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# Land survey trumps all documents in a house purchase

**Title insurance will help cover costs if alterations needed**

***Encroachment issues are easier to work out before a property sale, and a land survey is needed for that***

- True or false? A land survey is unnecessary if the house purchaser buys title insurance.

- Answer: False

A court decision released last month by small claims court in Welland, Ont. illustrates the commonly held but incorrect belief that title insurance replaces the need for a land survey.

In November, 2008, Jonathan Strutt wanted to buy a house on Stonehaven Rd., in Dunnville, Ont. Strutt is the pastor of the local Calvary Pentecostal Church.

Strutt had never previously owned a rural house and was unfamiliar with septic systems. After some negotiation, the agreement of purchase and sale was amended to include the seller's statement that, to the best of her belief, the septic system was installed according to all relevant regulations at the time, and continued to operate satisfactorily.

Two years after closing, Strutt was informed by Chad Plath, his next-door neighbour, that part of Strutt's septic system encroached onto the Plath property. Wisely, Plath had obtained a land survey prior to his own closing. That 2010 survey disclosed the encroachment, but Platt did not view the issue as a deal-breaker when he bought his new house.

Fortunately, Strutt's lawyer had arranged a title insurance policy with Chicago Title. So that future sale would not be jeopardized, Chicago Title arranged to have the septic bed relocated back onto the Strutt property at a cost of several thousand dollars.

In 2011, Strutt sued the prior owner of the house for negligent misrepresentation. The real plaintiff was Chicago Title, which sued Franko using Strutt's name in what is known as a subrogated claim.

At trial, Strutt conceded that on all prior home purchases he had obtained a survey first. He had wanted one for the Dunnville property, but his agent told him — wrongly as it turned out — it was unnecessary and to take title insurance instead.

When I spoke to Strutt last week, he told me that he was happy that he had purchased title insurance, since Chicago Title took care of all the costs of moving the septic bed.

Of course, had a proper land survey been obtained prior to closing, the issue of the encroaching bed could and would have been resolved years before. As well, there would have been no inconvenience or disruption when the septic bed and two holding tanks had to be moved. Title insurance does not compensate for that.

In his written decision last month, deputy judge Terry Marshall acknowledged that it was his task to separate "the wheat from the chaff" and decide whether Franko's written statement in the offer that the septic system "continues to operate satisfactorily" amounted to negligent misrepresentation.

After a detailed analysis based on a misrepresentation case in the Supreme Court of Canada, Marshall wrote, "The septic system worked fine when Franko was the property owner. It continued to work fine after Strutt became the property owner."

Even though the case was a "hotly contested matter," the judge ruled in favour of Franko and dismissed the claim.

For both urban and rural homeowners, the Strutt case provides important lessons when buying houses:

- Title insurance is *not* a substitute for a land survey . It may pay to rectify a problem but not for the inconvenience involved, or the aggravation of a lawsuit.

- It's far better to have a survey before closing (so that encroachment issues can be resolved in advance) than to have to deal with them later — even if the title insurer pays for the costs.

- A land survey is the most important document in a real estate transaction. Don't buy a house without one.

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# Strutt v Franko, 2013 CanLII 71368 (ON SCSM)

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ONTARIO SUPERIOR COURT OF JUSTICE 2545/11

(Welland Small Claims Court)

BETWEEN:

JONATHAN STRUTT

Plaintiff

- and -

NORRIE FRANKO

Defendant

Before: Marshall Deputy Judge

Plaintiff: R. Dowhan, counsel Defendant: F. Suter, paralegal

Heard: October 30, 2013

## J U D G M E N T

[1] This is a negligent misrepresentation claim involving the location of a septic system

partially on adjoining property. At issue is whether the words and actions of the Defendant vendor amounted to negligent misrepresentation. The scope of damages is also disputed. While not clear from the pleadings, this is a subrogation claim by Chicago Title in the name of its insured.

**PLAINTIFF'S EVIDENCE**

**1. Jonathon Strutt ["Strutt"]**

[2] Strutt is a minister. He is 41 years old. He had bought four houses previously but none in a rural setting. He was unfamiliar with a septic system for a house. I found him to be a candid witness.

