

[Cite as *Findlay Ford Lincoln-Mercury v. Huffman*, 2004-Ohio-541.]

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

**FINDLAY FORD LINCOLN-
MERCURY, ET AL.**

CASE NUMBER 5-02-67

PLAINTIFFS-APPELLANTS

OPINION

v.

ROBERT W. HUFFMAN, ET AL.

DEFENDANTS-APPELLEES

**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court.**

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: February 9, 2004.

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CUPP, J.

{¶1} Plaintiffs-appellants, Findlay Ford Lincoln-Mercury and Stanley Kujawa, appeal from the decision of the Common Pleas Court of Hancock County granting summary judgment in favor of the defendant-appellees, Robert and Carol Huffman.

{¶2} Appellees, Robert W. Huffman (hereinafter, “Huffman”) and Carol J. Huffman (collectively, the “Huffmans”) and appellants, Findlay Ford Lincoln-Mercury and its owner/president, Stanley J. Kujawa (hereinafter, referred to solely as “Kujawa”), entered into a land sales agreement, dated May 20, 1999, in which Kujawa agreed to purchase approximately 14.6 acres of land from the Huffmans.¹ The closing of the sale of the property was conducted on February 2, 2000. Thereafter, Kujawa began construction of what was to be the new Findlay Ford Lincoln-Mercury dealership. During excavation of the land, contamination in the soil was discovered in certain areas of the property due to the presence of oil. An underground, abandoned, unplugged oil well was also discovered on the property. As a result, Kujawa incurred unexpected expenses relating to the plugging of the abandoned oil well and removal of the contaminated soil. Kujawa asserts that the Huffmans knew of the existence of a well on the property prior to the sale of the property but had intentionally misrepresented that fact to him.

¹ The closing of the sale of property was structured in a manner to effectuate a tax free exchange. At closing, the Huffmans executed a deed to the property to an entity known as R.E. Services No. 8, LLC, which is not legally affiliated or owned by Kujawa.

{¶3} It is undisputed that nearly two years prior to the final closing of the sale of the property to Kujawa, Huffman became aware of the existence of a six inch well casing on the property. Records maintained by the Ohio Department of Natural Resources (hereinafter referred to as the “ODNR”) reveal that Huffman, in 1988, requested the ODNR to investigate the six inch well casing he had discovered on said property. In response to this request, Samuel Faust, an employee of the ODNR, inspected the six inch well casing on March 3, 1998, and advised Huffman to apply to the Ohio state-funded idle and orphan well program to have the well plugged. Faust, however, at no time indicated whether the six inch well casing was a part of a water well or oil well. Huffman did not follow through on the advice given to him by Faust, but instead, removed the top of the well casing and covered it with a steel farm disk.

{¶4} Prior to agreeing to purchase said property from the Huffmans, Kujawa hired Peterman Associates to perform a “Phase I environmental site assessment” to environmentally assess the property. The Phase I assessment was performed by Todd Jenkins. As part of the assessment, Jenkins interviewed Huffman by telephone. Kujawa specifically asserts that Jenkins asked Huffman if he knew of “any wells” located on the property, to which Huffman responded, “I don’t know.” Huffman, however, asserts by affidavit that he believed that Jenkins was solely asking whether there were “any oil wells” on the property, which prompted his response that he “did not know.” The completed Phase I assessment performed by Jenkins did not indicate the existence of any wells on the property.

{¶5} Based in part on the Phase I assessment performed by Jenkins, Kujawa agreed to purchase said property from the Huffmans. On March 16, 2000, after construction of the dealership began, Samuel Faust of the ODNR again returned to the property in order to inquire about the status of the well which he had previously inspected in 1998. Kujawa, however, was not aware of any wells located on the property. Shortly thereafter, during the course of construction of the dealership, it was discovered that there was in fact an underground water well *and* an oil well located on the property. It was also discovered that the property contained areas of soil contamination due the presence of oil.

{¶6} On January 11, 2001, Kujawa brought this action against the Huffmans seeking economic damages that resulted from having to plug the abandoned oil well and remove the contaminated soil from the site. In his complaint, Kujawa alleges that Huffman intentionally concealed the oil well and soil contamination from him.

