

IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO

MICHAEL V. DEMCZYK, Bankruptcy  
Trustee, et al.,

Plaintiffs,

vs.

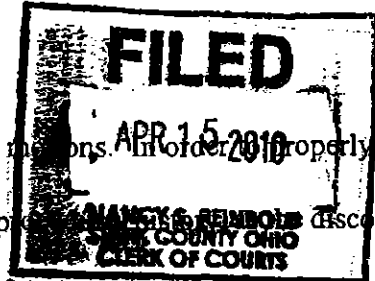
STEAMATIC OF NORTHEAST  
OHIO, et al.,

Defendants.

CASE NO. 2009CV02702

JUDGE CHARLES E. BROWN, JR.

JUDGMENT ENTRY GRANTING  
DEFENDANTS' MOTIONS FOR  
SUMMARY JUDGMENT



This matter is before the Court on several pending motions. In order to properly rule upon said motions the Court sets forth the following brief procedure. All discovery from all previously filed actions involving the parties in the within matter has been incorporated into this case by Judgment Entry filed on December 8, 2009.

Brief Statement of the Case

Timothy D. Schuller and Suzette M. Schuller were the owners of a home located at 9630 Hocking Street, NW, in Canton, OH. In 2002, the Schullers sustained water damage to their home as a result of a dishwasher leak. The Schullers' Complaints stem from the handling of the insurance claims by Defendant Farmers Insurance of Columbus, Inc. (hereinafter, "Farmers") and the reclamation work performed on the property by Defendant Steamatic of Northeast Ohio (hereinafter, "Steamatic", Defendant Greg Mang and Defendant DMZ Remodeling and Restoration, Inc.

The Schullers no longer own the property on Hocking Street, as the same was sold following foreclosure. Further, all financial obligations regarding the property were discharged

in bankruptcy.

**2004CV00160 – Timothy D. Schuller, et al. v. Steamatic of Northeast Ohio, et al.**

This matter was originally filed on January 16, 2004, by Plaintiffs Timothy D. Schuller and Suzette M. Schuller against Defendants Steamatic of Northeast Ohio and Farmers Insurance Group of Companies.

On the same day, January 16, 2004, Plaintiffs filed a petition for bankruptcy in the United States Bankruptcy Court, Northern District of Ohio, Petition Number 04-6-181. (See Exhibit B to Defendant Farmers Motion for Final Summary Judgment filed on May 4, 2007, in Case No. 2006CV01575).

On July 1, 2004, Plaintiff filed an Amended Complaint naming Michael Demczyk, Bankruptcy Trustee, as an additional Plaintiff, as well as, the minor children of Timothy and Suzette Schuller, i.e., Michael Schuller, Amanda Schuller and Kaitlin Schuller. Said Amended Complaint alleged claims of Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing and Negligence against Defendants Steamatic of Northeast Ohio and Farmers Insurance Group of Companies.

On April 21, 2005, a Stipulation of Voluntary Dismissal was filed by the parties.

**2006CV01575 – Timothy D. Schuller, et al., v. Steamatic of Northeast Ohio, et al.**

On April 18, 2006, Plaintiffs Timothy D. Schuller, Suzette M. Schuller, Amanda M. Schuller, Kaitlin R. Schuller, and Michel D. Schuller refiled their Complaint against Defendants Steamatic of Northeast Ohio, Farmers Insurance of Columbus, Inc.,<sup>1</sup> DMZ Remodeling and

---

1. A Joint Stipulation was filed on July 19, 2006, to correct the name of Defendant Farmers from Farmers Insurance Group of Companies to Farmers Insurance of Columbus, Inc.

Restoration, Inc., and Greg Mang.

On May 4, 2007, Defendant Farmers filed a Motion for Final Summary Judgment arguing that Plaintiffs did not have standing to file the lawsuit based upon Plaintiffs lack of standing to file the lawsuit because of the bankruptcy that was previously filed.

On June 19, 2007, an Agreed Judgment Entry was filed allowing Plaintiffs to file a First Amended Complaint naming as party Plaintiffs only the Bankruptcy Trustee and the minor children of the Plaintiffs. Said Amended Complaint was filed on June 20, 2007.