[3] In November, 2008, Strutt twice attended at 1 Stonehaven Road in Dunnville, Ontario. This community is in Haldimand County. All of his discussions about the property were with his real estate agent and that of Norrie Franko ["Franko"], the Defendant vendor. Strutt and his wife appear on title as purchasers.

[4] Before putting in an offer, Strutt testified he had discussions with his agent about whether the septic system was working properly. To provide some protection for Strutt, the agent had included in the proposed Agreement of Purchase and Sale ["the Agreement"] the following wording:

"Seller warrants that, to the best of his knowledge and belief, the septic system was installed according to all relevant regulations at the time of installation and continues to operate satisfactorily. On or before completion of this transaction, the Seller shall provide confirmation from the Ontario Department of Health that there are no outstanding work orders on file with respect to the septic system. Seller shall have the septic tank fully pumped out at his own expense, on or before completion."

[5] In the give and take leading up to the executed Agreement, Strutt acknowledges the wording was changed to the following:

"Seller states that, to the best of her knowledge and belief, the septic system was installed according to all relevant regulations at the time of installation and continues to operate satisfactorily."

[6] In short, there were three amendments: 1) the second sentence was deleted 2) 'warrants' was changed to 'states' and 3) 'his' was changed to 'her'. Strutt testified his agent had told him the first redrafted sentence should be 'okay'. Strutt wanted to be sure the septic system was not leaking into the backyard where his children would play.

[7] This one sentence is the only reference in this transaction to the septic system. Strutt testified he relied on same--along with title insurance--as his protection.

[8] A home inspection was done. It did not deal with the herein substantive issue of the location of the septic system. The transaction closed on November 28,2008.

[9] When Strutt bought, there was an empty lot at 5 Stonehaven Road, immediately to the west. It was owned by Franko and her father George Franko. The lot at 5 Stonehaven Road was sold in 2010 to Chad Plath ["Plath"].

[10] Prior to closing, Plath had obtained a survey from Rasch + Hyde, Ontario land surveyors. It is dated February 12, 2010. The survey is at Exhibit 1, Tab 4. It showed a portion of the septic system for the Strutt property was on the Plath property. Neither side called Plath to give evidence. The issue was evidently not a deal breaker for Plath as the transaction for 5 Stonehaven Road closed on February 26, 2010.

[11] Strutt testified Plath later in 2010 advised him part of the 1 Stonehaven Road septic system was on Plath's adjoining lot. What was the import of the discussion was frankly unclear to me. I find Plath never made a clear demand the septic system of Strutt be moved from the Plath property. Plath wanted to use the area in question for his own septic system.

[12] Strutt felt that Plath was 'nice enough' but worried if somebody else bought the Plath property there might be an issue.

[13] Strutt had obtained title insurance via Chicago Title when he bought his property. The upshot of the discussions with Chicago Title was

something had to be done as the septic system for 1 Stonehaven Road was partially on the lands of 5 Stonehaven Road. The issue about the lack of an easement on title came up in the course of these discussions.

[14] Strutt testified he sent documentation to Chicago Title. It was decided the only option was to move the portion of the Strutt septic system on the Plath property back on to the Strutt property.

[15] Strutt was told by Chicago Title to get an idea of the cost. He called Egger Excavating for options and quotes. Strutt had a meeting in his backyard with representatives of Chicago Title and Egger Excavating. A decision was made what to do.

[16] Strutt testified Egger Excavating needed to move the bed. The portion of the Strutt septic system that was on the Plath property consisted just of sand. The sand was reused as were other components ie the 1,000 gallon septic tank and the 300 gallon tank for the second compartment. The tile had to be replaced. Egger Excavating had been the original installer of the septic system at 1 Stonehave Road in 1992. The work done by Egger Excavating is detailed at Exhibit 1, Tab 6 in the amount of $13,209.70, including the septic permit application.

[17] There were two options. The cheaper option was not expanded upon by Strutt. From a prior statement given by Ken Egger it appears a new 10' x 15' bed could have been installed for $3,000.00. This statement is at Exhibit 2, Tab 15, page 2.

*Cross-examination*

[18] Strutt conceded on all prior home purchases he had obtained a survey first. He had wanted one. His agent said it was unnecessary and to take title insurance instead.

[19] Strutt did inspect the septic system area prior to purchase during the course of a backyard inspection. Both the tank and bed were visible, the latter less than 5' high.

