IN THE SUPREME COURT OF OHIO

KEITH ASHMUS, *Plaintiff-Appellant*, v. THOMAS M. COUGHLIN, JR., et al., *Defendants-Appellees*.	:	Supreme Court Case No. 2024-0264 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District, Court of Appeals Case No. CA-23-112816

MERIT BRIEF OF AMICUS CURIAE OHIO REALTORS® IN SUPPORT OF APPELLANT ASHMUS

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INTERESTS OF AMICUS CURIAE

Amicus Curiae Ohio REALTORS® submits this merit brief in support of Appellant. Formed in 1910, Ohio REALTORS® is the State's largest professional trade association with over 35,000 members who are mostly licensed real estate brokers and salespersons. In addition to serving as a spokesperson for the real estate industry, its activities include services in the areas of education, professional ethics training, legal information and legislative advocacy. In particular, the member services offered by Ohio REALTORS® include: lobbying state legislators on industry issues, research and professional development, providing current real estate information and member discounts on products and services, and legal information.

This case comes down to whether the existence of underground utilities within a publicly recorded easement should be discovered through the due diligence of the buyer or are required to be affirmatively disclosed by the seller. Consistent with decades of Ohio law and real estate practice, Ohio REALTORS® submits it should be the former. If not reversed, the Eighth District's decision will have a profound impact on the residential property disclosures required by home sellers, and directly implicate the way REALTORS® have practiced and interacted with their clients for decades. Thus, Ohio REALTORS® submits this merit brief in support of the reversal of the Eighth District's decision below and to request that the Court affirm the trial court's grant of summary judgment in favor of Appellant Ashmus that as a matter of law underground utilities observable through a recorded easement do not require disclosure on the residential property disclosure form.

STATEMENT OF THE CASE AND FACTS

Ohio REALTORS® incorporates the statement of the case and statement of facts submitted by Appellant Ashmus in his merit brief.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. Proposition of Law I: Neither a recorded sewer easement nor any sewer line located within it constitutes a defect that must be disclosed by a seller of residential property.

Prior to the enactment of R.C. 5302.30, the disclosures required by a home seller were found in Ohio common law. Ohio has long followed the rule of caveat emptor. *Layman v. Binns*, 35 Ohio St.3d 176, 177 (1988). Under that doctrine, buyers are responsible for discovering patent defects that are open to observation or discoverable with reasonable inspection. *Id*. Sellers, however, are required to disclose latent defects (those not open to observation and readily discoverable) of which they are aware. However, if the property is sold "as-is," then the seller is only liable for fraudulent concealment or misrepresentation. *See Kaye v. Buehrle*, 8 Ohio App.3d 381, 383 (9th Dist. 1983).

In 1993, however, the Ohio legislature adopted R.C. 5302.30 requiring all transfers of residential real property occurring after July 1, 1993, with certain limited exceptions, to include a property disclosure form adopted by the Ohio Department of Commerce. The statute does not distinguish between patent and latent defects and states that:

> The form prescribed by the director shall be designed to permit the transferor to disclose 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 nature of the sewer system serving the property; the condition of the structure of the property, including the roof, foundation, walls, and floors; the presence of hazardous materials or substances, including lead-based paint, asbestos, urea-formaldehyde foam

> insulation, and radon gas; and any material defects in the property that are within the actual knowledge of the transferor.

R.C. 5302.30(D)(1). Consistent with the statute, the Residential Property Disclosure Form ("RPD Form") identifies a number of specific issues that must be disclosed by the seller, including any issues with water supply, the sewer system, the roof, any water intrusion, structural components, wood destroying insects or termites, mechanical systems, hazardous materials, underground storage tanks or wells, flood plains, drainage or erosion, or zoning, among others. In Section N, the RPD Form requires disclosure of "Other Known Material Defects." A "material defect" is defined to include "any non-observable physical condition existing on the property that could be dangerous to anyone occupying the property or any non-observable physical condition that could inhibit a person's use of the property."

This Court should decline to hold that an underground sewer line located within an easement recorded in the public record is a "material defect" that must be disclosed in the RPD Form or under Ohio common law. This is particularly true, here, where the property was sold "as-is."

A. This Court should not interpret the RPD Form to require disclosure of an underground physical condition located within a publicly recorded easement.