On October 3, 2007, Defendant Greg Mang filed a Motion for Summary Judgment or in the Alternative Motion to Dismiss. On October 16, 2007, Plaintiffs filed a voluntary dismissal of Defendant Greg Mang.

On April 24, 2008, Defendant Steamatic served Plaintiff Demczyk and Timothy and Suzette Schuller with request for admissions. Pursuant to Civ. R. 36, answers to said requests had to be provided within 28 days, or on or before May 22, 2008. Since Plaintiffs failed to answer said requests for admissions, the Court finds that said requests are deemed admitted as a matter of law.

On June 2, 2008, Defendant Farmers filed a Motion for Final Summary Judgment and on June 6, 2008, Defendant DMZ Remodeling and Restoration filed a Motion for Summary Judgment. Defendant Farmers also filed a Motion to Compel Discovery on June 9, 2008. The Court set a briefing schedule with regard to the dispositive motions and granted Plaintiffs an extension of time to on or before July 23, 2008, in which to file responses. Prior to responses being filed as to the dispositive motions and motion to compel, Plaintiffs filed a notice of voluntary dismissal, without prejudice, as to all the Defendants on July 14, 2008.

**2009CV02702 – Michael V. Demczyk, et al., v. Steamatic of Northeast Ohio, et al.**

On July 13, 2009, Plaintiffs Michael V. Demczyk (hereinafter "Demczyk"), Bankruptcy Trustee, and Michael D. Schuller, Amanda M. Schuller and Kaitlin R. Schuller, as minor children of Timothy and Suzette Schuller, refiled their Complaint against Defendants Steamatic of Northeast Ohio, Farmers Insurance of Columbus, DMZ Remodeling and Restoration, Inc. and Greg Mang.

On November 18, 2009, Defendants filed a Joint Motion to Incorporate all Discovery in Prior Case Nos. 2004CV00160 and 2006CV01575, which the Court granted by Judgment Entry filed on December 8, 2009.

Dispositive motions were filed by all the Defendants on or before February 22, 2010. The pending motions for summary judgment are set forth in more detail below. A revised briefing schedule with regard to said motions was filed on February 23, 2010. Responses to the pending motions for summary judgment were due on or before March 22, 2010.

On March 8, 2010, a Notice of Dismissal was filed by Plaintiffs Michael D. Schuller, Kaitlin R. Schuller, and Amanda M. Schuller, the minor children of Timothy and Suzette Schuller, which dismissed all of the causes of action against all of the Defendants.

On March 18, 2010, Defendant Farmers filed a Motion to Compel. The filings with regard to said motion are set forth in more detail below.

On March 22, 2010, Plaintiff filed a Notice of Dismissal of Greg Mang.

On April 2, 2010, Plaintiff filed the Supplemental Affidavits of Greg Mang, a previously named defendant in this case, who is a shareholder and employee of Defendant DMZ Remodeling and Restoration, Inc., and Andrew Smith in support of Plaintiff's response to

Defendants' Motions for Summary Judgment. The filings in regard to said supplemental affidavits are set forth in more detail below.

On that same day, April 2, 2010, Plaintiff Demczyk filed a Notice of Dismissal as to Defendant DMZ Remodeling and Restoration, Inc., with prejudice.

#### **Defendant Farmers Motion to Compel**

Defendant Farmers filed a Motion to Compel Discovery on March 18, 2010, and Plaintiff Demczyk's Response was filed on March 29, 2010. Defendant Farmers filed a Reply Memorandum in Support of the Motion to Compel Discovery on April 1, 2010, and Plaintiff Demczyk filed a Combined Motion to Strike the Reply Memorandum and in the Alternative Motion for Leave to File a Sur Reply Brief in Opposition.

With regard to the above stated motions, the Court grants Plaintiff Demczyk's motion to strike the Defendant Farmers reply memorandum and finds the motion to compel moot based upon the Court's ruling with regard to Defendant Farmers Motion for Summary Judgment as set forth in more detail below.