[20] Strutt testified Plath never demanded the removal of the portion of 1 Stonehaven Road septic system from his property. He described Plath as 'a very nice guy' but both of them knew there was a 'problem'. Strutt never knew until his discussion with Plath that part of the septic system for 1 Stonehaven Road was on the Plath property.

[21] Strutt confirmed his general lack of familiarity with septic systems led to the inserting of a clause in the Agreement. He did not know about any regulatory framework relative septic systems and did not discuss same with his real estate lawyer. Candidly, he indicated that's why he bought title insurance. He did not make--or have made on his behalf--any inquiries of the municipality thereon.

**DEFENDANT'S EVIDENCE**

**2. Jennifer Shaw ["Shaw"]**

[22] Shaw is the deputy clerk and Freedom of Information ["FOI"] officer for Haldimand County. She processed two FOI requests by Franko.

[23] The first request related to 'general records pertaining to the property at 1 Stonehaven in Dunnville'. The May 6, 2011 letter from Haldimand County noted in part that Franko wanted to confirm:

--Hans Sauermilch ["Sauermilch"] installed the original septic system --the septic system was installed according to code --the Health Department designed and approved the shared title [sic] bed

This letter is at Exhibit 2, Tab 10. What was provided was a two page document entitled 'Application form and Certificate of Approval for a class 2-6 sewage system'. The document is from the Haldimand-Norfolk Regional Health Dept. It does state in part:

"For comunal [sic] system Lot 27-28 see Aquarobic Proposal Drwg Attached 2 Lot Design"

Lot 28 was the Strutt property; lot 27, the Plath property.

[24] The second request related to whether Chicago Title had contacted the County before October 8, 2010 and if the County had required the septic bed to be moved or a new one installed. This letter is at Exhibit 2, Tab 11. The relevance of the particular date is not clear from the evidence. In any event, Haldimand County had no information in response to this FOI request.

**3. Norrie Franko**

[25] Franko has been an elementary school teacher for 31 years. I found her to be a clear and articulate witness.

[26] Franko testified she had bought 1 Stonehaven Road from Sauermilch on November 23, 2001. She had prior discussions with him about the septic system. She also obtained a statutory declaration, sworn on November 21, 2001, from Sauermilch. Paragraph 4 thereof states:

"To the best of my knowledge and belief, the buildings used in connection with the premises are situate wholly within the limits of the lands above described, and there is no dispute as to the boundaries of the said lands. Except as may be registered on title, I have never heard of any claim or easement affecting the lands, either for light, drainage, or right of way or otherwise."

The statutory declaration is at Exhibit 2, Tab 3. I note in passing any comparable statutory declarations relative 5 Stonehaven Road when Franko bought and later sold the adjoining lot would have been more pertinent.

[27] Franko testified she had not had any septic system issues when she owned the property. Egger Excavating did monthly maintenance inspections, providing reports per its service contract with her.

[28] Franko testified the issue re part of the 1 Stonehaven Road septic system being on 5 Stonehaven property arose due to the requirement septic systems needed 100' of bed. This requirement evidently would have come from the Haldimand-Norfolk Regional Health Dept. The 1 Stonehaven Road lot is just 97' wide. What normally happened is an easement was granted for a joint mantle area: Exhibit 2, Exhibit 16. Same was never done by Sauermilch or later Franko as both individuals owned both properties over time. In such a situation there was no practical need for an easement. It only would become relevant if there were differnet owners of the two properties and an issue arose between the different owners.

[29] Franko testified she received a letter from Strutt's law firm dated September 1, 2010 advising the septic system on her former property encroached on the Plath property. Her real estate counsel in turn responded by letter dated September 15, 2010, advising title could have

been searched up to the requisition date and no survey was obtained. While the title extract was not make an exhibit, I find a search thereof would not have turned up the issue in question as there was no easement on title. I further find the issue would have surfaced had a survey been done, per the Rasch + Hydro survey obtained by Plath.