{¶7} Although the six inch casing which Huffman had prior knowledge of was later determined to be a water well and was not the direct cause of the damages suffered by Kujawa, the water well was located within several feet of the abandoned unplugged oil well. On appeal, Kujawa maintains that if Huffman had not misrepresented the existence of the six inch water well casing during the Phase I assessment, the oil well and the soil contamination would have been discovered before closing of the sale and the purchase price would have been lowered to

allow for the cost of plugging the oil well and removing the contaminated soil from the site.

{¶8} On June 20, 2002, after a lengthy period of discovery and several pre-trials, the Huffmans filed a motion for summary judgment. Kujawa responded with a memorandum in opposition to the Huffmans' summary judgment motion. Subsequently, the trial court denied the Huffmans' motion. The Huffmans then filed a motion for reconsideration.

{¶9} Upon reconsideration, the trial court granted the Huffmans' motion for summary judgment and dismissed Kujawa's cause of action. The trial court found Kujawa's cause of action to be barred by the doctrine of caveat emptor. The trial court determined that Kujawa had no right to rely on Huffmans' representation when the existence of the oil well was equally open to discovery by both parties by means of a check of public records maintained by the ODNR and that the presence of the oil well could thereby have reasonably been discovered prior to closing the sale of the property.

{¶10} It is from this judgment that Kujawa now appeals and asserts two assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

The trial court erred in granting summary judgment to appellees in that caveat emptor is not available as a defense and the duty to inspect terminates when representation by seller in direct response to purchase inquiry are misleading and false.

{¶11} The standard for review of a grant of summary judgment is one of de novo review. *Lorain Nat'l Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Such a grant will be affirmed only when 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). In addition, “summary judgment shall not be rendered unless it appears * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence construed most strongly in his favor.” *Id.*

{¶12} Kujawa asserts that a material issue of fact exists as to whether Huffman intentionally misrepresented his knowledge of *any* wells on the property to Jenkins in order to procure the sale of the land to Kujawa. Kujawa maintains that further investigation and possible price negotiations were negated by the fraudulent representation made by Huffman, and therefore, his cause of action must survive summary judgment.

{¶13} The determinative issue in the case sub judice is whether Kujawa’s recovery is barred by application of the doctrine of caveat emptor. The doctrine of caveat emptor, although virtually abolished in the area of personal property, remains a viable rule of law in real estate sales. *Layman v. Binns* (1988), 35 Ohio St.3d 176, 177; parallel citation omitted. Since problems of varying degree are to be found in most dwellings and buildings, the doctrine performs a function in the

real estate marketplace. Without the doctrine nearly every sale would invite litigation instituted by a disappointed buyer. *Id.*

{¶14} Pursuant to the doctrine of caveat emptor, a seller of realty is not obligated to reveal all that he or she knows. A duty falls upon the purchaser to make inquiry and examination. *Id.* The doctrine, however, has never shielded deliberate fraud by the seller. See *Id.*, syllabus. Caveat emptor does not bar recovery by a purchaser when latent defects not easily discoverable are coupled with affirmative misrepresentations by the seller. *Noah v. Hughley* (December 14, 2000), 8th Dist. No. 76552; citing *Jacobs v. Racevskis* (1995), 105 Ohio App.3d 1, 5.

{¶15} For fairness, the doctrine is subject to these requirements: (1) the defect must be open to observation or discoverable on reasonable inspection, (2) the purchaser must have an unimpeded opportunity to examine the property, and (3) the vendor may not engage in fraud. *Boehringer v. Miller* (Jan. 29, 1990), Auglaize App. No. 2-88-18; citing *Layman*, *supra* at 77. We apply these requirements to the case before us.

I.

{¶16} Here the cause of action concerned the underground oil well and surrounding soil contamination. If the oil well and soil contamination were patent defects, there was no duty on the Huffmans to disclose such information to Kujawa. It is argued by Kujawa, however, that the defects were latent. We disagree. Examination of the facts involved reveals that although the oil well for

which damages are sought was not discoverable by visual inspection, it was readily discoverable a searching of the public records maintained by the ODNR.

{¶17} In property transactions, there is no right to rely upon oral representations regarding the property transferred where the true facts are equally open to both parties. See *Traverse v. Long* (1956), 165 Ohio St. 249, 252. For the reasons more fully set out below, we find that Kujawa reasonably should have searched the public records maintained by the ODNR before purchasing the property to discover if there were any oil wells located on the property. Had he done so, he would have discovered gas and oil well maps which indicate the presence, or prior presence, of several oil wells on the property.

