on whether a crawlspace can become inundated with water – as Bilyards complain of. A conditioned crawlspace (vented to living quarters, insulated foundation walls, and HVAC connectivity) can still flood. There is no requirement that a crawlspace has to be waterproofed to be conditioned. A conditioned and unconditioned crawlspace can both flood alike. According to Bilyards', [sic] this lawsuit is not actually about a conditioned crawlspace, but rather water intrusion. That issue is entirely unrelated to stating that a crawlspace is 'conditioned' – as plead.

Mem. in Supp. of Mot. for Part. Summ. J. 8-9.

Ms. Bilyard responds that there was not a conditioned crawl space, and her retained expert defines a conditioned crawl space differently from Andreolas' expert. Her expert, Brian Daniels, asserts:

> The plans for the Plaintiff's residence called for a non-conditioned (or "'vented") crawl space. However, instead of following the plans approved for construction by the County, the Plaintiff's residence was built without vent structures. What resulted was a chaotic and misconceived attempt to create a conditioned crawl space.
>
> A conditioned crawl space is a fully enclosed crawl space and is considered part of the "building envelope," meaning the space should be resistant to outside water and water vapor in all respects. The air in the crawl space is treated by a HVAC system, which circulates the air throughout the entire home. Moisture in a conditioned crawl space will cause moist air to circulate throughout the home. Moist air will condense on cool surfaces, and contribute to rot and the growth of microbial molds. Exterior walls, especially in uninsulated areas such as attics and crawl spaces, are at significant risk of accumulating condensation moisture and mold growth if exterior moisture enters the building envelope.

Daniels Decl. ¶¶ 17-18. He claims that "the vapor barrier in the crawlspace was not sealed", as required under IRC N1102.2.10, and "The installation of the polyurethane barrier appears to be extremely haphazard and very shoddy workmanship." Pl.'s Opp'n to Mot. for Summ. J. at 23. Therefore, "[s]ince Mrs. Bilyard's crawl space was missing the requirements of a properly sealed polyurethane vapor barrier, foundation damp/waterproofing, foundation cold joint sealant, and a foundation drainage system, it cannot be considered a 'conditioned crawl space.'" *Id.* ¶ 36. Further, an architect hired to excavate and inspect the property "did not locate any foundation drain system in his excavation on the Subject Property." *Id.* The architect asserts: "since Ms. Bilyard's crawl space was missing the requirements of a properly sealed polyurethane vapor barrier, foundation damp/waterproofing, foundation cold joint sealant, and a foundation drainage system, it cannot be considered a conditioned crawl space." *Id.* at 24.

The Court incorporates its analysis from the above section. As found above regarding the curtain drains, there are clearly genuine issues of material fact upon which a reasonable jury could feasibly find fraud here pertaining to the crawl space. Accordingly, the motion for summary judgment must be denied.

2. Ms. Bilyard's claim for fraud by omission

Regarding Ms. Bilyard's separate claim of fraud by omission, Andreolas allege:

> . . . Bilyards' attempt to categorize the two (2) curtain drains on the Property as a 'dry creek' to support an omission claim. This is a misstatement. There are two curtain drains on the Property, which flow into a collection drain. The photographs could not be more clear – the curtain drains exist. That is, until Bilyards covered and/or destroyed them while landscaping their back yard. A statement that the Property has curtain drains is true, complete, and properly described the drainage on the Property.
>
> Bilyards' [sic] cannot contrive a fraud claim based upon the statements plead [sic] in the Complaint. Because, in reality, the statements accurately depicted the features of the home. Bilyards cannot spearhead accurate descriptions to encapsulate other conditions of the home. It cannot be ignored that these alleged statements were made during the primary site inspection. Bilyards had the opportunity (and chose not to) look inside the conditioned crawlspace to see if it was sealed to their liking. They did not. Now, Bilyards must live with that decision.
>
> As such, Bilyards' claim for fraud by omission should be summarily dismissed.

Mem. in Supp. of Mot. for Part. Summ. J. 9-10.