[30] Sauermilch was apparently too old and frail to give testimony. At Exhibit 2, Tab 9 is an undated statement from him as to the history of the septic systems on Stonehaven Road. The following extract is pertinent:

"...the Health Department agreed to a plan to install an Aquarobic System on each lot, however they stated that the width of the drainage bed had to be 100 feet wide and each lot was about 3 feet short of that requirement. As ridicules [sic] as this was, the health department would not lean our way and requested that on each 2 lots, the required area in the back of those lots would have to be severed and registered in a common ownership of both parties. They specified the required sandy soil that had to be imported and spread across the both lots for the drainage bed.

This was the only way at the time we could go, to obtain the approval from the Health Department.

As I was the owner of Lot 27 and 28 I did not have to get a severance and the Tile drainage bed was installed as per the requirements of the Health Department, allowing for a further extension if another house was build [sic] on lot 27 at a future date."

Sauermilch's statement confirms 1) there was no immediate need to address any easement issue relative 1 Stonehaven Road and 5 Stonehaven Road and 2) there was a process to deal with the septic system of one property encroaching on another. With respect to the latter, either Sauermilch is incorrect in what that process was re lot severance or the process changed over time to an easement, per Exhibit 2, Tab 16.

[31] Exhibit 3 is a 'Statement to the Court' from Sauermilch, sworn on July 9, 2013. Additional details provided therein are as follows [underlining in original]:

"...At the time the health Department decided that an aquarobic system (a mini septic plant) had to be installed on each lot and it required a septic tile bed 100 ft.wide. The only way to meet these requirements was to have something called a joint mantle (a 2 to 3 foot pile of sand) shared with the neighbouring lot (in this case lot 5). This was necessary because the lots were only about 97 ft wide, about 3ft less than the 100 feet required by the Health Departments [sic] regulation at that time.

<u>The aquarobic plant, tank and all tiles were installed completely on the 1 Stonehaven lot. The only part of the septic bed on lot 5 was the required joint sand mantle which was to be extended when ever [sic] the adjoining lot was being developed.</u>

The health department was very vigilant during the installation, and this was the first house built on the street. The health department approved the septic system in 1992. The houses built prior to 1998 have these shared mantles between the properties.

...

There was an easement clause in place on the street between neighbours regarding the joined mantles. There was no easement clause on title between the two properties I sold Norrrie Franko, and Norrie and George Franko as I did not need one."

[32] Franko testified she sold the 5 Stonehaven Road property to Plath on February 26, 2010. She indicated there were no discussions re the 1 Stonehaven Road septic system encroaching on the 5 Stonehaven Road property.

[33] Franko testified the septic system at 1 Stonehaven Road was installed according to all the relevant regulations.

[34] Franko testified she did not meet Strutt before the closing date. She was not aware of his asking for the location of the septic system, matter of factly noting it was the mound in the backyard.

[35] Franko met Strutt for the first time in May, 2010. He did not mention anything about any issue with the location of his septic system at that time.

*Cross-examination*

[36] Franko testified she knew nothing about the shared mantles until this litigation. For clarity, a mantle is an additional leaching bed, providing a further area for treatment. Franko suggested she had never really thought about whether part of the mantle for her residence encroached on the 5 Stonehaven Road property.

[37] Mr Dowhan reviewed with Franko the septic system provisions from Schedule 'A' of the Agreement. She agreed her real estate agent had crossed out the second sentence. She initialled the changes and agreed with the revised first sentence [para. 5 above].

**<u>Ken Egger ["Egger"]</u>**

[38] Egger is a co-principal with his brother in Egger Excavating Ltd. He would install 18 to 25 septic systems a year. I found him to be forthright in his testimony.

[39] Egger testified the original septic system at 1 Stonehaven Road was installed by his father. He described it as a Class 4 treatment type system. The shared mantle aspect was a feature unique to that subdivision. Only sand as part of the 1 Stonehaven Road septic system was on the 5 Stonehaven Road property.

[40] Egger testified his company serviced the 1 Stonehaven Road septic system for Franko and has continued to do so for Strutt.

[41] Egger testified he got a call in early 2010 from Strutt concerning the location of his septic system. Egger attended and explained 'why where it was' relative the shared mantle and its approval when built. The Exhibit 2, Tab 15 statement from Egger suggests this meeting was in September, 2010 but nothing turns on it. Egger related the history of the sand mantle for 1 Stonehaven Road being on 5 Stonehaven Road property 'as per health department regulations at the time of installation'.

