IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Kelly v. Wiseman*, 2018 NSSM 67

Claim No: SCCH 461253

BETWEEN:

MICHAEL KELLY and WENDY KELLY

Claimants

-and –

GLENN WISEMAN and NICKEY GLYNN

Defendants

Andrew Christofi represented the Claimants, Michael and Wendy Kelly.

David Barrett represented the Defendant, Nickey Glynn.

Allison Reid represented the Defendant, Glenn Wiseman.

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

DECISION

(1) The Claimants and Defendants were parties to a real estate transaction in 2012. When the Defendants attempted to sell their home in 2016, a problem was discovered with the septic system in the home. At issue was the degree of knowledge the Defendants possessed of the septic problem. The Defendant, Glenn Wiseman and the Claimants settled the claim against Wiseman. A release and indemnity was executed in his favour. This is a claim in misrepresentation against the remaining Defendant, Nickey Glynn. It is necessary to review the background and evidence of this matter.

Background

(2) The facts in this matter are largely undisputed. Indeed, a portion of the facts are entered into evidence by way of an Agreed Statement of Facts.

(3) The Kellys allege the Defendants are liable in negligent misrepresentation. The original claim was for $15,851.35 plus general damages of $100.00 and costs. The Defendant, Nickey Glynn alleges she disclosed what she was aware of to the best of her knowledge as the repairs and renovations were made by Mr. Wiseman, prior to her

moving in with him. She did not know about the defects and could not have known. She is seeking that the claim against her be dismissed.

The Issues

(4) Is the Defendant, Nickey Glynn, liable in negligent misrepresentation as it relates to the problem with the septic field?

(5) If so, what are the damages owing by her?

The Evidence

(6) As noted, the parties entered into evidence an Agreed Statement of Facts. Several witnesses testified as well.

Agreed Statement of Facts

(7) The Agreed Statement of Facts consists of 10 paragraphs, which are set out below. Counsel has signed on behalf of their clients, although there are portions which are agreed to by only one of the Defendants. Thus, paragraphs 1-5 are agreed to by all parties, paragraph 6 are agreed to by the Kellys and Mr. Wiseman, paragraphs 7-10 are agreed to by the Kellys and Ms. Glynn.

(8) I shall set out the provisions of the document verbatim:

"1. The Claimants, Michael Kelly and Wendy Kelly (the "Kellys"), by warranty deed dated July 5, 2012 acquired the property located at [address removed], Province of Nova Scotia (the "Property").

2. The Defendants, Glenn Wiseman and Nickey Glynn sold the property to the Kellys.

3. The Property Condition Disclosure Statement ("PCDS") provided to the Kellys by the Defendants in respect of the sale of the Property states that the Defendants were not aware of any problems with the septic system, and furthermore that no upgrades or repairs had been carried out to the septic system in the last five years.

4. At no time before the closing date of the sale of the Property to the Kellys did the Defendants repair or replace the septic tank and pumping system.

5. The Kellys have settled this claim with the Defendant Glenn Wiseman in the total of $8000 in and the Plaintiffs have executed a full and final release and indemnity in regards to the settlement, and hereby disclose the fact that the settlement to the Court.

6. Before the closing date for the sale of the Property to the Kellys, the Defendants represented to the Kellys that there were no issues with the septic system located on the Property.

7. The septic system failed on the new buyer's professional home inspection when the Kellys were selling the Property to the Parsons. The inspection was conducted by Dean Walker, whose written report is dated June 18, 2016.

8. This is also when the Kelly's discovered that the previous homeowners built the house on the Property with three bedrooms, and added two additional bedrooms once the house had passed inspection.

9. At the time that the Kelly's retained Terry Amirault, P. Eng., to replace the septic field on the Property, the Kelly's learned that the septic tank was in actual fact designed for a three-bedroom home with accommodation for flow-through of 1000 litres per day.

10. The Kelly's have incurred necessary excavation and installation costs in the amount of $15,851.35 for a new septic field in order to allow the septic field to accommodate a daily flow-through of 1500 litres. The Kellys subsequently sold the property to the Parsons with the new septic system in place."

(9) Essentially, the Kellys now seek $7851.35 plus general damages, prejudgment interest and costs from Ms. Glynn. In his brief, counsel for Ms. Glynn claims general damages of $100 plus costs. No counterclaim has been filed. I have awarded costs for an adjourned hearing made by counsel for the Claimants.