Ms. Bilyard responds:

> Mr. Afana did not disclose that the Subject Property was not equipped with working curtain drains protecting the house and he did not disclose that the crawl space had a water intrusion problem. Mrs. Bilyard testified that she would not have closed on the Subject Property had she known about the water intrusion issues. Mr. Afana's choice not to disclose the water intrusion problem prior to closing constitutes a material omission of fact amounting to fraud.
>
> Therefore, there is a genuine issue of material fact as to whether Mr. Afana fraudulently failed to disclose water intrusion and crawlspace issues. There is also a material issue of fact related to the crawl space not being conditioned, and the curtain drains non-installation and/or failure to function as they were supposed to. It also represents a failure and deficiency in the drainage system in general—even if curtain drains had been installed. Knowledge that water and drainage issues were so profound that they filled the

> crawl space and caused damage that needed to be fixed should have been disclosed instead of kept secret and minimized. Summary judgment should therefore be denied.

Pls.' Mem. in Opp'n to Mot. for Summ. J. 30-31 (citations omitted). Additionally, Ms. Bilyard alleges that:

> . . . shortly after moving into the house on the Subject Property, she discovered a hose hanging out of her bathroom window running towards the entrance of the crawlspace. Bilyard Decl. ¶ 14. Two days after closing, Mr. Afana sent people to install a sump pump in the crawl space, the workers installing the pump stated that Mr. Afana felt it would better to protect the property, still with no discussion that water had breached prior to closing. *Id.* ¶ 17. Subsequently, she hired Mr. Daniels to perform inspect for construction problems. Daniels Decl. ¶ 4.

Id. ¶ 11. The results of Mr. Daniels' inspection are discussed above.

Andreolas respond:

> Now, for the first time, Bilyards have shifted course away from curtain drains, and a conditioned crawlspace, to omitting water intrusion problems and the existence of a sump pump. These new arguments should not be considered, as they were not plead with particularity as required by Rule 9(b). This Court should not allow Bilyards to ambush new claims and arguments after Andreolas filed a motion for summary judgment.

Reply 8.

The Idaho Supreme Court has held:

> Omission of information may constitute fraud when a duty to disclose exists. *Sowards v. Rathbun,* 134 Idaho 702, 707, 8 P.3d 1245, 1250 (2000); *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 522, 808 P.2d 851, 859 (1991); *Tusch Enterprises v. Coffin,* 113 Idaho 37, 43, 740 P.2d 1022, 1028 (1987);. [sic] A party may be under a duty to disclose: (1) if there is a fiduciary or other similar relationship of trust and confidence between the two parties; (2) in order to prevent a partial statement of the facts from being misleading; or (3) if a fact known by one contracting party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other does not know it. *Sowards,* 134 Idaho at 707, 8 P.3d at 1250.

Humphries v. Becker, 159 Idaho 728, 736, 366 P.3d 1088, 1096 (2015).

> Silence may constitute fraud when a duty to disclose exists. *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991); *Tusch Enterprises v.*

Coffin, 113 Idaho 37, 740 P.2d 1022 (1987); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Janinda v. Lanning*, 87 Idaho 91, 390 P.2d 826 (1964).

Sowards v. Rathbun, 134 Idaho 702, 707, 8 P.3d 1245, 1250 (2000). The intent to deceive element of fraud is irrelevant in cases of fraud by omission. *Staff of Idaho Real Estate Comm'n v. Nording*, 135 Idaho 630, 635, 22 P.3d 105, 110 (2001) (citing *Tusch*, 113 Idaho at 42, 740 P.2d at 1027). "Whether there is a duty to disclose is a mixed question of law and fact. Whether the circumstances, if proved, would be sufficient to give rise to a duty to disclose is a matter of law. But once the court makes that determination, whether those circumstances were proved is a question of fact." *Investor Recovery Fund, LLC v. Hopkins*, 167 Idaho 42, 48, 467 P.3d 406, 412 (2020) (citing *Printcraft Press, Inc. v. Sunnyside Park Utils., Inc.,* 153 Idaho 440, 453, 283 P.3d 757, 770 (2012)) (internal citations omitted).