[42] Egger testified the bed itself could have been moved to the Strutt property. Same would only have cost $3-4,000.00 as existing sand would have been used.

[43] Egger testified Strutt later called him about the price of a new system. It would have costed $11-12,000.00, lower than normal as existing materials and the septic tank would have been used. The second options is what Strutt wanted. Egger testified a different style of septic system was then installed. The backyard mound was 2-3' lower, making the lot look better too. The new system had better effluent

treatment.

*Cross-examination*

[44] Egger conceded the sand mantle is part of the septic system. He confirmed such systems are usually on the lands of the house it is servicing. If there is a shared system, one should get permission. He was aware of other shared mantles in the subdivision.

[45] Egger agreed some remedy was in order. Moving the sand was the most viable option.

**SUBMISSIONS**

**The issue of subrogation**

[46] Mr Suter took issue in his opening statement and in submissions with the fact this was in reality a subrogated action. It is true one would look in vain for any reference in the Plaintiff's Claim to Chicago Title bringing this action in the name of Jonathan Strutt, its insured. He also submitted under Rule 7.01 (2) such information should have been in the Plaintiff's Claim [italics added]:

"(2) The following requirements apply to the claim:

1. It shall contain the following information, in concise and non-technical language:

i. The full names of the parties to the proceeding and, *if relevant, the capacity in which they sue or are sued,*"

I agree with Mr Suter the Plaintiff's Claim is deficient in that regard.

[47] It was however known to Franko who was the real Plaintiff. A representative of Chicago Title attended the settlement conference. It is clear to me on general insurance principles there would be a right of subrogation available to Chicago Title.

[48] I am mindful no representative of Chicago Title appeared at trial. No title insurance contract was placed in evidence. Said contract would have detailed the subrogation provisions and streamlined matters today. The approach of Mr Dowhan has been rather cavalier in not laying the proper basis for a subrogated claim.

[49] Even for lawyers, the Small Claims Court is one of equity. I am not prepared to dismiss the claim on this basis.

**The issue of negligent misrepresentation**

**A. Plaintiff**

[50] The *Cognos* decision from the Supreme Court of Canada outlines the five requirements for a successful negligent misrepresentation claim:

1) there must be a duty of care based upon 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 representation;

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.

Mr Suter properly conceded the first requirement. Issue was joined on the second, third, fourth and fifth requirements.

[51] For ease of reference, the portion of the Agreement dealing with the septic system is reproduced:

"Seller states that, to the best of her knowledge and belief, the septic system was installed to all relevant regulations at the time of installation and continues to operate satisfactorily."

Both parties provided case law for my consideration.

[52] Mr Dowhan referenced para. 38 of *Usenik v Sidorowicz*, a decision of J. Wright J, as to what is a negligent misrepresentation:

"A negligent misrepresentation is a representation carelessly, not knowingly, made that is untrue, inaccurate or misleading. A person may be "misled" by a failure to divulge as much as by a statement that is inaccurate or untrue. The duty may be breached not only by positive misstatements but also by omissions, for they may be just as misleading. (*Spinks v R*. 1996 CanLII 4041 (FCA), (1996) 134 DLR (4th) 223 (Fed. CA))"

Mr Dowhan contended I must take a broad interpretation of the agreement. He submitted Franko should have made inquiries to substantiate the sentence left in the Agreement re the septic system. In the view of the Plaintiff, the statement is untrue, inaccurate and misleading, said state of affairs curable by reasonable inquiry.

[53] Mr Dowhan also submitted 'regulations' in the Agreement be given the broadest possible interpretation, suggesting breaches of the *Land Titles Act* and the *Trespass to Property Act*. No sections under these statutes were provided to me. He also noted there was no easement registered on title.

[54] Asked about the import of the local solution for this subdivision--the shared mantles due to the limited lot widths--Mr Dowhan said Strutt should have been told about it.

[55] Mr Dowhan contended the sentence is untrue, inaccurate and misleading in two respects:

a) the septic system was not installed according to all relevant regulations as it ran afoul of sundry statutes; and

b) the septic system could not be found to be operating satisfactorily against such statutory violations.