Since its adoption over thirty years ago, the RPD Form has never required disclosure of an underground physical condition located within and pursuant to a publicly recorded easement. Nor has any court in Ohio interpreted the form to require such disclosure, until now. Appellees and the Eighth District rely upon the catchall provision in Section N of the RPD Form, requiring disclosure of "Other Known Material Defects." The purported "material defect" here was a sanitary sewer line within a

publicly recorded easement. Although the Eighth District recognized that nothing in the RPD Form identifies an "easement" as a defect requiring disclosure, it believed such disclosure may be required under the catchall provision for "Other Known Material Defects." *Ashmus v. Coughlin*, 2024-Ohio-341, ¶ 39 (8th Dist.). This Court should reverse and hold that Appellant Ashmus was not required to disclose the underground sewer line in the RPD Form for several reasons.

First, the RPD Form does not mention the word "easement" or underground utilities anywhere. The Ohio legislature and/or the Department of Commerce could have included a specific provision requiring disclosure of any and all underground utility lines, like it did for underground storage tanks and natural gas wells, but chose not to. This Court should not usurp the role of the Ohio legislature or the Department of Commerce to require additional disclosure not set forth in the RPD Form or the Revised Code.

Second, to require disclosure in the RPD Form in Section N, the condition must be a "***non-observable*** physical condition" on the property. The evidence in the record demonstrates that the sewer easement here was recorded in 1964, and it was ultimately identified by Appellees in the public record before closing. The Eighth District found the RPD Form required disclosure because the sewer line was "well below the surface of the Property and, therefore, not open to observation or even discoverable upon reasonable inspection." *Ashmus* at ¶ 23. Not so. The Eighth District's opinion too narrowly limits knowledge to those conditions that are simply visible by sight. It ignores that the sewer line was easily discoverable through public records. As the dissent recognized, "[w]hile the sewer line is not physically observable, the recording of the sewer easement serves as constructive notice to the potential buyer." *Ashmus* at ¶ 57 (Sheehan, P.J. concurring in

part, and dissenting in part). Indeed, Ohio courts have long recognized the doctrine of constructive notice on the purchaser through recorded instruments. *Cox v. Estate of Wallace*, 1987 Ohio App. LEXIS 10358, *6 (12th Dist. Dec. 31, 1987).

Third, affirming the Eight District's opinion will unnecessarily expand the disclosure obligations of both sellers and their REALTORS®. Many REALTORS® give the RPD Form to their clients to fill out. But if the REALTOR® is similarly aware of the condition, they are likewise under an obligation to disclose it to the buyer under Ohio law. R.C. 4735.67. (requiring licensee to "disclose to any purchaser all material facts of which the licensee has actual knowledge pertaining to the physical condition of the property that the purchaser would not discover by a reasonably diligent inspection, including material defects in the property . . ."). For the first time, a court in Ohio held that a physical condition located within the bounds of a publicly recorded easement could be considered a "material defect," triggering a potential obligation to disclose by not only sellers, but also their REALTORS®.

Finally, placing such burdens upon sellers and their REALTORS® is unnecessary. Ohio law already contains protections for the buyer. As occurred here, the buyer received a title report that would reveal any underground easements within the chain of title, and therefore any potential underground physical conditions that might impede their intended use of the Property. It is then incumbent upon the buyer to conduct due diligence to investigate any potential issues identified in the title report. The Eighth District's opinion now purportedly flips that burden to sellers and their real estate agents. If the easement was not properly identified in the title report, the buyer might have a claim against the title company. Or, if the underground condition was not in the location of the recorded easement, and that was known by the seller, then the seller

could be held liable for a failure to disclose the defect, assuming the condition was shown to be dangerous or to inhibit a person's use of the property.

The Eighth District's decision takes the disclosure requirements of the RPD Form too far and imposes an unreasonable burden on both sellers and REALTORS® statewide. It imposes additional obligations on sellers and their agents in place of the buyers' obligation to perform their own due diligence, including reviewing the title commitment. As such, this Court should reverse the Eighth District's opinion and affirm the trial court's ruling that sellers (and therefore their REALTORS®) are not required to disclose underground conditions readily identifiable in the public record as an "Other Known Material Defect" in Section N of the RPD Form.

B. The Eighth District Wrongly Applied the Law Regarding As-Is Sales in Ohio.

What makes the Eighth District's decision even more concerning is its potential impact on the disclosures required in an "as-is" sale. Ohio law has long held that an "as-is" clause in a contract bars a cause of action against the seller on a theory of nondisclosure or passive fraud. *See Eiland v. Coldwell Banker Hunter Realty*, 122 Ohio App.3d 446, 457 (8th Dist. 1999). It eliminates the seller's duty to disclose material latent defects. But it does not shield a seller from liability for positive misrepresentation or fraudulently concealing the complained of condition. (i.e. – active fraud). *Id.* "Thus, while a seller may not have a duty to disclose a defective condition, the seller may not take affirmative steps to misrepresent or to conceal the condition." *Mar Jul, L.L.C. v. Hurst*, 2013-Ohio-479, ¶ 43 (4th Dist.).