#### **Pending Motions for Summary Judgment**

This matter is before the Court on Defendant Farmers Motion for Final Summary Judgment filed on February 8, 2010, Summary Judgment Exhibits filed on February 8, 2010, Defendant Steamatic's Motion for Summary Judgment filed on February 16, 2010, and Plaintiff Demczyk's Response filed on March 22, 2010, Plaintiff's Summary Judgment Exhibits filed on March 22, 2010, Defendant Steamatic's Reply filed on March 30, 2010, and Defendant Farmers Reply filed on April 7, 2010.

**Plaintiff's Motion to Strike Supplemental Affidavits in Support of  
Plaintiff's Response to Defendants' Motions for Summary Judgment**

Also before the Court is Plaintiff Demczyk's Supplemental Affidavits filed on April 2, 2010, Defendant Farmers Motion to Strike Plaintiff Demczyk's Supplemental Affidavits filed on April 7, 2010, and Plaintiff Demczyk's Combined Motion for Leave to File Supplemental Affidavits and Response to the Motion to Strike filed on April 9, 2010.

Defendant Farmers moves the Court to strike the filing of Plaintiff Demczyk's supplement affidavits, as being untimely filed.

By Judgment Entry filed on February 23, 2010, the Court granted Plaintiff Demczyk an extension of time from a previously set date in which to file response briefs regarding the pending motions for summary judgment. Plaintiff Demczyk's responses were due on or before March 22, 2010. Plaintiff Demczyk did not file the supplemental affidavits until April 2, 2010.

While Plaintiff Demczyk claims that the information contained in the Affidavit of Greg Mang was just received as a result of the settling of all claims against the Defendant DMZ Remodeling and Restoration, Inc., and that the Affidavit of Andrew Smith was the result of the negotiations with Defendant DMZ Remodeling and Restoration, Inc., the Court finds that the information obtained from Greg Mang was available to Plaintiff Demczyk prior to the April 2, 2010 date, as Greg Mang and DMZ Remodeling and Restoration, Inc. have been parties to this lawsuit since April 18, 2006. In fact, Greg Mang was voluntarily dismissed by the Plaintiffs in the 2006 case on October 16, 2007.

Based upon the untimely filing of Plaintiff Demczyk's supplemental affidavits, the Court grants Defendant Farmers motion to strike the supplemental affidavits. Plaintiff Demczyk's

leave to file the supplemental affidavits is denied.

### Summary Judgment Standard

Summary Judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The moving party must initially inform the trial court of the basis for its motion and identify those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex v. Catrett* (1986), 477 U.S. 317, citing with approval in *Wing v. Anchor Media Ltd. of Texas* (1991), 59 Ohio St.3d 108. See, also, *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth the specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

Civ.R. 56(E)

Once the moving party has satisfied his initial burden, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Vahila* at 429, quoting *Dresher* at 293.

### Brief Statement of Facts

The Court adopts, in part, the facts as set forth in Defendant Farmers Motion for Summary Judgment, as follows:

### 1996 Claim

Mr. and Mrs. Schuller have a claim history with Farmers going back to at least 1996. In 1996 the Schullers reported to Farmers their home sustained damage as a result of a water leak from their dishwasher. (Suzette Schuller depo., pp. 14-20; Timothy Schuller depo., pp. 10-12). Farmers investigated the claim, accepted the claim, and issued payments to the Schullers in 1996, totaling \$3,997.23, under the policy's structure coverage. (Bart Boston Affidavit – Exhibit C). Payment was made directly to the Schullers by Farmers, as opposed to any third-parties. (Timothy Schuller depo., p. 11).

### 2002 Claim

In April 2002, the Schullers again made a claim to Farmers, claiming damage to their home from a dishwasher leak. (Suzette Schuller depo., pp. 20-22; Timothy Schuller depo., pp. 11-12). Farmers investigated the claim and advised the Schullers it was a covered loss. (Bart Boston Affidavit). Farmers never denied the Schullers' claim or told them the claim was not covered. (Id.).