[56] Concerning damages, Mr Dowhan sought complete subrogation of the monies paid to Strutt. If the alternate, if the less expensive option proposed by Egger was found to be the proper measure of damages, he asked for $4,000.00 on the seeming basis Egger had testified the work for the first option might have cost $3-4,000.00.

**B. Defendant**

[57] Mr Suter submitted the upshot of the discussion between Strutt and Plath was nothing more than there might be a problem. I take him to be implying Strutt overreacted in the circumstances, people buying in such rural situations to be accommodating. He noted Plath, survey in hand, nevertheless closed the deal knowing there was some issue in that regard.

[58] Mr Suter submitted the septic system issues were felt to be legal by Haldimand County, citing Ex 2, Tab 11. With respect, that is a misreading of the letter. It states the county had no documentation on file to answer the inquiry.

[59] Mr Suter contended Strutt could have done more, chief of which was to get a survey. He argued the Plaintiff is trying to shift the maxim *caveat emptor* on the seller.

[60] Mr Suter referred to *Anderson v Gionet*, a 2009 decision from the New Brunswick Court of Queen's Bench. Paragraph 14 deals with what is a patent defect. Citing Halsbury's Laws of England, Grant J noted:

""...patent defects are those readily discoverable by ordinary inspection. Vendor is under no duty to draw attention to patent defects which can readily be observed by the purchaser if he pays ordinary attention during inspection. If the purchaser fails to observe patent defects on inspection he cannot be heard to complain about such defects later and the rule of caveat emptor applies.""

Mr Suter submitted the location of the septic system for 1 Stonehaven Road was patent and the maxim *caveat emptor* should apply.

[61] Concerning the *Cognos* requirements, Mr Suter submitted the sentence in the Agreement 'says what it says' namely, that it was true, accurate and not misleading; was not negligently made and Strutt had other options for information had he chosen to pursue same.

[62] On damages, Mr Suter submitted there should have been none had Strutt and/or Chicago TItle done due diligence.

**ANALYSIS**

***Liability***

[63] Separating the wheat from the chaff, this action still comes down to the interpretation of a single sentence.

[64] Neither side provided me with any cases dealing with the wording of the sentence. I find I must give the words used by the parties their ordinary meaning, mindful of the context of a property transaction.

[65] I will deal first with the closing words: that the septic system 'continues to operate satisfactorily'. Mr Dowhan submitted same has to be read relative the statutory backdrop. I disagree. A purchaser wants to make sure the septic system is in working order. This phrasing deals with nothing more than the day to day operational nature of the septic system. The septic system worked fine when Franko was the property owner. It continued to work fine after Strutt became the property owner. I find Franko has readily satisfied the closing wording of the sentence.

[66] Was the septic system "...installed according to all relevant regulations at the time of installation....". I find that it was. The peculiar history of the installation of septic systems in this subdivision has been discussed above re the 97'/100' issue causing the shared mantles. The statements from Sauermilch confirm same. The Haldimand-Norfolk Regional Health Dept's 'Application form and Certificate of Approval for a class 2-6 sewage system' notes the communal nature of the septic system. According to Sauermilch, the health department closely monitored the work in question: Exhibit 3. I accept that view of events.

[67] As to the contention 'all relevant regulations' means every Ontario statute, I think that is an unreasonable interpretation of the words. If Mr Dowhan wanted to contend there were some regulations under, for example, the *Land Titles Act*, as it read in 1992, which impacted the installation, I was not made aware of them. I find the words 'all relevant regulations'reflect the requirements of the body with supervisorry jurisdiction over the septic system in question. Same clearly is the Haldimand-Norfolk Regional Health Dept.

[68] The original wording of the sentences in the Agreement was drafted on behalf of Strutt. The crossed off sentence pertained to getting information from the Ontario Department of Health, presumably here meaning the Haldimand-Norfolk Regional Health Dept. Strutt was apparently content not to push the issue, amenable to relying on title insurance. The information of a shared mantle was available, per Exhibit 2, Tab 10. Chicago Title cannot stand in any higher position than its insured in that regard.

[68] Mr Dowhan puts too high a burden on Franko in suggesting she cannot simply state the septic system was installed according to all relevant regulations at the time of installation. I find she and her real estate agent addressed the two sentences and gave them due thought. One sentence was deleted and the other amended twice, none of the changes challenged by Strutt. In any event, anything else Franko might have found only confirmed the proper steps were taken relative the installation of the septic system.

