

# Well Water/Sale of Residence: Ohio Appellate Court Addresses Failure to Disclose/Fraud Issue



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The Court of Appeals of Ohio (“Court”) addressed in a June 12th Opinion an issue involving an alleged fraudulent misrepresentation made by the seller of a home involving contamination of its well water. See *Enger v. Black*, C.A. No. 22AP0010.

The question considered was whether the seller of the home committed fraud by failing to disclose contaminants present in the well water.

The Court notes that Ohio law requires that a seller of residential real estate complete a form disclosing material matters relating to the physical condition of the property to be transferred. Further, the Court states:

... This statutory requirement includes disclosure of material matters relating to the physical condition of the property to be transferred, including, but not limited to, the source of water supply to the property, the presence of hazardous materials or substances, and any material defects in the property that are within the actual knowledge of the transferor.

Mr. Black (“Seller”) owned a home that drew water from a well that was drilled on the property in 1991. The Seller discovered that the water contained elevated minerals that could be smelled and tasted. Therefore, he contacted the Ohio Department of Natural Resources (“ODNR”) regarding the quality of the water in the well.

Due to this contamination the Seller:

- deepened the well,
- installed a water softener to treat the water entering the home, and
- installed a reverse osmosis system on the kitchen sink.

ODNR informed Seller on several occasions that the barium, chloride, and total dissolved solids (“TDS”) levels found in the water were above the Maximum Containment Levels established by the Safe Drinking Water Act.

Seller listed the home for sale. He completed the required residential property disclosure form. The completed form stated that water was supplied to the home from an on-site private well.

In response to a question on the form as to whether the Seller knew of any current leaks, backups, or other material problems with the water system or quality of water, he checked a box that indicated a response of “no.”

The Engers (“Buyers”) then purchased the home. The Real Estate Purchase Agreement they executed contained a clause stating that the property is being purchased “as-is.”

Buyers became aware of the water contamination after purchasing the property. They filed a Complaint against the Seller in the Wayne County Court of Common Pleas (“County Court”) alleging fraud.

The County Court granted summary judgement in favor of the Seller. It held that the Seller did not make an affirmative misrepresentation or misstatement of material fact relative to the quality of the water.

The Buyers appealed.

Fraudulent misrepresentation in Ohio requires that a buyer establish the following elements:

1. A representation or, where there is a duty to disclose, concealment of a fact,
2. Which is material to the transaction at hand,
3. Made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
4. With the intent of misleading another into relying upon it,
5. Justifiable reliance upon the representation or concealment, and
6. A resulting injury proximately caused by the reliance

Buyers argued that the County Court erred in finding that the Seller’s action in completing the disclosure form was not an affirmative misrepresentation.

Seller responded that the County Court properly granted summary judgment because:

1. the purchase agreement contained an “as-is” clause, and because of that the Seller had no duty to disclose any facts of material nature;
2. there was no fraud on the part of the Seller because the condition of the water could have been ascertained through an inspection; and
3. the completion of the disclosure form did not constitute an affirmative representation required to establish fraud.

The Court held that an “as-is” clause cannot bar a claim for fraudulent misrepresentation or fraudulent concealment. It explained that the Seller did make a representation to the Buyers by answering questions on the disclosure form. The Seller therefore had a statutory duty to make the disclosure.

The disclosure also had to be made in good faith. Since there was a dispute as to whether the representation made by the Seller regarding the quality of the water was false, then a genuine issue of fact existed as to whether there was a fraudulent misrepresentation. Therefore, the Court stated that the Seller was not entitled to summary judgment. The case was reversed and remanded for further proceedings.

A copy of the Opinion can be downloaded [here](#).