Evidence of Witnesses

Michael Stephen Kelly

(10) Michael Kelly and his wife lived in Nova Scotia from 2012 to 2016. He currently lives and works in Strathmore, Alberta. He recalls when purchasing the home, there were no discussions regarding problems with the septic system. He was advised the house was originally a three bedroom house. He was told Mr. Wiseman added two additional rooms for an in-law suite. The house had two bathrooms. Mr. Kelly and his father built a garage. Mr. Kelly testified that after the Parsons' test, he was provided with a copy of their engineers report. Essentially, the flow required of the septic system to service a four bedroom house is 1500 litres per day. A five bedroom house requires 3300-4500 litres per day. A septic system would need to be designed by an engineer at a QP1 level.

(11) After the fail was observed, Mr. Kelly contacted his neighbour, Brian Telder, who advised him the septic system was originally designed for a three bedroom house. According to Mr. Kelly, Mr. Telder advised him he had a similar discussion with Mr. Wiseman prior to the sale of the house to the Kellys. The Kellys hired Terry Amirault to design a system for a five bedroom house. The Wiseman/Glynn house was designed for a three bedroom house at 1000 litres per day. He identified Mr. Amirault's bill and some of the additional invoices in evidence. Mr. Kelly testified that had he known of the problem, he would have walked away from the transaction.

(12) Under cross examination, Mr. Kelly confirmed they had no agent dealing with the Defendants. They retained counsel once the price was agreed to. (I note that his lawyer, on the transaction is not and was not a member of the same firm as Mr. Christofi.). He noted the inspection clause in the Agreement of Purchase and Sale, namely that the Kellys had a right to have the well pump and septic system tested, including a discharge test. Mr. Kelly did not have a test done because, according to him, his lawyer opined that it would be an engineered system and it should be installed “to code”. He relied exclusively on the PCDS.

(13) He noted the property had an in-law suite which they rented when Mr. and Mrs. Kelly lived there. They have two children who had moved out the last two years to attend school. They also had a tenant. He acknowledged there were four people living in the house. There were no problems with the septic system or the sounding its alarm to alert them of any problems. He does not recall being told of water in the septic field. There was nothing wrong with the system between 2012-2016.

(14) In redirect evidence he acknowledged he had no idea of the volume of the system. He received a pump out slip before selling the home. He confirmed there was a minimum of four occupants and a maximum of five during his time owning the property.

Robert Morris Jenkins

(15) Mr. Jenkins testified that he is a civil engineer with a QP 2 designation. He met with Mr. Kelly when he was brought into examine the septic system once the inspection identified the out flow limitations of the septic. He was aware of the regulations regarding outflow and confirmed them. He was asked to redesign this system but he could not do so as he was travelling out of the country. He referred the Kellys to Mr. Amirault.

(16) Under cross examination, he confirmed the regulatory requirement for outflow of 1000 litres per day for a three bedroom house. The pump chamber has a capacity of 800 litres. He was not surprised there were no problems with outflow when three people lived there.

(17) In redirect evidence, he confirmed there was nothing in the tank when the test was conducted. He does not know of the cause of issue with the septic.

Terrance Joseph Amirault

(18) Terry Amirault is an engineer. He has been designing systems for 20 years. He has his P.Eng. designation and completed the QP1 course.

(19) He met the Kellys when he was advised of the inspection failing the flow test. He observed the field and noticed greener grass on one end of the septic field. He found this to be the result of seepage in a failed system.

(20) Mr. Amirault did not know the precise reason why the system failed. It could have been the result of grease, poor workmanship, or infiltration.

(21) He does not believe there were any issues with the quality of work. It is described as a manual system with the distribution bed two to three feet above ground. He believed if the distribution trench failed, drainage would be an issue.

(22) He described the process to remove or repair the old system and replace it with the new field. He certified the septic had an outflow of 1500 litres per day. The certificate appears in evidence. He described this as suitable for a four bedroom house, i.e. 1000 litres for a three bedroom house and 500 litres per bedroom thereafter.

(23) Under cross examination by Mr. Barrett, he confirmed seeing “black gunk” in the stones, which was effluent from the system. He would normally have been sent in to determine the issue, but it was clear it was undersized for the home. If the landscaping were an issue, he would ensure that there was no run off or leakage. He described the system as 11 years old, having been built in 2005. Infiltration occurs when there is run off from the house to the tanks or with high ground water and surface run off.