[69] I have reviewed the cases provided by Mr Dowhan. In *Usenik*, the vendor gave misleading information in a Seller Property Information Statement ["SPIS"] as to a history of moisture/water problems. J. Wright J noted there can be fraudulent, negligent or inadvertent/innocent statements [para. 35]. It is only suggested Franko's statement was negligent.

[70] Mr Dowhan submitted Franko misled Strutt by not divulging--in fact omitting-- information: para. 52 above. In my view, the argument is misconceived. In *Usenik*, the question about property flooding was not limited to now but reasonably interpreted to mean past flooding. The narrow answer provided was found to be false [paras. 46-47]. Here, there was nothing false about the statement the septic system was installed per regulatory requirements. Simply put, the assurances sought by Strutt in this action were not sought in the Agreement relative the septic system. He chose title insurance over a survey and his insurer cannot now complain about the Agreement wording. I have found said sentence to be accurate, reinforced by the fact Franko herself was not aware the shared mantle issue until this litigation. I accept her evidence on that point.

[71] In *Costa v Wimalasekera*, van Rensburg J dealt with an appeal of a decision of Deputy Judge Filkin. Damages for misrepresentation were awarded against a seller due to water accumulation in the backyard after a rain. Another SPIS was involved. The seller had indicated the property was not subject to flooding, suggesting there was only 'ponding'. There was a finding the 'no' answer to flooding constituted a negligent misrepresentation.

[72] *Costa* is similar to *Usenik*: a particular statement in a SPIS was found to be inaccurate, leading ultimately to a negligent misrepresentation. In this matter, I have found the original statement made was accurate. These precedents do not help Strutt. While *obiter*, in my view a fact specific answer about a topic does not put anything and everything about said topic in issue if the original answer is accurate. In *Usenik* and *Costa,* there were negligent misrepresentations as the underlying answer in the SPIS's were factually wrong. Same is

not the case in this action. I find the sentence in issue in this action simply did not offer Strutt any protection on the possibility the 1 Stonehaven Road sewer system encroached on the 5 Stonehaven Road lot. Other options were available to Strutt and specifically not done re requisitions, statutory declarations and a survey.

[73] *Morton v. Spearn* is a decision of Reilly J. The third party claim therein was against the vendor concerning what Reilly J had found to be an easement. The third party had provided a statutory declaration that to the best of her knowledge there were no rights-of-way or easements over the property. On the facts in *Morton*, Reilly J found the statutory declaration was neither false nor made negligently. Reilly J dealt with the effect of wording 'to the best of my knowledge and belief' and the importance the representation be false:

"[29] I find the presence or the absence of the phrase "to the best of my knowledge and belief [sic] or "to the best of my knowledge" adds little to the analysis of whether the statements in an offer of purchase and sale or in a statutory declaration constitute a negligent misrepresentation....If a declarant makes such statements recklessly or negligently, then the declarant may be liable for a negligent misrepresentation. If the statements are indeed false, the standard is an objective one...."

The core statement in this claim relates to whether the septic system was installed in accord with all relevant regulations at the time. I have found that it was. Franko did not make a false statement.

[74] The Court of Appeal in *Krawchuk v Scherbak* dealt in part with a finding of a successful negligent misrepresentation claim against the Scherbaks as vendors. This action also involved an SPIS, the answers in dispute involving the structural integrity of three walls. Gordon J had found the answer re any foundation issue was false as incomplete, not only not limited to the northwest corner of the house but also more serious in scope. The answer to the plumbing question therein was also found to be false. Gordon J found the disclosure on these issues were not full, frank and accurate, eventually leading to a finding of negligent misrepresentation.

[75] The Scherbaks' appeal re negligent misrepresentation was dismissed. Epstein JA went through the five part test for this tort. The findings about an incomplete answer re the structural walls and a false answer as to the plumbing were upheld. In this action, I have found the statement in issue to be true so the second aspect of the *Cognos* test has not been met. The claim in negligent misrepresentation accordingly fails.

