

[Cite as *Lewis v. Basinger*, 2004-Ohio-6377.]

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

JAMES R. LEWIS, Sr.,	)	
	)	CASE NO. 03 MA 223
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
J. PAUL BASINGER,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Struthers Municipal Court, Case No. CVF 200071.

JUDGMENT: Reversed. Judgment Vacated.

APPEARANCES:  
For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:  
Hon. Mary DeGenaro  
Hon. Cheryl L. Waite  
Hon. Joseph J. Vukovich

Dated: November 22, 2004

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral argument to this court. Defendant-Appellant, J. Paul Basinger, appeals the decision of the Struthers Municipal Court which found that Basinger was liable for negligent misrepresentation and awarded Plaintiffs/Appellees, James and Karen Lewis, Two Thousand Dollars in damages.

{¶2} Basinger argues that the trial court erred when it found him liable for negligent misrepresentation since both the "as is" nature of the contract and the doctrine of caveat emptor shield him from all liability except for fraud. Basinger is correct. The doctrine of caveat emptor and the "as is" nature of a contract preclude recovery against both a seller and the seller's agent absent fraud. In this case, the trial court concluded that Basinger acted negligently, not fraudulently. Thus, the trial court erred when it granted judgment to the Lewises. The trial court's decision is reversed and the judgment against Basinger is vacated.

#### Facts

{¶3} Basinger is a licensed auctioneer and real estate broker. He was retained to sell a home in Poland, Ohio, on behalf of an estate after the decedent passed away. He advertised the auction and held two open houses. The Lewises were interested in purchasing the house, but only if it was connected to the sewer. The Lewises attended the first open house and Mr. Lewis asked Basinger if the home was connected to the sewer. At this point, the parties' testimony differs. Basinger testified he remembered talking to various people, but he didn't "remember the specific discussions with the Lewises." Mr. Lewis testified that Basinger said there was a sanitary sewer, and that Basinger also said, "he was going to check to make sure." At the time of the open house, there was a sewer manhole on the property and Mr. Lewis saw no indication that the property had a septic system.

{¶4} On the day of the auction, Mr. Lewis again asked Basinger if the house was connected to the sewer. Basinger answered that it was. The Lewises then submitted the winning bid on the real estate and signed a contract stating that they "hereby acknowledge that they have purchased the above mentioned real estate at a public

auction and accept it in its present condition with no additional warranties express or implied and that inspection time was provided prior to the auction."

{¶15} After buying the property, the Lewises discovered that it was not connected to the sewer. They connected to the sewer and brought suit against Basinger in the Mahoning County Court of Common Pleas. The case was later transferred to the Struthers Municipal Court. After a bench trial, the trial court found that Basinger negligently misrepresented that the home was connected to the sewer and granted judgment to the Lewises in the amount of two thousand dollars. It is from this judgment that Basinger timely appeals.

#### Liability

{¶16} In his first assignment of error, Basinger argues:

{¶17} "The trial court erred when it gave weight to oral statements made by J. Paul Basinger – which were themselves in dispute – given the fact that the written contract between the parties governed the sale of the property."

{¶18} Here, Basinger contends that the trial court erred when it found him liable for negligent misrepresentation since the real estate was sold "as is" and the doctrine of caveat emptor shields him from all liability except for fraud. In response, the Lewises question whether Basinger can rely on the language in the contract since he was not a party to the contract. Thus, the central question the parties pose is whether an auctioneer or real estate broker can be liable for negligent misrepresentation when the real estate is sold "as is". The answer is no.

{¶19} The doctrine of caveat emptor generally applies to all real estate transactions. That doctrine precludes recovery in an action by the purchaser where 1) the condition complained of is open to observation or discoverable upon reasonable inspection; 2) the purchaser had the unimpeded opportunity to examine the premises; and, 3) there is no fraud on the part of the vendor. *Layman v. Binns* (1988), 35 Ohio St.3d 176, syllabus. Even more claims are precluded if the real estate is sold "as is." When a buyer contractually agrees to accept property "as is," the seller is relieved of any duty to disclose the property's latent conditions and only has the duty not to commit an

affirmative fraud. *Kaye v. Buehrle* (1983), 8 Ohio App.3d 381, 383.

{¶10} Ohio's courts have consistently held a seller's agent is as protected by the doctrine of caveat emptor and the "as is" language in a sales contract as the seller. See *Buchanan v. Geneva Chervenik Realty* (1996), 115 Ohio App.3d 250; *Duman v. Campbell*, 8th Dist. No. 79859, 2002-Ohio-2253; *Durica v. Donaldson* (Mar. 3, 2000), 11th Dist. No. 97-T-0183; *Hearty v. First Merit Bank* (Nov. 24, 1999), 9th Dist. No. 19273; 9th Dist. No. 96CA006327; *Mills v. Saxton Real Estate* (Apr. 27, 1995), 10th Dist. No. 94APE09-1304. The reason for this rule is obvious. Both an "as is" contract and the doctrine of caveat emptor place the risk on the buyer. The buyer is the party to the contract who has the burden of discovering latent conditions. That burden does not shift merely because the defendant is the seller's agent rather than the seller. Since the buyer bears the risk, these defenses apply equally to both the seller and the seller's agents.

{¶11} In this case, the property was sold "as is", so the Lewises cannot recover from Basinger absent fraud. The trial court found that Basinger's representations were negligent, thereby rejecting the Lewises' claim that those representations were fraudulent. The Lewises have not challenged that finding on appeal. Accordingly, they cannot recover against Basinger. Basinger's first assignment of error is meritorious.

#### Damages

{¶12} In his second assignment of error, Basinger argues:

{¶13} "Whatever may have taken place regarding the sale of the property, the trial court erred in awarding the Lewises \$2,000.00 in damages."

{¶14} Here, Basinger contends that the trial court's award of damages is excessive since the evidence produced at trial demonstrated that the Lewises had mitigated their damages. Because we have concluded that Basinger is not liable, this assignment of error is moot.

{¶15} The Lewises cannot recover against Basinger since he did not commit fraud when answering their questions about the septic system. The trial court's decision granting judgment to the Lewises was erroneous. Accordingly, the judgment of the trial court is reversed and the judgment against Basinger is vacated.

Waite, P.J., concurs.

Vukovich, J., concurs.