In response to the Schullers' 2002 claim, Farmers made the following payments, to the following payees, on the following dates (See Bart Boston Affidavit for all payments referenced in the tables):

#### Structure Payments

| <u>Date of Payment</u> | <u>Amount of Payment</u> | <u>Payee</u>   |
|------------------------|--------------------------|--|
| 7/1/02                 | \$8,867.41               | Timothy D. Schuller, Suzette Schuller, Chase Manhattan Mortgage Corp., and Steamatic of Northeast Ohio |

|          |             |   |
|----------|-------------|---|
| 7/12/02  | \$819.38    | ACV Floor Covering, Timothy D. Schuller, and Suzette Schuller |
| 8/16/02  | \$3,654.63  | Timothy D. Schuller, Suzette Schuller                         |
| 10/9/02  | \$383.37    | Timothy D. Schuller, Suzette Schuller                         |
| 11/14/02 | \$3,591.00  | Steamatic of Northeast Ohio <sup>2</sup>                      |
| 1/17/02  | \$17,150.12 | Chase Manhattan Mortgage Corp <sup>3</sup>                    |

**Contents Payments**

| <u>Date of Payment</u> | <u>Amount of Payment</u> | <u>Payee</u>   |
|------------------------|--------------------------|--|
| 5/15/02                | \$1,204.75               | Timothy D. Schuller, Suzette Schuller                              |
| 5/23/02                | \$1,776.98               | Timothy D. Schuller, Suzette Schuller                              |
| 6/5/02                 | \$10,236.00              | Timothy D. Schuller, Suzette Schuller, Steamatic of Northeast Ohio |
| 7/12/02                | \$4,314.12               | Timothy D. Schuller, Suzette Schuller                              |
| 7/22/02                | \$873.26                 | Timothy D. Schuller, Suzette Schuller                              |
| 11/14/02               | \$8,486.45               | Steamatic of Northeast Ohio <sup>4</sup>                           |
| 4/22/03                | \$1,025.00               | Electronic Restoration Services <sup>5</sup>                       |

2. The original check for this payment was issued on October 11, 2002, and was reissued to reflect a change in payees.

3. The original check for this payment was issued on October 14, 2002, and was made payable to Mr. and Mrs. Schuller, Chase Manhattan Mortgage, Huntington National Bank, and DMZ, Inc. The check had to be reissued as the original check was destroyed by Mr. and/or Mrs. Schuller.

4. The original check for this payment was issued on October 9, 2002, but had to be reissued due to a change in payees.

5. The original check for this payment was issued on October 9, 2002, but had to be reissued as it became stale when it was not timely negotiated by the payees.

**Additional Living Expense Payments**

| <u>Date of Payment</u> | <u>Amount of Payment</u> | <u>Payee</u>                          |
|------------------------|--------------------------|---------------------------------------|
| 5/8/02                 | \$3,079.12               | Timothy D. Schaller, Suzette Schaller |
| 5/15/02                | \$1,014.28               | Timothy D. Schuller, Suzette Schuller |
| 5/24/02                | \$431.49                 | Timothy D. Schaller, Suzette Schuller |
| 6/5/02                 | \$2,100.00               | Timothy D. Schuller, Suzette Schuller |
| 6/18/02                | \$519.60                 | Timothy D. Schuller, Suzette Schuller |
| 6/28/02                | \$2,396.08               | Timothy D. Schaller, Suzette Schuller |
| 7/31/02                | \$2,100.00               | Timothy D. Schuller, Suzette Schuller |
| 9/3/02                 | \$2,100.00               | Timothy D. Schuller, Suzette Schuller |
| 9/30/02                | \$2,425.41               | Timothy D. Schaller, Suzette Schuller |

Farmers' total payments of \$78,548.45 were allocated among the following coverages within the policy:

- Structure - \$34,465.91
- Contents - \$27,916.56
- Additional Living Expense - \$16,165.98

In 2002, several different contractors were engaged in an effort to repair and/or remediate the damage to the Schullers' home. Steamatic of Northeast Ohio was engaged to perform mold remediation. Mrs. Schuller learned of Steamatic through a friend, and chose Steamatic to perform the work at the home. (Suzette Schuller depo., pp. 87-90). Mr. Schuller

had interaction with Steamatic before they were hired and found them trustworthy. (Timothy Schuller depo. pp. 18-19). He had no objection to Steamatic being used. (Id).