Glenn Willis Wiseman

(24) Glenn Wiseman is one of the named Defendants in this matter. He gave evidence by teleconference from Ontario with the consent of all parties. Mr. Wiseman is an aircraft engineer.

(25) Mr. Wiseman purchased the property as a vacant lot in 2004. He moved into the house in 2005. In 2007, Ms. Glynn moved in with him. They moved out of the house when it was sold in 2012 and relocated to Brampton, Ontario. He and Ms. Glynn separated after about a year.

(26) He recalls preparing a Property Condition Disclosure Statement and providing it to the Kellys. He employed the “Property Guys” rather than a traditional realtor. He does not recall what he signed indicating only “if I signed it, I signed it”.

(27) He was shown a copy of the PCDS. He believed there were no problems with the system. There were no repairs or upgrades. He believes the document was signed by Ms. Glynn at the same time. When he purchased the property, it had three bedrooms. When he sold it, it had an additional in-law suite and storage.

(28) He testified that Brian Telder installed the septic system and he was told it had a capacity of 1000 litres per day. He discussed various things regarding the house. There were no discussions about the septic system.

(29) In questioning from Mr. Christofi, Mr. Wiseman testified that he and Ms. Glynn were a couple then and getting along. They sold the house together and moved to Brampton. They spoke about things as a couple, except for what he described as “minor things”. As it related to the house, they discussed the contents of the PCDS. They were

both on the road with their respective jobs. It was a busy time for both of them.

(30) He acknowledged there was an alarm that would go off when the system leaked. He was not sure if the system went off and was not concerned about it. In the Spring of 2011, he believed there was a leak and asked Mr. Telder to look at it. He said it was very minor. He does not recall any indications from him that he would need an engineer. He understands Mr. Telder could not design a system and that it must be done by an engineer. He recalls discovering a leak and covering it over with a few wheelbarrows of dirt. There were no discussions of a flow test. He did not understand how a pump worked as it was his first septic house.

(31) He did not know or recall any the reasons for the leak. He was shown in the chambers where the leak took place. He had no idea if the work was not completed. He did not know of any problems at the time. He did not know about a flow test.

(32) Under cross examination, he purchased the property as vacant land in 2004. His home was installed by Maple Leaf Homes in Cole Harbour who placed a modular home on it. When he moved in, there were two people living in the basement. Before Ms. Glynn moved in, he did not perform any landscaping other than crushed stone out back. He indicated there was always an issue with the contour of the property. Nothing was ever dry. To remedy this, they installed a weeping tile to handle the water run off to the French drain on the side. To address the drainage, they put crusher dust on the side.

(33) In 2008, Ms. Glynn's name was added to the property and the building was mortgaged to allow for construction of a garage. He does not recall Ms. Glynn ever advising him of problems with the septic or the alarm sounding. If there were issues, he would have expected her to do so and he would have contacted Mr. Telder.

(34) He recalled signing the PCDS. He does not recall being asked for any documentation or leaving with any. He had no conversations regarding the capacity of the system with the Kellys or Ms. Glynn. He does not recall the Kellys performing a flow test.

(35) In redirect evidence, he testified the crushed stone was added in the backyard to allow for walking. The French drain was installed near the back of the property, nowhere near the septic.

Brian Telder

(36) Brian Telder is a self-employed general contractor which includes the installation of wells and septic systems. He has lived near the property at [address removed] since 1996. He knew Glenn Wiseman but was not acquainted with Nickey Glynn. He had performed work for Maple Leaf Homes in the past installing well and septic systems.

(37) With respect to the system for the property, he testified he did not design the system, rather, he installs systems according to the design by the engineer. The

engineer requires approval from the Department of Environment.

(38) When he was hired to install the system, he had not yet met Mr. Wiseman. When he constructed the system, he found the grade was two feet lower than normal. He built it up to a suitable level as he found the surface water was running into the lid. As a result, the pump chamber was becoming a catch pit for surface water.

(39) When spoke with the Kellys, he advised the drainage was causing an issue. He did not speak with the Kellys regarding a malfunction or other problems. He did not think they needed a bigger system.

(40) Mr. Telder testified that he was not aware the outflow depended on the number of persons.

(41) Under cross examination, he acknowledged that any work must be done under the regulations of the Department of Environment. He indicated any changes would not be approved without the advice of the engineer. He was not called about a leak in 2011. He does not recall a second leak but acknowledged it was possible. He had no difficulty with Mr. Wiseman or the Kellys as neighbours.