"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." *Lewis*

v. Basinger, 2004-Ohio-6377, ¶ 10 (7th Dist.) (citing cases); *see also Moreland v. Ksiazek*, 2004-Ohio-2974, ¶ 38 (8th Dist.) ("A cause of action cannot be maintained against the seller **or its agent** for fraudulent nondisclosure when the property is being sold 'as is.'") (emphasis added). As the Court in *Lewis* stated:

> 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.

Lewis at ¶ 10.

Moreover, while R.C. 5302.30 may create certain disclosure obligations by statute, Ohio courts have rejected the argument that the disclosures required by the RPD Form under R.C. 5302.30 otherwise negate prior law on "as is" residential home purchase agreements. *See Belluardo v. Blankenship*, 1998 Ohio App. LEXIS 2409, *10-11 (8th Dist. June 4, 1998). "[A] violation of R.C. 5302.30 does not equal fraudulent misrepresentation per se." *Majoy v. Hord*, 2004-Ohio-2049, ¶ 17 (6th Dist.). "To overcome the 'as-is' clause, a buyer must establish that a seller failed to disclose a material defect on the disclosure form and that this failure constituted fraud." *Arbogast v. Werley*, 2010-Ohio-2249, ¶ 39 (6th Dist.). Thus, absent a disclosure required by the RPD Form, a seller has no obligation to disclose any latent defects to the buyer. Since the RPD Form did not require disclosure of the underground sewer line and the related easement, the "as-is" clause would prohibit any claim for nondisclosure.

The Eighth District cites the law correctly but then applies it incorrectly. *Ashmus*, 2024-Ohio-341, at ¶ 24 (8th Dist.). It held that because the sewer line was below the surface of the property and not open to observation or even discoverable upon

reasonable inspection, Appellant could not rely upon the existence of the "as is" clause to avoid liability. *Id*. But that ignores the holdings of the above cases, and those cited by the majority, that an "as-is" clause places the risk on the buyer, and the seller and/or their agent are only liable if they make an affirmative misrepresentation about the condition or take affirmative steps to conceal it. Indeed, the Eighth District recognizes this very point in the next paragraph of the opinion, yet fails to cite to any evidence that Appellant or his agent made any affirmative misrepresentations or took any steps to conceal the sewer line or the easement. *Id*. at ¶ 25. The Eighth District states that "Ashmus was aware of the existence of the sewer line easement and did not disclose the fact." *Id*. But that is a classic claim for nondisclosure, which is ***barred*** by an "as-is" clause, not the other way around. *Eiland*, 122 Ohio App.3d at 457. Once again, the Eighth District's decision would flip the burden from the buyer to the seller to disclose discoverable defects in an as-is sale contrary to decades of both Ohio law and real estate practice.

Moreover, "[a] buyer's reliance on a seller's fraudulent misrepresentation or concealment 'is not justifiable, as a matter of law, where undisputed evidence demonstrates that the buyer had other sufficient notice of the issue before closing on the home.'" *Jones v. Gilbert*, 2023-Ohio-754, ¶ 16 (3d Dist.), *quoting Bechtel v. Turner*, 2020-Ohio-4078, ¶ 39 (10th Dist.). Thus, for example, when a buyer is alerted to a potential defect through an inspection report, the buyer is placed with knowledge and a duty of exploring the issue further. *Id*. "'Once alerted to a possible defect, a purchaser may not sit back and then raise his lack of expertise when a problem arises.'" *Id*., quoting *Tipton v. Nuzum*, 84 Ohio App.3d 33, 38 (9th Dist. 1992). Again, there is no dispute here that Appellees were on notice of the sewer line prior to closing. They

identified it in public records and the sewer easement was included on the title commitment. As such, they cannot rely upon an alleged fraudulent nondisclosure here.

The Eighth District points to the RPD Form requiring certain disclosures as a matter of Ohio law, and in particular, Section N requiring disclosure of "Other Known Material Defects." But neither that section, nor anywhere else in the form, indicates that an underground physical condition existing pursuant to a publicly recorded easement must be disclosed as a "material defect." And common sense says it need not be. Absent a requirement to disclose the condition in the RPD Form, the "as-is" law in Ohio still applies, and the seller and their agent cannot be held liable for mere nondisclosure. Thus, in interpreting Section N of the RPD Form as broadly as it did, the Eighth District significantly undercut both the purpose and the protections of an "as-is" sale. For this reason, too, its opinion requires reversal.