[76] The third aspect under *Cognos* deals with a vendor being negligent in the making of the statement. In *Krawchuk*, the Court of Appeal noted a need to provide "accurate and complete information" [para. 79] and "a reasonable person in similar circumstances would have disclosed more" [para. 80]. In this action, I have found the statement in the Agreement to be accurate and complete. There was nothing else to disclose on the narrow point in issue. Franko did not know about the shared mantle. I do not find Franko made her statement in the Agreement in a negligent manner. The third aspect of a negligent misrepresentation claim also fails.

[77] The fourth aspect under *Cognos* is whether Strutt reasonably relied on the provision. At this stage, the patent/latent defect and *caveat emptor*issues referenced by Mr Suter have relevance. Most of the discussion by Epstein JA pertains to other cases where an SPIS [or comparable document] was involved. The cases by and large deal with hidden ie latent defects which would not normally be known to a prospective buyer. In this action, while the general location of the septic system near the property line to the 5 Stonehaven Road lot was clear on any reasonable observation, I would hold its possible encroachment on to the 5 Stonehaven Road lot was a latent defect. This does not end, however, the inquiry under the fourth part of the *Cognos* test.

[78] While Strutt testified he relied on the Agreement relative the septic system, he took the advice of his real estate agent not to get a survey and in reality relied instead on title insurance. There was no evidence led that had Strutt been aware of the fact his septic system encroached on the 5 Stonehaven Road lot he would not have proceeded with the transaction. The issue did not stop Plath from buying the neighbouring lot. While a close call, I find the required reliance has not been demonstrated to the degree necessary to establish the fourth requirement. I find the reliance in the cases cited by Dr Dowhan to be qualitatively different than the facts before me. If a vendor tells a purchasr there is no flooding, there is little in the way of options for the purchaser than accepting the statement in most situations. Between the likes of requisitions, statutory declarations and a survey, there were ample routes available to Strutt which call into question his reliance on the statement in the Agreement.

[79] The final case provided by Mr Dowhan is *Foley v Shamess*, a decision of O'Neill J. It does not deal with negligent misrepresentation so I did not consider it further.

[80] The fifth aspect is damages. While there may be a contention Strutt 'jumped the gun' in that there was no clear demand from Plath something had to be done, I am prepared to accept it was reasonable for Strutt to take steps to remove the small portion of the 1 Stonehaven Road septic system from 5 Stonehaven Road. I do not accept the submission of Mr Suter no damages have been proved in the circumstances.

[81] The scope of damages varies markedly between what could have been done [$3,000.00 per the statement of Egger at Exhibit 2, Tab 15] and what was done [$13,711.42 per the two checks paid to Egger Excavating and one check paid to Strutt at Exhibit 1, Tab 8].

[82] I find the removal of sand three feet on the Plath property would have been a rather simple process, dealing with the issue. Strutt instead used the opportunity of repairs to get a more updated septic system. He can of course do so but that additional sum should not be laid at the door of Franko. I find the work could have been done for $3,000.00 per the Egger estimate. Same is the measure of damages.

[83] Mr Dowhan took issue with Egger's testimony the work could have been done for $3-4,000.00. I find a statement given on March 15, 2012, more than a year and a half ago, to be more accurate.

**SUMMARY**

[84] Strutt claimed the statement relative the septic system in the Agreement supported a claim for negligent misrepresentation. I find to the contrary.

[85] While the vendor/purchaser relationship between the parties satisfied the first *Cognos* condition, I find the underlying statement in issue was true. The septic system was built according to all the requirements of the local health department. 'relevant regulations' refers to those of the local health department. As this statement was true and accurate, it was not negligently made. There was no evidence led that Strutt relied on the statement for anything more than it plainly states, quite apart from the fact the very wording in issue was supplied on behalf of Strutt. He opted for title insurance to deal with such issues. That is his right to do so but Chicago Title, standing now in his shoes, is in no higher position. Had liability been found, damages of $3,000.00 would have been awarded.

[86] I do not know if there are any offers to settle which might impact on costs. I would ask the representatives of the parties to provide any submissions on costs and disbursements to me by November 25, 2013 via the Welland Small Claims Court fax number 905-734-9119.

[87] I found all of the witnesses to be candid and fair in their testimony. While a hotly contested matter, Mr Dowhan and Mr Suter are to be commended for their respective presentations on behalf of their clients.

November 8, 2013

_____"Marshall Deputy Judge"_____

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