(42) He found out about the standards when he spoke with Mr. Kelly. He was approached by him with Mr. Walker's report. He confirmed he told Mr. Kelly he was not qualified to design the system. He believes he could have spoken with Mr. Kelly about the capacity of the septic tank. He recalled discussing the leak with Mr. Kelly. He does not recall any rubber installed. They installed a newer riser to allow for improved pumping. Photographs of this work has been tendered into evidence.

Nickey Glynn

(43) The Defendant, Nickey Glynn, currently resides in St. John's, Newfoundland and Labrador. She testified that she met Mr. Wiseman in December 2006 and began cohabitating with him in 2007. Mr. Wiseman was working in Africa then and was often away several weeks at a time. While he was away, Mr. Wiseman instructed her to call Brian Telder if the alarm sounded. She does not recall any difficulties with the septic. They did not discuss any issues.

(44) She indicated there were never more than four people in the house at one time, including herself, Mr. Wiseman and their tenants. She did not know the pump chamber had to be pumped out. She did not know of any problems in 2005. She did not know Mr. Wiseman at the time. She confirmed filling out the PCDS to the best of her knowledge. She did not know of any problems with the system at the time. Any questions regarding the property were deferred to Mr. Wiseman.

(45) She was formerly employed as a flight attendant with Canjet until the company was out of business in 2015. She is not working at the moment. She described her time at the house as being away one day at a time or a maximum of four or five days. They sold the house in 2012 when Canjet closed in Halifax. She took a position with that

company out of Toronto. Mr. Wiseman was working up north at the time. He was in Halifax for the closing.

(46) She described her first impressions of the house as a nice home with no issues. She had not dealt with septic systems before living in the house. She knew there was an in-law suite. She did not discuss the original state of the home with anyone else. She confirmed both she and Mr. Wiseman completed the PCDS.

(47) She was asked about her answers for other matters such as electrical, plumbing, heating, etc. Her responses were to the effect that Mr. Wiseman handled those issues. She trusted his knowledge on these matters and signed the form accordingly. While she lived at the house, she had no knowledge of any septic problems. Indeed, there were none when she was living there.

The Law

(48) The law respecting considerations in the purchase and sale of real property has been well described in the case of *Thompson & Martin v. Schofield & White*, 2005 NSSC 38. In that case, Justice Gregory Warner stated the following:

"[16] Generally transactions involving the sale of real property are subject to the principle of *caveat emptor* with respect to the physical amenities and condition of the property. Absent fraud, mistake or misrepresentation, a purchaser takes an existing property as he or she finds it unless the purchaser protects himself or herself by contractual terms. This is set out in several important decisions, some of which were included in the defendant's memorandum, such as **McGrath v. MacLean,** (1979), 22 O.R. (2d)784 (OCA), and **Edwards v. Boulderwood Development Corporation**, (1984) 64 N.S.R. (2d)395 (NSCA). It is referred to in **Redican v. Nesbitt**, [1924] S.C.R. 135.

[17] In **Edwards,** our Court of Appeal found that the defendant had made an innocent misrepresentation and was not liable to the seller with regards to the condition of a vacant lot of land and further found that the innocent misrepresentation had been made after the contract had been entered into and therefore could not have influenced the entering into of the agreement.

[18] A second legal question requiring clarification, for the purposes of this decision, is, what is a patent defect and what is a latent defect? A patent defect is one which relates to some fault in the structure or property that is readily apparent to an ordinary purchaser during a routine inspection. A latent defect, as it relates to this case, is a fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection. For the purposes of the decision, it is not disputed that whatever the defect was that caused the flooding in the basement, that it was a latent defect, that is, a defect which was not apparent on an ordinary inspection of the property. The defendants claim that because it was latent, they also were not aware of it. My understanding of the defendant's memorandum is that they acknowledge that, because the basement was finished and because neither building inspector nor the plaintiffs had the right, before the closing, to take the basement apart, their ability to determine any defects in the property was limited to those defects which would be apparent without taking apart the walls or the floors or the panelling that covered the cement walls.

[19] A third legal question requiring clarification is what constitutes negligent and fraudulent misrepresentation.

