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## Witfoth v. Kiefer, No. L-02-1325, 2003 Ohio App. LEXIS 6766 (Ohio Ct. App. 2003)

J. Reid Bumgarner

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square feet and allowed some optional clustering provisions. This amendment to the ordinance was the subject of Manzo's suit.

In order to assess the challenge to SCPRD-II, the court first recognized the presumption of validity accorded municipal ordinances. The court then quickly dismissed four of Manzo's contentions as irrelevant to the factual situation. Next, the court evaluated whether Marlboro's purpose in adopting the ordinance creating the SCPRD-II was reasonable and therefore valid.

Manzo first asserted that the purpose of the ordinance was to allow Marlboro to limit the number of households, although Marlboro's expressed purpose was to protect streams, particularly nearby Big Brook. The court concluded that evidence such as the Township Master Plan, the Township Planner, and Township Council minutes supported Marlboro's stream-protecting purpose. The court further identified New Jersey's legislation and a Municipal Land Law that noted the correlation between residential and commercial development and reduced water quality.

Manzo further requested the court to examine the means utilized by Marlboro to support this goal. The court determined that Marlboro's ordinance exhibited a legitimate relationship to its purpose because experts agreed that cluster developments allow less land disturbance and less opportunity for pollution to reach waterways. Concluding that the SCPRD-II cluster provisions supported Marlboro's objective for less-polluted streams, the court dismissed Manzo's complaint.

*Becky Bye*

## OHIO

**Witfoth v. Kiefer, No. L-02-1325, 2003 Ohio App. LEXIS 6766 (Ohio Ct. App. 2003)** (holding (1) no reasonable person could consider a low yielding well a material defect or problem, (2) sellers need not disclose low well yield on disclosure form, and (3) nondisclosure did not amount to fraudulent concealment).

In 1998, Frank and Mary Witfoth filed suit in Lucas County Court of Common Pleas against James and Kim Kiefer alleging fraudulent representation and concealment arising out of the sale of the Kiefer's home. The Kiefers disclosed a well supplied water to the home on the sales disclosure form but made no indications about the condition or yield of the well. Prior to purchase, the Witfoth's professional home inspector advised them to hire a specialist to measure the well's yield. The Witfoths declined, trusting that the sales disclosure would have indicated low well yield. After move in, the Witfoths discovered the water flow was insufficient for consecutive showers or loads of laundry. A pump test later determined the well yield was 1.5 gallons per minute

“gpm”) while the average well yield in a two-mile radius was 2.5 gpm and 5 to 7 gpm in Lucas County. The county previously approved the well and maintained a public record of its yield. Expenses to correct the yield exceeded \$18,000. After hearing the evidence, the trial court directed a verdict in favor of the Kiefers. The Witfoths appealed to the Ohio Court of Appeals.

On appeal, the court of appeals first considered whether the water system’s low yield constituted a material problem or defect requiring disclosure. The court noted that the well functioned properly, was approved by the county, and was not substantially lower yielding than nearby wells. As such, no reasonable person could consider the water system a material problem or defect. Furthermore, although the low yield was inconvenient, the court noted judicious use of the well enabled the family to shower, wash clothes and wash dishes. Thus, the court held the Kiefers needed not disclose the low yield.

Next, the court of appeals considered whether the doctrine of caveat emptor precluded recovery for fraud. Under Ohio law, a buyer cannot recover damages where (1) the condition is discoverable upon reasonable inspection, (2) the purchaser had an opportunity to examine the premises, and (3) there is no fraud on the part of the seller. As to the first and second part of the test, the court noted the Witfoths had full opportunity to inspect the property, a test existed to measure well yield, the Witfoths did not order such a test and the yield was public record. Accordingly, the court concluded no reasonable person could dispute the well yield was open and obvious and not misrepresented. As to the third part of the test, absence of fraud, the court considered whether nondisclosure amounted to fraudulent concealment. Again, the court noted the Kiefers did not actively misrepresent the well. Therefore, under the doctrine of caveat emptor precluded the Witfoths from recovering for fraud.

In sum, the court held no reasonable person could consider a water supply with low yield a material defect or problem. The court then held the Keifers had no obligation to disclose the low well yield and the nondisclosure did not constitute fraudulent concealment. Thus, the court affirmed the trial court’s rulings.

*J. Reid Bumgarner*

## SOUTH CAROLINA

**Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County Water & Sewer Auth., 593 S.E.2d 154 (S.C. Ct. App. 2003)** (holding that a county’s constructive approval of a water and sewer service proposal submitted by a non-profit corporation grants only non-exclusive water and sewer service rights and that a county is immune from tort liability for non-intentional conduct which incidentally acts to depreciate the commercial value of the non-profit’s non-exclusive