In *G & M Farms v. Funk Irr. Co.*, a purchaser of an irrigation system brought an action against the manufacturer for intentional and negligent misrepresentation. 119 Idaho 514, 808 P.2d 851 (1991). A representative of the irrigation system manufacturer visited G & M Farms' property to inspect the land and determine whether the irrigation system that G & M Farms wished to have installed was suitable. *Id.* at 518-19, 808 P.2d at 855-56. G & M Farms' representative asked him if "the irrigation system would cover the necessary ground and supply sufficient water." *Id.* at 519, 808 P.2d at 856. The irrigation system manufacturer representative stated "yes, it will work." *Id.* G & M Farms relied on this statement because he was the factory representative and he had stated that they made many such machines with "great success". *Id.* The irrigation system manufacturer refused to sell the system to the seller as requested without signing an indemnity agreement because they were "concerned it did not have sufficient experience with three-quarter mile side irrigation machines". *Id.* They signed the

agreement, and a new indemnity agreement was later entered into, which "expressly stated that [the manufacturer] did not recommend the system, that it was not designed for the three-quarter mile length requested by [the seller], and that its length may cause the system to misalign and shut down". *Id.* G & M Farms asserted that they were never informed of the issues with the design or that there was a risk it would not function properly, and that the indemnity agreements demonstrate knowledge that the system would not function as promised. *Id.* The Idaho Supreme Court found that the manufacturer representative's statement that it would work constitutes a "failure to disclose known facts concerning the problematic design" and that "the likely malfunctioning of the irrigation system [fell] within the category of intentional misrepresentation . . . based on nondisclosure of material information." *Id.* at 520, 808 P.2d at 857. In coming to its decision, the Idaho Supreme Court relied on its prior decisions in *Tusch Enters. V. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987), and *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966), finding that "These operational characteristics and the design limitations constitute, for purposes of summary judgment proceedings, hidden conditions or defects similar in nature to those presented in *Tusch Enterprises* or *Bethlahmy*." *Id.* at 520-21, 808 P.2d at 857-58.

In *G & M Farms*, the Idaho Supreme Court held that:

> Knowledge of these operational and design defects was known only to [the manufacturer] and discoverable by G & M Farms only after purchase and installation of the extensive irrigation system. Under these circumstances the inference can be drawn that G & M Farms and [the manufacturer] were not dealing on equal terms. Consequently, for purposes of our review on summary judgment, [the manufacturer] had a duty to disclose that the system was not designed for the length required by G & M Farms and that the system was likely to malfunction or shut down under normal operating conditions. Such information was material to G & M Farms' decision to purchase the irrigation system. "Materiality refers to the importance of the misrepresentation in determining the plaintiff's course of action." *Edmark Motors, Inc. v. Twin Cities Toyota*, 111 Idaho 846, 727 P.2d 1274 (Ct. App.1986). This information, if

known to G & M Farms, may well have induced G & M Farms to refrain from purchasing the machine which would have resulted in [the manufacturer] losing the $425,000.00 sale. Instead, [manufacturer] representatives assured G & M Farms that the system would work. G & M Farms had the right to rely on the manufacturer's representation that the machine would perform the job for which it was purchased.

Id. at 521, 808 P.2d at 858. The Idaho Supreme Court in *G & M Farms* summarized the holdings of those two cases:

> In *Tusch Enters. v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987), this Court held that an intentional misrepresentation or fraud claim should not be analyzed only with reference to the elements recited in *Faw v. Greenwood*, 101 Idaho 387, 613 P.2d 1338 (1980). We stated in *Tusch* that the facts of that case fell within the category of misrepresentation on the basis of nondisclosure. 113 Idaho at 41–42, 740 P.2d at 1026-27. The plaintiff in Tusch Enterprises was a purchaser of several duplexes and the defendants were the respective builder and vendor of the duplexes. The vendor stated that the buildings were of "good quality construction." It was later shown that the buildings had been constructed on fill dirt which eventually settled and caused the foundations and walls to crack. Tusch Enterprises submitted proof that it was not told of the fill dirt conditions or of possible problems with the foundations. We held that the vendor should have disclosed the latent fill dirt problems and that Tusch Enterprises was entitled to rely upon the vendor's representation that the dwellings were well constructed. The trial court's entry of summary judgment against Tusch Enterprises was reversed on the fraud claim, and the case was remanded for trial.
>
> In *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966), a home builder failed to disclose to a purchaser the presence of an unsealed irrigation ditch running beneath the garage of the house which, in conjunction with the fact that the basement was not of waterproof construction, caused seepage into the basement during the irrigation season. We held in *Bethlahmy* that the failure to disclose these major defects which were known to the defendants and unknown to the plaintiffs, and not discoverable upon reasonable inspection, supported a finding of fraud.