II. Proposition of Law II: Sellers of residential real property are only obligated to disclose non-observable physical conditions that could inhibit a person's use of the property based on its current use.

Even assuming that certain underground physical conditions must be disclosed under Section N of the RPD Form, it is not all such conditions. Rather, it is only a non-observable physical condition that is either (1) dangerous to anyone occupying the property, or (2) would inhibit a person's use of the property. There was no evidence or argument that the underground utility here was dangerous. Rather, the Eighth District found a factual dispute as to whether the underground sewer line inhibited *Appellees'* use of the Property. But that holding creates even bigger problems for home sellers and the real estate agents who represent them.

The sole argument relied upon by the majority opinion that the sanitary sewer line inhibited Appellees' use of their property was that they were unable to build a new

house on the portion of the property that contained the sewer line. *Ashmus*, 2024-Ohio-341, at ¶ 30-33 (8th Dist.). But that incorrectly reads a subjective element into the RPD Form. As the dissent correctly recognized, the question is "*not* whether the sewer line could inhibit a particular buyer's intended use of the property but rather whether the sewer line could inhibit a person's use of the property generally." *Id.* at ¶ 56 (Sheehan, P.J. concurring in part and dissenting in part); *see also Nieberding v. Barrante*, 2021-Ohio-2593, ¶ 29 (8th Dist.) (holes in a seawall were not material defects even if not discoverable because they were not dangerous and did not inhibit a person's use of the property"). As the dissent recognized, the use of "a" versus "the" in the RPD Form indicates an indefinite or generalized person as opposed to the particular subject that precedes it. *Ashmus* at ¶ 55 (Sheehan, P.J. concurring in part and dissenting in part) (citing cases).

In most instances, sellers complete the RPD form *before* they know about the buyer's intended use for the property, if such use is ever disclosed by the buyer; it does not have to be. Requiring sellers and their agents to anticipate a potential use, and then requiring them to make disclosures based upon those anticipated uses is both unreasonable and inconsistent with standard practice for decades. It would require sellers and their agents to speculate about <u>all</u> potential uses for the property by the buyer and then determine whether a publicly disclosed underground easement could somehow inhibit that use.

So, for example, a seller and/or their real estate agent could be liable for failing to disclose an underground electrical line located within a publicly recorded easement by the power company if that easement somehow interfered with the buyer's desire to build a new garage on the property in the area where the underground electrical line is

located. Or, perhaps the seller mentions to their agent that the soil in the backyard has a high amount of silt or sand, making it unsuitable for certain types of improvements. If a buyer intended to build an addition or an in-ground pool after purchasing the home, both the seller and their agent could be sued, if that condition inhibited the buyer's ability for such construction.

These scenarios setup both the seller and their agent to be sued for claims for breach of contract (as to the seller) and/or fraud and misrepresentation (as to both the seller and their agent), regardless if they were even informed of the buyer's intended use. Any underground utility, which may be visually unobservable, would be required to be disclosed despite the fact that these underground utilities are rarely "defects" and are usually easily discoverable in the chain of title, and in many instances benefit the purchaser. And absent knowledge of the purchaser's intended use, it would be impossible to determine if the underground utility could somehow constitute a "defect" to that particular buyer or their intended use of the property. Thus, the majority's opinion requires REALTORS® to not only be real estate agents for their clients, but now also title agents and mind readers too.

That is not the purpose of the RPD Form, it is the purpose of a title report. If a condition is readily discoverable through the title report, the buyer is required to conduct their own diligence of publicly available information and to make those assessments themselves. *See Jones*, 2023-Ohio-754, at ¶ 16. It would be inappropriate to put that burden on sellers and REALTORS® and would be contrary to long established Ohio law. *Fraley v. Ohio Dept. of Rehab. & Corr.*, 2019-Ohio-2804, ¶ 30 (10th Dist.) (constructive notice of a defective condition can be imputed when evidence establishes the defect could or should have been discovered); *Nieberding*, 2021-Ohio-2593, at ¶ 23,

quoting *Roberts v. McCoy,* 2017-Ohio-1329, ¶ 17 (12th Dist.) ("The duty to conduct a full inspection falls on the purchasers, and the disclosure form does not function as a substitute for such careful inspection.").

As such, the Eighth District compounded its error by requiring sellers to not only disclose a material defect that may inhibit a general use of the property, but also to determine all potential intended (known or unknown) uses by the purchaser to determine if such disclosure is required.

CONCLUSION

For all these reasons, this Court should reverse the Eighth District's decision and affirm the trial court's grant of summary judgment in favor of Appellant Ashmus.

Respectfully submitted,

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