II.

{¶18} The evidence shows that Kujawa was permitted full examination of the premises, inspected the property and was in no way prevented from conducting his own examination of the premises.

III.

{¶19} This brings us to the final inquiry. On the facts in this case, did Huffman's representation regarding his knowledge of wells on the property amount to fraud? If there was no fraudulent representation by Huffman, the doctrine of caveat emptor would apply and Kujawa would be precluded from recovering any damages resulting from the abandoned oil well or soil contamination.

{¶20} In an action for fraudulent inducement to purchase real estate, the complaining party must show actual fraud or such gross negligence as will amount to fraud. *Noth v. Wynn* (1988), 59 Ohio App.3d. 65, 67. The elements of fraud as outlined by this court in *Lane v. Lynn* (Feb. 20, 1981), Hancock App. No. 5-80-29, are:

- 1. Actual or implied representation (or concealment) of a matter of fact material to the transaction and relating to the past or present (i.e., at time of statement).**
- 2. Made knowing the falsity or with such utter disregard as to truth that knowledge may be inferred.**
- 3. Made with intent to mislead.**
- 4. Reliance by the purchaser, with a right to so rely.**
- 5. Damage.**

{¶21} Assuming for the purposes of summary judgment that the actions of Huffman amount to a knowing misrepresentation of the presence of a well on the property, we nevertheless conclude that the element of justifiable reliance is lacking. Based on the facts before the trial court, which are not in dispute, we find that Kujawa could not justifiably have relied upon the statement made by Huffman.

{¶22} In determining whether reliance is justifiable, " ' * * * courts consider the various circumstances involved, such as the nature of the transaction, the form and materiality of the representation, the relationship of the parties, the respective intelligence, experience, age, and mental and physical condition of the parties, and their respective knowledge and means of knowledge.' " *Finomore v. Epstein* (1984), 18 Ohio App.3d 88, 90; quoting *Feliciano v. Moore* (1979), 64 Ohio App.2d 236, 241, parallel citations omitted.

{¶23} It is uncontroverted that actual hand-drawn gas and oil well maps were available in the ODNR's public records which revealed the presence of the oil well in question. Kujawa and the inspector's hired by him, however, failed to utilize these gas and oil well maps prior to closing of the sale of the property. Rather, they resorted to these maps only after physically discovering a well on the property. Although Kujawa alleges that Huffman misrepresented his knowledge of the six-inch water well casing, Kujawa had the opportunity to obtain and investigate the gas and oil well maps, but failed to do so. He "cannot, because of [his] failure to investigate, complain of fraud." *Van Horn v. Peoples Banking Co.*

64 Ohio App.3d 745, 748; quoting *Ralston v. Grinder* (1966), 8 Ohio App.2d 208, 210.

{¶24} Moreover, based upon the evidence in the record, it is evident that there was information attained and known to Kujawa and his agents sufficient to have put Kujawa on notice of the potential for the existence of wells on the property and the need for further investigation. This information, as gleaned from the discovery documents includes, for example: (1) information that the property had, at one time, been owned by the Ohio Oil Company (April 18, 2002, Deposition of Jenkins, pp. 31-32); (2) that Jenkins did have a gas and oil field map that showed that that the property was located in an area where gas and oil fields exist or had existed, but failed to further inquire to the ODNR about the existence of oil wells on the property (April 18, 2002, Deposition of Jenkins, pp. 30-31, 36, and 50); (3) that a tract of real estate adjacent to the subject property, as revealed from aerial maps, was the site of a tank farm used for the storage of petroleum products (April 30, 2002 Deposition of Jenkins, p. 11); and, (4) that the parties considered language in the preliminary contract drafts which recognized the possible existence of abandoned oil and gas wells, even though such language was dropped in the final agreement (See the April 13, 1999 “Agreement for the Sale of Commercial Real Estate” as found in Plaintiff’s Response to Defendants’ Motion for Summary Judgment, July 29, 2002, marked as “Plaintiff’s Exhibit 2”).

{¶25} The record herein is replete with facts which should have made Kujawa aware of the potential for oil wells existing on the property. The failure to

investigate the existing and available ODNR public records removes any justifiable reliance upon Huffman's statement that he "did not know" of the existence of wells on the property.