Id. at 520, 808 P.2d at 857.

First, the Court does not agree with Andreolas' assertion that Ms. Bilyard's claims of water intrusion problems are new arguments that should not be considered because they were not plead with particularity in the complaint. *See* Reply 8. Ms.

Bilyard did plead the alleged facts sufficiently for the summary judgment phase. In her complaint, she alleges:

> 29. The Bilyards were never informed prior to closing that the crawl space had flooded, despite Mr. Afana being aware of the flooding and the extent of the flooding. The night before closing, the Bilyards received a phone call from Mr. Afana stating there was a "little problem" at the new construction home but that he would fix it. At that time, Mr. Afana did not disclose to the Bilyards that the Subject Property did not have curtain drains, nor did he disclose that water had gotten inside the "conditioned crawl space," and downplayed the "little problem" which in reality was an [sic] recurring and ongoing problem which had been known to Mr. Afana and the Andreolas. Believing Mr. Afana would fix the "little problem," the Bilyards closed on the new construction home the next day.
>
> 30. After closing, and upon being told about the flooding, Mr. Afana suggested installing a sump pump.
>
> 31. Unfortunately, the sump pump did not pump all the water in the crawl space out as the pump was installed at a high point in the crawl space. To make matters worse, Polar Construction had not graded the crawl space and the uneven grading meant water pooled in low spots and did not get pumped out, contributing to the growth of mold. Further, Mr. Afana installed the sump pump to discharge into the sewer, which is a violation of the Hayden Lake Sewer District's Ordinances.
>
> . . . .
>
> 48. Mr. Afana did not tell the Bilyards that there were no curtain drains or that the "conditioned crawl space" was improperly sealed, even after the crawl space had flooded, thereby breaching his duty to disclose and committing fraud by omission / nondisclosure.

Complaint ¶¶ 29-31, 48. Similar to the fraud by misrepresentation claim, the Court finds that a reasonable jury could find that there is enough evidence to support a claim for fraud by omission or nondisclosure. If the jury were to find that the elements of fraud by misrepresentation have not been met, the jury may still find that the elements of fraud by omission or nondisclosure have been met by the same alleged facts.

There are several reasons that this Court finds summary judgment must be denied with regard to this claim. First, similar to the facts in *G & M Farms*, only Polar Construction (and possibly Andreolas, if Polar Constructions informed them of it) was in

a position to know about the water intrusion problems, since this happened after the Bilyards inspected the property. Thus, Ms. Bilyard and the Andreolas, should the jury find that Polar Construction and Mr. Afana were acting as their agents (see discussion *infra*), were on unequal terms and there was a duty to disclose the details and extent of the alleged "little problem". Second, similar to the facts of *Tusch Enterprise*, if Mr. Afana did make the alleged statements regarding the existence of a conditioned crawl space and curtain drains, a jury could find Andreolas and Polar Construction liable for fraud by omission because Mr. Afana implied with his words that they were functioning, when there were not. As in *Tusch Enterprises*, a jury could find that Ms. Bilyard was entitled to rely on Mr. Afana's assertions and was not required to perform her own extensive inspection. A jury may also find that such a quick turnaround for inspection and closing may have inhibited the Bilyards from properly performing an inspection of the property. This is even more true for the curtain drains since the property was covered in heavy snow. Third, Ms. Bilyard alleges that she and her husband would not have gone forward with closing if they had known the extent of the problems with the construction. Thus, a reasonable jury could find that the third type of duty to disclose were present. Because there are factual issues for the jury pertaining to the duty to disclose, the Court declines to determine the extent of the duty at the summary judgment phase. Because there are several genuine issues of material fact pertaining to the issue of fraud by omission or non-disclosure, summary judgment must be denied.

3. Agency

Ms. Bilyard argues:

> Here, Defendants Andreolas contracted with Polar Construction to build them a home on the Subject Property. Prior to the construction's completion, the Andreolas entered into the PSA to sell the Subject Property to Plaintiff.

The Andreolas authorized Mr. Afana to access the Subject Property for the purpose of showing the Subject Property to the Bilyards and answering questions. To that end, Mr. Afana was present during the inspection walkthrough.