While the complaint alleges Farmers "negligently chose and/or hired" "incompetent contractors" and Farmers "negligently supervised incompetent contractors," Farmers did not instruct the contractors on how to perform their work or in any way limit them on the tasks they intended to perform. (Bart Boston Affidavit). None of the contractors were Farmers' employees. (Id). The contractors were actually hired and chosen by the Schullers, not Farmers. (Id.; also see Suzette-Schuller depo., p. 87).

It is the practice of Farmers that if an insured does not know any contractors in a particularly field, Farmers will pass along names of contractors in those fields for the insured to choose from - that is what was done with regard to DMZ. (Bart Boston Affidavit). Before the Schullers engaged DMZ they attempted to engage A&S Construction to perform similar work. (Suzette Schuller depo., p.54). Farmers did not object to A&S being selected.

A&S ultimately declined to proceed because they would not agree to the Schullers and their mortgagors also being listed as payees on the checks Farmers issued for their work. (Id.). A&S was concerned that due to the Schullers' financial situation, their lien holders would claim the entirety of any payment issued by Farmers. (Id.).

#### **Remaining Claims for Summary Judgment**

The only remaining Plaintiff in this matter is Plaintiff Demczyk, Bankruptcy Trustee asserting claims on behalf of the debtors, Timothy and Suzette Schuller. The only remaining Defendants in this matter are Defendant Farmers and Defendant Steamatic.

Based upon Plaintiff Demczyk's Response Brief, the remaining claims as to Defendant Farmers are (1) breach of contract, (2) promissory estoppel, and (3) bad faith, which includes a claim for punitive damages. The remaining claim asserted against Defendant Steamatic is a claim for negligence.

There is also a mention in Plaintiff Demczyk's brief that while there is no longer a claim for bodily injury to Timothy and Suzette Schuller, they are making a claim for "their suffering of emotional and mental distress." (Plaintiff's Response, p. 2).

#### **History of Bankruptcy Filings**

On or about August 30, 2002, the Schullers filed a petition in the United States Bankruptcy Court, Northern District of Ohio, Petition Number 02-64060-rk. The Schullers filed a Motion to Dismiss the case and the petition was dismissed by the Bankruptcy Court on June 6, 2003. (See Exhibit A Docket Sheet for Bankruptcy Petition 02-64060-rk, attached to Defendant Farmers Motion for Final Summary Judgment filed on May 4, 2007, in Case No. 2006CV01575).

On January 16, 2004, the Schullers filed another petition for bankruptcy in the United States Bankruptcy Court, Northern District of Ohio, under Petition No. 04-60181. (See Exhibit B, attached to Defendant Farmers Motion for Final Summary Judgment filed on May 4, 2007, in Case No. 2006CV01575).

Plaintiffs did not list the within matter in the schedule of assets and liability in the bankruptcy action because the Trustee had stated that the claims in the lawsuit were without merit. Specifically, on or about October 25, 2006, the Trustee of the Estate of the Schullers filed a Report of the Trustee in a no asset case in which he stated that he had neither received any property nor paid any money on account for the Schullers' estate except exempt property, that he had made a diligent inquiry into the financial affairs of the debtors and that there was no property available for distribution from the estate over and above that exempted by law with the

exception of a lawsuit against the homeowners' insurance which was without any merit. (See Exhibit D Report of Trustee, attached to Defendant Farmers Motion for Final Summary Judgment filed on May 4, 2007, in Case No. 2006CV01575).

On May 21, 2007, the Trustee filed a motion to reopen the Bankruptcy proceedings, which was granted on May 21, 2007. The instant action is now listed as an asset of the Bankruptcy Estate. (See, Plaintiff's Exhibit 11).

#### **Impact of Bankruptcy Filing/Evidence of Recoverable Damages**

Since all of the Schullers' liabilities to creditors were extinguished in the bankruptcy discharge, the Court finds that Michael V. Demczyk does not have standing to assert the within action on behalf of the Schullers.

Further, even if Michael V. Demczyk did have standing there has been no evidence of economic damages submitted or expert testimony provided as to the causal connection between the alleged conduct of the Defendants and the foreclosure and filing of bankruptcy by the Schullers. The Court finds that the only evidence provided are the self-serving affidavits of the Schullers.