{¶26} Additionally, the element of fraud requiring an "actual or implied representation or concealment of a matter of fact material to the transaction," is also lacking in the case sub judice. As the Ohio Supreme Court in *Traverse v. Long* (1956), 165 Ohio St. 249, 252, stated, "[t]he purchaser has no just cause for complaint even though there are misstatements and misrepresentations by the vendor not so reprehensible in nature as to constitute fraud." The only statement made by Huffman, when asked by Jenkins if there were "any wells" on the property, was that he "did not know." He never stated affirmatively that there were "no wells" on the property. Kujawa was not justified in relying on Huffman's uncertainty as to the presence of "any wells" on the property to conclude there were no wells. Such a statement would not excuse Kujawa's duty to make a reasonable search into the existence of patent defects, especially when other facts as to the property's oil history were known to Kujawa through the investigation performed by Jenkins.

{¶27} There is no evidence establishing that the Huffmans specifically knew of the oil well or soil contamination of which Kujawa's alleged damages are based. Although it is true that the evidence shows that Huffman knew of the presence of "some kind of" well in relation to the six inch well casing, which was later discovered to be a water well, there has been no showing that he ever knew

of the oil well located on the property. The record is also clear that the Huffmans were never aware of the soil contamination located on the property.²

{¶28} Because Kujawa could have discovered the alleged defect through a reasonable inspection and because he is unable to establish the existence of misrepresentation made by Huffman amounting to actual fraud, the trial court correctly held that the doctrine of caveat emptor precludes Kujawa from recovering damages. See *Boehringer v. Miller* (Jan. 29, 1990), Auglaize App. No. 2-88-18.

{¶29} Accordingly, Kujawa's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. II

The trial court erred in considering appellees' motion for reconsideration for the reason that appellees failed to demonstrate an obvious error, or that an issue was not considered or considered carefully.

{¶30} In his second assignment of error, Kujawa argues that the trial court erred in considering and granting appellees' motion for reconsideration.

{¶31} The Ohio Rules of Civil Procedure do not prescribe motions for reconsideration after a final judgment. *Pitts v. Dept. of Transportation* (1981), 67 Ohio St.2d 378. However, a motion for reconsideration would be the proper procedural vehicle for obtaining relief after interlocutory orders. *Id.* at 380, fn. 1.

² In fact, it has not been determined that the unplugged oil well caused the soil contamination. The oil well in dispute was located on the northwest section of the property, the soil contamination was located on the southwest section of the property, at least 200 feet from the oil well.

{¶32} Since an order denying a motion for summary judgment is not a final appealable order, the trial court had authority to rule on appellee's motion to reconsider its motion for summary judgment. *Fieg Sewering Co. v. Romaniw* (Feb. 8, 1990), Cuyahoga App. No. 56526.

{¶33} In his brief, Kujawa cites *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, in support of his argument that the trial court erred in granting appellees' motion for reconsideration. The court in *Hodge* stated that: "[t]he test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Hodge*, supra at ¶ 1 of the syllabus; citing *Mathews v. Mathews* (1981) 5 Ohio App.3d 140.

{¶34} Kujawa maintains that the Huffmans' motion for reconsideration did not meet the standard as set forth in *Hodge*, but merely reasserted the same argument and facts as their original motion for summary judgment, thereby giving the trial court no new basis upon which to change its prior judgment. We disagree.

{¶35} Assuming without deciding that the test provided by *Hodge* for appellate courts is equally applicable to a trial court's determination whether to consider and/or grant a movant's motion for reconsideration, we find that the trial court specifically took into account, for the first time on reconsideration, the affidavit of Ralph Russell, neighbor of the Huffmans, and further considered the

availability of the public ODNR records. See, also, *Osborne v. Lyles* (July 26, 1990), Cuyahoga App. No. 57289.

{¶36} The trial court did not err in considering the Huffmans' motion for reconsideration. Accordingly, Kujawa's second assignment of error is overruled. Furthermore, based on this court's analysis of Kujawa's first assignment of error, we find that the trial court, upon reconsideration, properly granted the Huffmans' motion for summary judgment.

{¶37} Having found no error prejudicial to appellants herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW, P.J., and BRYANT, J., concur.