Mr. Afana was presented to the Bilyards by the Andreolas as a knowledgeable authority for the Subject Property when he was designated by them to answer questions about the construction and Show them around the Subject Property. The Andreolas were not present during the walkthrough. When the Andreolas granted Mr. Afana the authority to appear on their behalf and make representations regarding the Subject Property's construction, this constituted a grant of "real" or "express" authority for Mr. Afana to act as the Andreola's agent for the purpose of "answering questions" which would then be relied upon by the Bilyards.

It is his representations about the house having a conditioned crawlspace and curtain drains that constitute the fraudulent misrepresentations complained of by the Plaintiff. These same misrepresentations and nondisclosures also support violations of the Consumer Protection Act, and the breach of the covenant of good faith and fair dealing. These representations were all made within the scope and authority granted to him by the Andreolas.

Therefore, the Andreolas granted Mr. Afana real (express) authority and Mr. Afana was acting within his scope of authority to provide information, when he misrepresented the Subject Property's condition. Thus, there is no question that the Andreolas expressly granted Mr. Afana the authority to provide information on their behalf to the Bilyards during the Andreolas' sale of the Subject Property.

If the admissions and evidence described herein do not conclusively resolve the agency issue in the favor of Ms. Bilyard, it certainly introduces a "genuine issue of material fact" as to whether express/real authority was granted to Mr. Afana. As such, Defendant's Motion for Summary Judgment should be denied.

Pls.' Mem. in Opp'n to Summ. J. 17-18 (citations omitted). Regarding express authority, Ms. Bilyard argues:

Here, the Andreolas granted Mr. Afana the authority to appear at the inspection contingency walkthrough of the Subject Property. In line with that grant of authority, Mr. Afana was allowed to be present on the Subject Property for the inspection walkthrough and provided information about the house's construction to the Bilyard's alongside the listing agent. That is precisely the authority necessary, usual, and proper to accomplish or perform the task authorized by the Andreolas; providing information about the construction to facilitate the sale of the Subject Property. During the walkthrough, Mr. Afana made representations about the construction of the house and the development of the Subject Property. Mr. Afana assured the Bilyards that he would be there

for them if a problem arose and continued to contact them regarding information about" the Subject Property. Further, at no time did Mr. Afana or the listing agent (Stefan Smith) clarify that Mr. Afana was not the seller.

When liberally construing the evidence in favor of Mrs. Bilyard, there is substantial evidence that the Andreolas had directed and were relying on Mr. Afana to provide information about the construction on the Subject Property in order to facilitate its sale.

Therefore, there is a genuine question of fact as whether Mr. Afana was acting with implied authority from the Andreolas to provide information to the Bilayrds [sic] when he made the representations regarding the crawl space being conditioned and there being curtain drains to protect the house.

Id. at 19 (citations omitted).

. . . Plaintiff believed that Mr. Afana was the seller during the walkthrough because he appeared, spoke with knowledge, spoke with authority, and gave assurances. The Andreolas' listing agent did not clarify who the seller was at the time.

The objective act of allowing someone onto your property leads to the reasonable belief that they were intended to be there doing what they were doing. In this case, Mr. Afana was authorized to be present on the Subject Property, attend the walkthrough, answer questions, and make statements regarding the Subject Property on behalf of the Andreolas. Mr. Afana's presence, knowledge, and assurances related to the property were so complete that the Bilyards (and their friend, Donna Schwenk) thought that he was the owner selling the property.

Therefore, there is a genuine question of fact as to whether the Andreolas granted apparent authority to Mr. Afana, and summary judgment should therefore be denied.

Id. at 20 (citations omitted).

The only response that Andreolas give is:

Bilyards dedicate a significant amount of their Opposition arguing that Mr. Afana was Andreolas' agent during the times relevant to this case. Without conceding the fact, Andreola has not raised or contested that issue on this Motion whatsoever. Respectfully, the portions of Bilyards' Opposition addressing agency status can largely be ignored.

Reply to Pls.' Opp'n to Defs.' Mot. for Summ. J. 4. This contradicts the assertion made in the introduction to their memorandum in support of their motion for summary

judgment that Mr. Afana's statements cannot be attributed to Andreolas. *See* Mem. in Supp. of Mot. for Summ. J. 2.