[20] Fraudulent misrepresentation is dealt with, among other cases, by a decision of Saunders, J., as he then was, in **Grant v. March** (1995), 138 N.S.R. (2d) 385. At paragraph 20 of that decision he says:

> With respect to the first allegation, that is, that Mr. March fraudulently misrepresented the facts, the law on this subject was canvassed in **Charpentier v. Slaunwhite** (1971), 3 N.S.R. (2d) 42. In that case, which involved problems with a well, Jones J. (as he then was) cited [at p. 45 N.S.R.] G.S. Cheshire and C.H.S. Fifoot, *The Law of Contract*, 6th ed. (London: Butterworths, 1964), at page 226:
>
> > A representation is a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes that induces the contract. Examples are a statement that certain cellars are dry, that premises are sanitary, or that the profits arising from a certain business have in the past amounted to so much a year.
>
> And again on page 241, as follows:
>
> Fraud in common parlance is a somewhat comprehensive word that embraces a multitude of delinquencies differing widely in turpitude, but the types of conduct that give rise to an action or deceit have been narrowed down to rigid limits. In the view of the common law "a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shown that he had a wicked mind". Influenced by this consideration, the House of Lords has established in the leading case of **Derry v. Peak**, that an absence of honest belief is essential to constitute fraud. If a representor honestly believes his statement to be true he cannot be liable in deceit, no matter how ill advised, stupid, credulous or even negligent he may have been. Lord Herschel, indeed, gave a more elaborate definition of fraud in **Derry v. Peak**, saying that it meant a false statement "made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false," but, as the learned judge himself admitted, the rule is accurately and comprehensively contained in the short formula that a fraudulent representation is a false statement which, when made, the representor did not honestly believe to be true.

[21] At paragraph 21, Justice Saunders quotes the **The Law of Vendor and Purchaser**, 3d ed. by V. DiCastri (Carswell,1988), as saying that to found a claim for false misrepresentation one must do the following:

> In order to succeed on the ground that a contract was induced by false and fraudulent representations, a plaintiff must prove: (1) that the misrepresentations complained of were made to him by the defendant; (2) that they were false in fact; (3) that when made, they were known to be false or were recklessly made, without knowing whether they were false or true; (4) that by reason of the complained-of representations the plaintiff was induced to enter into the contract and acted thereon to his prejudice; and (5) that within a reasonable time after the discovery of the falsity of the representations the plaintiff elected to avoid the contract and accordingly repudiated it."

The onus is on the plaintiffs to establish fraud on the part of the defendant. Fraud is a serious complaint to make, and the evidence must be clear and convincing in order to sustain such an allegation.

[22] On the facts in **Grant v. March**, the trial judge was not satisfied that the defendants knew of the water problems that existed and he further found that any representations that they did make were not made before the contract was entered into.

[23] Another relevant decision cited in the defendants' memorandum is **Jung v. Ip** 1988 CarswellOnt 643 (ODC), where the Court, in finding liability against the vendor for failing to disclose a termite infestation, said at paragraph 18:

> It is now clear that the law of Ontario is such that the vendors are required to disclose latent defects of which they are aware. Silence about a known major latent defect is the equivalent of an intention to deceive. In the case before this Court, there was nothing innocent about the withholding of the information. It was done intentionally. This was not an innocent misrepresentation.

[24] In finding liability against the vendor for failing to disclose a sediment problem with the well and sewer system in a property disclosure statement, the Court in **Ward v. Smith** 2001 CarswellBC 2542 (BCSC) discussed the application of the principles of negligent misrepresentation at paragraphs 33 to 39; quoting from paragraphs 33 to 35 of that decision (not as an authoritative decision but simply as one of the many that set out in summary nature what a negligent misrepresentation is), Gotlib D.C.J. said:

> . . . The requirements to establish a claim in negligent misrepresentation were summarized by Mr. Justice Iacobucci in **Queen v. Cognos Inc.**, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 (S.C.C.), at 643:
>
> > (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
> > (2) the representation in question must be untrue, inaccurate, or misleading;
> > (3) the representor must have acted negligently in making said misrepresentations;
> > (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
> > (5) the reliance must have been detrimental to the representee in the sense that damages resulted.
>
> In their pleadings, the plaintiffs used the expression "reckless misrepresentation" which was understood, during the course of argument, to be negligent misrepresentation. I am satisfied that, in fact, the defendants did negligently misrepresent the quality of the available water by stating that they were not aware of any problems with the quality of the water. . . .
>
> The defendants owed a duty of care to the plaintiffs to not negligently misrepresent either the quality or quantity of the water supply.