Based upon the above, the Court grants Defendants' Motions for Summary Judgment.

#### **Breach of Contract/Bad Faith Claim**

Even if the Court were to find that Plaintiff Demczyk had standing to assert the causes of action contained in Plaintiff's Complaint, and that there was evidence of recoverable damages, the Court finds that there has been no evidence provided that Defendant Farmers breached the contract or acted in bad faith in this action.

Specifically, the Court finds that there is no evidence that Defendant Farmers "delayed," "lowballed" or "stone-walled" with regard to making payments to the Schullers for their claims,

thereby "contributing to the water-mold residual damage." (See, Affidavit of Expert Witness Clinton E. Miller, Plaintiff's Exhibit 5). In fact, there is no evidence whatsoever as to when the mold growth in question may have begun or that Defendant Farmers knew of and concealed evidence of water damage.

With regard to Plaintiff Demczyk's bad faith claim, in *Zoppo v. Homestead Insurance Co.* (1994), 71 Ohio St.3d 552, the Ohio Supreme Court set forth the proper standard to be used to decide whether an insurer has breached its duty to its insured to act in good faith as follows:

An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor.

*Id.* at syllabus.

In the instant case, there was no blatant refusal by Defendant Farmers to provide coverage under the subject policy. Rather, Defendant Farmers paid \$78,548.45 to or on behalf of the Plaintiffs from 2002 through the present. This is evidenced by the schedule of payments made by Defendant Farmers regarding the Schullers' claims as set forth in the Brief Statement of Facts. Further, a dispute as to the value of a claim does not amount to bad faith. See, *Baker v. State Farm Insurance Company*, 2000 WL 699646 (Ohio App. 5 Dist.).

Therefore, the Court finds Plaintiff Demczyk's claims for breach of contract and bad faith are without merit and grant Defendant Farmers Motion for Summary Judgment as to same.

Since the Court finds that Plaintiff Demczyk's bad faith claim is without merit, the Court also grants Defendant Farmers Motion for Summary Judgment as to Plaintiff Demczyk's claim for punitive damages.

### Intentional Infliction of Emotional Distress

Even if the Court were to find that Plaintiff Demczyk had standing to assert the causes of action contained in Plaintiff's Complaint, and that there was evidence of recoverable damages, the Court finds that there has been no evidence to support Plaintiff Demczyk's claim for intentional infliction of emotional distress.

There has been no evidence provided of any medical treatment of medical bills incurred as a result of mental distress. Rather, the only evidence provided are the self-serving affidavits of the Schullers.

To prevail on a claim for intentional infliction of emotional distress, a party must prove the following: (1) the defendant intended to cause emotional distress, or knew or should have known his actions would result in serious emotional distress, (2) the defendant's conduct was so extreme and outrageous that it went beyond all possible bounds of decency, and can be considered completely intolerable in a civilized community, (3) the defendant's actions proximately caused psychic injury to the plaintiff, and (4) the plaintiff suffered serious mental anguish of the nature no reasonable person could be expected to endure. Restatement of Torts 2d 77, Section 46, and *Pyle v. Pyle* (1983), 11 Ohio App.3d 31.

The Ohio Supreme Court, in *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, adopted the definition of intentional infliction of emotional distress as found in the Restatement, as follows:

One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other result from it, for such bodily harm.

Restatement of the Law 2d, Torts (1965) 71, Section 46(1).

With respect to the requirement that the conduct alleged be “extreme and outrageous” the Court looked to comment *d* to Section 476 of the Restatement, *supra*, at 73, which states:

“\*\*\* It has not been enough that the defendant has acted with an intent which is tortuous or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”

The Court does not find that any alleged conduct of Defendant Farmers in the instant case rises to the level of “extreme and outrageous” conduct as set forth above, nor has the Plaintiff provided any evidence that either Plaintiff has suffered a severe and debilitating injury. See, *East Ohio Gas Company v. Walker*, 59 Ohio App.2d 216, *Zindle v. Parker*, 1991 WL 70159 (Ohio App. 5 Dist.), *Rafoth v. Smith & Schmidt Assoc., Inc.* (1985), 55 B.R. 820, *Reprogle v. Pub, Inc.*, 2002WL 31108630 (Ohio App. 3d Dist.), and *Finley v. First Realty Property Management*, 2009WL 4981217 (Ohio App. 9 Dist.).