"Agency is a fiduciary relationship in which the principal confers authority upon the agent to act for the principal." *Gissel v. State*, 111 Idaho 725, 728–29, 727 P.2d 1153, 1156–57 (1986) (citing Restatement (Second) of Agency § 1 & 7 (1957)).

> There are three separate types of agency, any of which are sufficient to bind the principal to a contract entered into by an agent with a third party, and make the principal responsible for the agent's tortious acts, so long as the agent has acted within the course and scope of authority delegated by the principal. The three types of agencies are: express authority, implied authority, and apparent authority. *Clark v. Gneiting,* 95 Idaho 10, 11-12, 501 P.2d 278, 279-80 (1972); *Hieb v. Minnesota Farmers Union,* 105 Idaho 694, 697, 672 P.2d 572, 575 (Ct. App.1983).
>
> Both express and implied authority are forms of actual authority. Express authority refers to that authority which the principal has explicitly granted the agent to act in the principal's name. *Wiggins v. Barrett & Assoc., Inc.,* 295 Or. 679, 669 P.2d 1132, 1138 (1983). Implied authority refers to that authority "which is necessary, usual, and proper to accomplish or perform" the express authority delegated to the agent by the principal. *Clark, supra,* 95 Idaho at 12, 501 P.2d at 280.

Bailey v. Ness, 109 Idaho 495, 497, 708 P.2d 900, 902 (1985).

> Proof of implied agency is generally found in the acts and conduct of the parties, rather than from an oral or written contract which establishes the agency relationship. *State v. DeBaca,* 82 N.M. 727, 487 P.2d 155 (1971). *See also Briggs v. Morgan,* 262 Or. 17, 496 P.2d 17 (1972) (agency may be proven by circumstances and course of dealing between the parties); *Land-Air, Inc. v. Parker,* 103 Ariz. 1, 435 P.2d 838 (1967) (agency may be established from the relationship of the parties to each other and to the subject matter). In addition, the existence of an agency relationship is a question for the trier of fact to resolve from the evidence. *Clark v. Gneiting,* 95 Idaho 10, 501 P.2d 278 (1972); *Thornton v. Budge,* 74 Idaho 103, 257 P.2d 238 (1953) (if the existence or nonexistence of agency is a disputed question of fact it was for the jury to decide).

Adkinson Corp. v. American Bldg. Co., 107 Idaho 406, 409, 690 P.2d 341, 344 (1984).

> Apparent authority differs from actual authority. It is created when the *principal* "voluntarily places an agent in such a position that a person of ordinary prudence, conversant with the business usages and the nature of a particular business, is justified in believing that the agent is acting pursuant to existing

> authority." *Id.* (footnote omitted); *Clements v. Jungert,* 90 Idaho 143, 152, 408 P.2d 810, 814 (1965); *Hieb, supra.* Apparent authority cannot be created by the acts and statements of the agent alone. *Idaho Title Co. v. American States Insurance Co.,* 96 Idaho 465, 468, 531 P.2d 227, 230 (1975); *Clements, supra,* 90 Idaho at 152, 408 P.2d at 814. Finally, significant to this appeal, where the existence of an agency relationship is disputed—whether or not there is apparent authority on the agent's part to act as he acted—it is a *question for the trier of fact* to resolve from the evidence. *Clark, supra,* 95 Idaho at 12, 501 P.2d at 280; *John Scowcroft & Sons Co. v. Roselle,* 77 Idaho 142, 146, 289 P.2d 621, 623 (1955); *Thornton v. Budge,* 74 Idaho 103, 108, 257 P.2d 238, 241 (1953). A review of cases from other jurisdictions reveals that this is the majority rule. *See* 3 Am. Jur. 2d *Agency* § 359 and cases cited therein.

Bailey v. Ness, 109 Idaho 495, 497-98, 708 P.2d 900, 902-03 (1985). Whether an agency relationship exists is a question of fact for the jury. *Adkison Corp. v. American Bldg. Co.,* 107 Idaho 406, 690 P.2d 341 (1984).