The Court went on to make a determination that the defendants negligently misrepresented the state of the water. He was satisfied that they knew the nature of the problem with the well, even though they may not have known the extent of the problem.

[25] The Court's analysis in **Swayze v. Robertson,** 2001 CarswellOnt 818 (OCJ), a case involving a flooding problem caused by a defect in the foundation, is similar.

[26] The plaintiffs rely upon the decision of Wright J. in **Desmond v. McKinlay** (2000), 188 N.S.R.(2d) 211, which decision was upheld by our Court of Appeal at (2001), 193 N.S.R. (2d) 1. In **Desmond v. McKinlay**, Mr. Justice Wright, like the Court in **Jung v. Ip** found that silence could constitute a negligent misrepresentation. At paragraph 43, he says:

> In the present case, the essential question in my view comes down to this. Was it an actionable misrepresentation for the vendor Joan McKinlay to have held out to the purchaser through her realtor's listing cut (with information provided by her) that the property was only 14 years old without further disclosing the fact that the water supply and sewage disposal systems servicing the property were in excess of 40 years old by an indeterminate length of time? I have concluded that such partial disclosure of the true facts did create such a misleading impression to the plaintiff, on which she relied to her detriment so as to create an actionable misrepresentation at law.

[27] If this court finds that the answers given in the disclosure statement, which was incorporated in the agreement, were either negligent or fraudulent misrepresentations, there is no doubt that (a) they were material, (b) they were made at the time of the entry into the contract or the agreement of sale and were relied upon, and (c) based on the law as set out in **Desmond v. McKinlay** at paragraphs 48 to 51, they would constitute, in addition to negligent misrepresentations, a breach of a collateral warranty and

thereby constitute a breach of the agreement of sale."

(49) Counsel have cited several applicable cases in their submissions which I have considered.

Findings

(50) Michael and Wendy Kelly entered into an Agreement of Purchase and Sale with Mr. Wiseman and Ms. Glynn in 2012. The Agreement contained a provision providing the Kellys with the right to have an inspection performed on the property, particularly the septic system. The Kellys did not do so.

(51) As it turned out, the septic system was inadequate for the number of bedrooms in the dwelling. The system flow rate was 1000 L per day. The required standard was 1500L per day for a four bedroom house, according to the engineers. Mr. Telder indicated there was nothing overtly wrong with the system.

(52) While not raised by either counsel, adequate septic flow rate is a matter of law, prescribed under the various schedules of the *On-Site Sewage Disposal Systems Standard Adoption Regulations* created under the *Environment Act*. The test performed by the Parsons revealed the system did not meet this standard. It was a capacity issue, based on the standard set by regulation. It had nothing to do with the contours of the land. The Parsons' inspection also brought to light an on-going problem with the system which needed to be rectified, namely that effluent was leaching onto the bed. The system had failed.

(53) The work was performed to increase the outflow. There is no evidence of any further leaking or sludge. I find there is none. Therefore, I find as a fact the work which was undertaken to replace the system fixed the problem.

(54) Mr. Wiseman owned the house from the time it was erected in 2005. He lived there for awhile before being joined by Ms. Glynn. He added her name to the title of the property. They sold the house together and moved to Toronto. It is clear she relied on Mr. Wiseman with respect to any structural issues and on his knowledge of any problems. I infer from this and find as a fact that Nickey Glynn did not know about any problems with the septic system or much else related to the structure of the building.

(55) On the other hand, Mr. Wiseman had the house installed from Maple Leaf Homes on the vacant lot in Nine Mile River. It was his first experience with a septic system. The well and septic system may have been installed under the direction of Maple Leaf Homes. It is not material. It was up to Mr. Wiseman to learn about the workings and demands on a well and septic system. He impressed me as intelligent and careful. He built an in-law suite including an extra bedroom. While there was evidence of a fifth bedroom, I accept that room was used for storage.

(56) I find the sludge observed by the witnesses, the leeching and darker green grass had been present for some time. Mr. Wiseman's solution was to dump wheelbarrows of

sand on it. This occurred several times during his occupation. Ms. Glynn knew none of this.

(57) Had the matter not been settled between the parties, I would have had no difficulty finding Mr. Wiseman liable in negligent or even fraudulent misrepresentation.