#### **Negligent Infliction of Emotional Distress**

Even if the Court were to find that Plaintiff Demczyk had standing to assert the causes of action contained in Plaintiff’s Complaint, and that there was evidence of recoverable damages, the Court finds that there has been no evidence to support Plaintiff Demczyk’s claim for negligent infliction of emotional distress.

With regard to any claim for negligent infliction of emotional distress, an essential element in said claim is that the distress is caused by the plaintiff's fear of an actual physical peril. *Audia v. Rossi Bros. Funeral Home, Inc.* (2000), 140 Ohio App.3d 589 (holding that a cause of action for negligent infliction of emotional distress, relating to the negligent handling of a dead body, and with no requirement of fear of actual peril, does not exist).

Negligent infliction is limited "to such instances as where one was a bystander to an accident or was in fear of physical consequences to his own person." *High v. Howard* (1992), 64 Ohio St.3d 82, 85-86, overruled on other grounds in *Gallimore v. Children's Hosp. Med. Ctr.* (1993), 67 Ohio St.3d 244.

The Court finds that the within action is not one in which the Schullers were placed in fear of actual physical peril. Therefore, any claim for negligent infliction of emotional distress fails as a matter of law and Defendants are granted summary judgment as to any such claim.

#### **Promissory Estoppel**

Even if the Court were to find that Plaintiff Demczyk had standing to assert the causes of action contained in Plaintiff's Complaint, and that there was evidence of recoverable damages, the Court finds that there has been no evidence to support Plaintiff Demczyk's claim for Promissory Estoppel.

With regard to Plaintiff Demczyk's claim for Promissory Estoppel, the Court finds that Plaintiff Demczyk's Response fails to satisfy the requirements of Civ. R. 56, as the only argument asserted in support of said claim is set forth in Plaintiff Demczyk's Response as follows:

Plaintiff's Promissory Estoppel Cause of Action is adequately supported by the record and Plaintiff's evidentiary materials, and will not be further discussed in Plaintiff's Response.

(Plaintiff's Response, p. 3).

Therefore, the Court grants Defendant Farmers Motion for Summary Judgment as to said claim.

#### **Negligence Claim against Defendant Steamatic**

Even if the Court were to find that Plaintiff Demczyk had standing to assert the causes of action contained in Plaintiff's Complaint and that there was evidence of recoverable damages, the Court finds that there has been no evidence presented which supports Plaintiff Demczyk's claim of negligence against Defendant Steamatic. Rather, the Court finds that the mold and remediation work performed by Defendant Steamatic was in accordance with the protocol developed by the EA Group and satisfied the EA Group's safe habitability threshold.

The Court find that the only evidence provided by Plaintiff Demczyk that Defendant Steamatic failed to meet its standard of care is the testimony of Suzette Schuller, which is contradicted by the report provided by the Plaintiff and attached as Plaintiff's Exhibit 7.

Therefore, the Court grants Defendant Steamatic's Motion for Summary Judgment.

#### **Conclusion**

For the reasons stated above, the Court finds that there are no genuine issues of material fact, and viewing the evidence in a light most favorable to the Plaintiff, Defendants are entitled to judgment as a matter of law.

IT IS SO ORDERED.

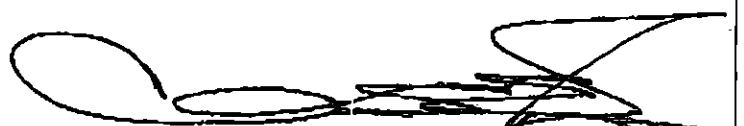


Judge Charles E. Brown, Jr.

Copies to: Edward J. Heben, Jr., Esq.  
Thomas F. Glassman, Esq.  
Mel L. Lute, Jr., Esq.  
William M. Shackelford, Esq.

**NOTICE TO THE CLERK:  
FINAL APPEALABLE ORDER**

IT IS HEREBY ORDERED that notice of the foregoing Judgment Entry shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket.



Judge Charles E. Brown, Jr.