Here, there are clearly genuine issues of material fact regarding whether Mr. Afana was acting as an agent of Andreolas' if he did indeed make these alleged fraudulent statements. Although Andreolas claim that they are not disputing whether Mr. Afana was their agent for the purposes of summary judgment, they did raise this issue in their answer and it appears crucial to the Court for the issues before it on summary judgment. If Mr. Afana was not Andreolas' agent, Andreolas could not be held liable for any of his statements, which are the heart of this motion. Thus, summary judgment must be denied because the question of agency may be disputed.

B. There are genuine issues of material fact regarding Bilyards' claim for violation of the Idaho Consumer Protection Act.

Andreolas argue that "Surely, accurately describing features existing on a property cannot be 'misleading, false, or deceptive.'" Mem. in Supp. of Mot. for Summ. J. 10. Andreolas argue that this case is similar to *Fern v. Noah*, 142 Idaho 775, 133 P.3d 1240 (2006), because:

> Bilyards, albeit erroneously, argue that the Property purchased (with conditioned crawlspace and curtain drains) differed from the property received

(without those features). That is not the case. The Property purchased, and received, both contain a conditioned crawlspace and curtain drains. By Idaho law, that is not false and deceptive. Under *Fenn*, this cannot support a claim under the ICPA.

Summary Judgment is appropriate on Bilyards' claim under the Idaho Consumer Protection Act.

Id. at 11-12.

Ms. Bilyard responds:

Defendants Andreolas cite to *Fenn v. Noah*, 142 Idaho 775, 780 (2006), to support their assertion that they made no misleading, false, or deceptive act since they allege Plaintiff received what she contracted for.

The Andreola's reliance on *Fenn* is misplaced, and the holding in the case does not support the position of law asserted in Defendant's Memorandum at page 10. In *Fenn*, the Supreme Court held that "Fenn can claim statutory damages under the Idaho Consumer Protection Act" and even held that "[t]he real property at issue is clearly within the definition of 'goods'" under the CPA. *Id.* Unfortunately for Fenn, he was *a successor in interest to a prior purchaser's agreement with the seller* to buy the land at issue. What Fenn acquired was the Purchaser's land contract with the seller, which he obtained without making any contact with the seller. That contract accurately described the land that was conveyed to him (as opposed to what he thought would be conveyed based on fence locations). Thus, his claim under the CPA was held to not be actionable because not only was there *no misrepresentation* regarding what land was to be sold as between the seller of the land and Fenn, but the purchase and sale agreement *accurately described the land that was conveyed*. *Id.* In the present case we are not concerned with the legal description of the property — we are concerned with the misrepresentations and nondisclosures related to construction, known water issues, and misrepresentations about curtain drains and conditioned crawl spaces.

Plaintiff contracted to purchase the Subject Property as represented by both the listing description, and Mr. Afana (who was answering questions on behalf of the Andreolas, and therefore "describing" the Subject Property on behalf of the Andreolas). The purpose of the inspection contingency here is precisely to ensure that the buyer of real property is purchasing what they are contracting for, a functional residence without water issues, and with the characteristics that were described by Afana and Andreolas.

. . . Unlike the facts in *Fenn*, where the Appellant assumed he was taking title to the property bound within a fence line, the Plaintiff here was given actual representations during the inspection contingency walkthrough about what she was purchasing from the sellers and the sellers' agent. *See* 142 Idaho 775, 780; Bilyard Decl. ¶¶ 5, 9, 11.

> The Andreolas, by their agent Mr. Afana, made false, misleading, and deceptive representations during trade or commerce to the Plaintiff about what she was purchasing. Therefore, the Andreolas violated the ICPA, or at the very least, there exists a genuine question of material fact such that summary judgment cannot be granted.

Pls.' Opp'n to Mot. For Summ. J. 32-33.

The Consumer Protection Act's purpose is to "protect both consumers and businesses against unfair methods of competition and unfair and deceptive practices in the conduct of trade or commerce and to provide efficient and economical procedures to secure such protection." I.C. § 48-601. The Act should be construed liberally. *Id.* Real property clearly falls within the definition of "goods" in the act. *Fenn v. Noah,* 142 Idaho 775, 780, 133 P.3d 1240, 1245 (2006); I.C. § 48-602(6). "A consumer who purchases goods and suffers a loss as a result of an act unlawful under the ICPA may treat the agreement as voidable or seek damages. I.C. § 48-608(1)." *Fenn v. Noah*, 142 Idaho 775, 779-80, 133 P.3d 1240, 1244-45 (2006).