Negligent Misrepresentation

(58) The leading case on negligent misrepresentation is *Queen v. Cognos*, cited by Justice Warner above. The five conditions are set out above. I have restated them below:

(1) there must be a duty of care based on a "special relationship" between the representor and the representee;
(2) the representation in question must be untrue, inaccurate, or misleading;
(3) the representor must have acted negligently in making said misrepresentations;
(4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
(5) the reliance must have been detrimental to the representee in the sense that damages resulted.

(59) As a seller of property, it is clear the first of the criteria apply to Ms. Glynn. The Kellys also relied on that statement, although as I have noted later, not solely on that representation. This reliance caused them to accept a property with reduced flow capacity which they were forced to remedy in order to close. Therefore, the fourth and fifth conditions have also been satisfied.

(60) The second and third conditions can be considered together. The Defendants indicated that as sellers of the property, they did not experience any problems with the septic system. As noted above, Mr. Wiseman knew about some leaking but may not have drawn the correct conclusion of the state of the septic system and field. Instead, he covered the leak over with two wheelbarrows of dirt. Ms. Glynn knew nothing of the kind.

(61) The PCDS does not distinguish if this is the knowledge of one or two sellers. They each signed the same document. The document is a standard form which does not allow for the possibility of one party owning a property longer than the other. Despite what I am certain is not an unusual situation, it does not address this contingency. Thus, a purchaser reading this document assumes both parties experience was the same. The form was completed without assistance from a lawyer or agent. There is nothing in evidence Ms. Glynn attempted to qualify her responses. She did not seek further proof or additional information. There is no evidence she did not know what she was signing. It must have been clear to her that a person reading this form could infer joint knowledge on the part of her and Mr. Wiseman. By signing the document in this way, I find she was standing behind their respective experiences. While she was misinformed by Mr. Wiseman, she is responsible for what she provided to the Kellys.

(62) I find the statement made was to the effect that there were no problems with the septic system to the best of the knowledge of Ms. Glynn and Mr. Wiseman. She did not take steps to qualify her statement or obtaining further information. I find Ms. Glynn

liable for negligent misrepresentation.

Contributory Negligence

(63) Paragraph 8(b) states as follows:

"The Purchaser shall have the right to:

(b) have the well, pump and water, and septic system inspected within 14 days of acceptance of this offer. Such inspection shall include a discharge test, bacterial test by the department of health, a test of mineral content and a review of the pumping system and an inspection of the septic system."

(64) Mr. Kelly's evidence was that his lawyer told him the septic would have been engineered to meet the requisite standard and, therefore, an inspection was unnecessary. His lawyer did not give evidence. Whether derived from advice or simply his understanding of the advice, this proved to be incorrect. The Kellys had the opportunity to conduct an inspection to test that the flow met the provincially prescribed standard. The test would have been uncovered the deficiency in flow capacity even if the system had not failed. The Claimants are also responsible. I find they are 40% contributory negligent.

Damages

(65) In awarding damages for misrepresentation, the object is to put the parties in the position as if the misrepresentation had not occurred. I accept the evidence of the Claimant on the costs of the diagnostics and repair of the system.

(66) I award the following:

Assessment/Sewer Design (Amirault)	$ 1,016.35
Telder Excavating Ltd.	$14,835.00
Total	$15,851.35

(67) Given my finding of contributory negligence, I decline to award general damages.

(68) No argument was made for consideration of betterment. There is no evidence of the life expectancy of the previous system, had it been correct. I decline to make any adjustments for betterment.

(69) In assessing the liability of Ms. Glynn, I apply the following:

Total Special Damages:	$15,851.35
Less: Contributory Negligence (40%)	($ 6340.54)
Less: Settlement with G. Wiseman	($8000.00)
Total	$1510.81

Costs

(70) Mr. Christofi seeks full indemnity of disbursements including travel plus costs to file and serve documents. The Claimant was successful but only in part. I also found significant contributory negligence. I allow costs of $150.

(71) There were costs sought by Ms. Glynn's counsel following the rescheduling of the hearing at the request of the Kellys and their solicitor. In granting the adjournment, I indicated I would make the adjustment as to costs. Her total expenses for the first trip were for $737.41. Her costs appear reasonable for the most part for the car rental amount. I award costs for the adjournment of $650.00 to be set off against the judgment.

Summary

(72) I find for the Claimants, Michael Kelly and Wendy Kelly in the amount of $1010.81.

(73) An order shall be issued accordingly.

Dated at Halifax, NS,
on July 27, 2018;

_____
Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant (s)
Copy: Defendant(s)