Andreolas' sole argument for this issue appears to be that the statements were not untrue and thus could not be false and deceptive. As the Court has already discussed, there are genuine issues of material fact pertaining to whether or not these statements are true. Accordingly, the Court denies summary judgment on the issue of violation of the Idaho Consumer Protection Act.

C. There are genuine issues of material fact regarding Ms. Bilyard's claim of breach of the implied covenant of good faith and fair dealing.

Finally, Andreolas argue:

> At the risk of sounding redundant, that allegation [that "Afana breached his duty of good faith and fair dealing when he *deliberately* misled the Bilyards about the existence of curtain drains and a properly sealed 'conditioned crawlspace' at the" Subject Property] is simply not true. The Property **does** have curtain drains, and **does** have a conditioned crawlspace. Afana never knowingly made any false statement to Bilyards. Afana did nothing more than describe the house Polar Construction built. Bilyards had the contractual right and ability to inspect the Property, and did. Now, on one hand, Bilyards argue that these

features were material to their purchase. Yet, on the other hand, Bilyards apparently opted not to inspect the crawlspace to determine whether it met Bilyards' definition of 'conditioned crawlspace.' This *ex post facto* lawsuit against Andreolas (who never even spoke to Bilyards) has resulted.

Certainly, Bilyards will not dispute that accurately representing features that exist on a home in conjunction with a real estate transaction does not, and cannot, support a claim under Idaho law. Summary judgment is appropriate on all of Bilyards' claims.

Mem. in Supp. of Mot. for Summ. J. 11-12.

Ms. Bilyard responds:

. . . In short, the Andreolas, through their agent Mr. Afana, made material misrepresentations regarding the presence and function of the house's crawl space and curtain drain system. Those representations were false because those systems were so inadequately designed and constructed (or missing in the case of a lateral curtain drain) as to be non-effective and non-existent.

Those misrepresentations significantly impaired the benefit of Plaintiff's contract with the Andreolas because she had to hire contractors to perform remedial work, which cost tens of thousands of dollars. *See* Bilyard Decl. ¶¶ 22-27; *see also* Exhibit A of Daniels Decl. at 23-25.

Pls.' Opp'n to Mot. for Summ. J. 33-34.

The implied covenant of good faith and fair dealing applies to all contracts. *Luzar v. Western Surety Co.,* 107 Idaho 693, 696, 692 P.2d 337, 340 (1984). It is a covenant that is implied by law, and it "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Idaho First Nat'l Bank v. Bliss Valley Foods,* 121 Idaho 266, 288, 824 P.2d 841, 863 (1991), *quoting Badgett v. Security State Bank,* 116 Wash.2d 563, 569, 807 P.2d 356, 360 (1991). The implied covenant "requires only that the parties perform in good faith the obligations imposed by their agreement." *Id.*

Record Steel & Constr., Inc. v. Martel Constr., Inc., 129 Idaho 288, 292, 923 P.2d 995, 999 (Ct. App. 1996).

"A violation of the implied covenant is a breach of contract. It does not result in a cause of action separate from breach of contract claims, nor does it result in separate contract damages unless such damages specifically relate to the breach of the good faith covenant." *Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP*, 157 Idaho 106, 120, 334 P.3d 780, 794 (2014) (quoting *Idaho First Nat'l Bank*, 121 Idaho at 289, 824 P.2d at 864).

Drug Testing Compliance Group, LLC v. DOT Compliance Service, 161 Idaho 93, 102-03, 383 P.2d 1263, 1272-73 (2016).

Again, Andreolas' sole argument for this issue appears to be that the statements were not untrue and thus could not be a breach of the covenant of good faith and fair dealing. As the Court has already discussed, there are genuine issues of material fact pertaining to whether or not these statements are true. Accordingly, the Court denies summary judgment on the issue of violation of the implied covenant of good faith and fair dealing.

IV. CONCLUSION AND ORDER.

For the foregoing reasons, defendant's Motion for Summary Judgement must be denied in all aspects.

IT IS HEREBY ORDERED Defendant's Motion for Summary Judgment is **DENIED.**

Entered this 28th day of February, 2022.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 28 day of February, 2022, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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