

Appellate Court Case Number  
A05-1837

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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James J. Kellogg and Tari L  
Kellogg

Respondents,

vs.

William B. Woods, Defendant  
and Third Party Plaintiff,

Appellant,

vs.

Wayne Anderson d/b/a Mariway  
Land Consultants, Third Party Defendant,

Respondent.

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**APPELLANT'S BRIEF AND APPENDIX**

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## ISSUES PRESENTED

- I. Where a "Certificate of Compliance" is issued as required by Minn. Stat. § 115.55 indicating that a septic system is in compliance at the date of an inspection but the system's holding tank is discovered to be cracked five months later, is this evidence, alone, sufficient to conclude the certificate of compliance was improperly issued?

The trial court held: in the affirmative.

- II. Is a seller liable, under Minn. Stat. § 115.55 Subd.6, for a defective septic system even when the seller had no actual knowledge of the system's condition at the time of the sale?

The trial court held: in the affirmative.

- III. Is a licensed septic system inspector who negligently performs an inspection under a contract with the seller liable for the seller's damages arising from the inspector's negligence?

The trial court held: in the negative.

## STATEMENT OF FACTS

This appeal has its genesis in Appellant William B. Woods' ("Woods") 2001 sale of a lake home to Respondents James and Tari Kellogg ("Respondents" or "Kelloggs")<sup>1</sup>. In fall 1996 Woods purchased real estate located at 1153 East Clark Lake Road, Nisswa, Minnesota (T. 61). The cabin on the property was apparently a rudimentary structure intended only for seasonal use (T. 62, 66 - 67). Woods first used the cabin in the spring of 1997 (T. 62).

Shortly after Woods purchased the cabin, his wife became pregnant and, because the cabin was unairconditioned, she felt "very uncomfortable" at the site (T. 64). Woods' daughter was born with a heart ailment in August and her condition prevented any further visits to the cabin that season (T. 65). As Woods' family grew he found it increasingly difficult to use the cabin and eventually felt it was "a huge burden on his family" (T. 61, 67). Woods estimated that the cabin was used no more than 6 - 8 times between 1997 and 2000 (T. 65).

Accordingly, Woods decided to sell the property. Initially, Woods agreed to allow a neighbor, Clark Fischer, to list the cabin for sale (T. 70, 72)<sup>2</sup>. Although not entirely clear from the trial record, it appears Fischer attempted to sell the property during the fall of 2000 and when Fischer left to spend the winter in Florida, Woods decided to utilize a different realtor (T. 73). Woods interviewed two realtors including Jim Christensen, who was associated with Kurilla Realty (T. 73 - 74). Ultimately, Woods decided to shift the property's listing to Christensen/Kurilla (T. 74). According to Woods, Christensen suggested listing the cabin at

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<sup>1</sup> The lake home was owned in joint tenancy by Woods and his wife, Nicolle. However, she was not included as a defendant in this litigation.

<sup>2</sup> Apparently Fischer was associated with a business known as "Seagull Realty" (T. 74).

\$120,000.00 for an immediate sale, but added that the property might yield \$149,000.00 during the ensuing summer (T. 75). Woods, anxious to rid himself of the cabin, instructed Christensen to offer the property at the lower price (T. 75). Shortly after agreeing to list the property, Christensen orchestrated its sale to Kelloggs. Christensen represented both the buyers and sellers in this transaction (T. 8). The purchase price was \$119,900.00. Not surprisingly, given its location and rustic character, the cabin's waste was drained into a septic system. The Purchase Agreement included a clause stating:

Seller agrees to provide buyers with a current septic inspection and warrants its compliance.

(A. 1). The septic system utilized by the cabin drained waste into a holding tank (T. 69). When Woods purchased the property, he did not solicit detailed information concerning the septic system (T. 68 - 69). According to Woods, the former owners reported the holding tank needed to be pumped, on average, once each season (T. 68) and they described a gauge which could be read to reveal when the tank was full (T. 69)<sup>3</sup>. At the time Woods sold the property he was unaware of any problem with the septic system and believed there was no reason to be concerned about the condition of its holding tank (T. 71).

Woods did not discuss the condition of the septic system with Kelloggs prior to their purchase (T. 10 - 11). According to James Kellogg, he had no conversations at all with Woods prior to the closing (T. 11). Kellogg also testified that he did not receive a septic system disclosure statement from Woods or his realtor prior to the closing (T. 11) but had a conversation with Woods about the operation of the septic system after the closing (T. 11). Kellogg was

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<sup>3</sup> Woods acknowledged that he always lived in an urban environment and knew very little about septic systems.

aware that a septic system was used at the site, that it included a holding tank was in place and had been inspected prior to the closing (T. 12).

This inspection was arranged by Jim Christensen, Woods' listing agent, and conducted by Wayne Anderson ("Anderson") who did business under the assumed name Mariway Land Consultants (T. 131, 132 - 133). Anderson had been employed as a septic inspector/designer since 1992 (T. 131 - 132), Anderson testified that he was telephoned by an employee of Kurilla Realty on March 25 or 26, 2001, and asked to do a septic system compliance inspection (T. 133). According to Anderson, he conducted the inspection on March 28, 2001 (T. 133). Before conducting the inspection, Anderson was apparently told that the realtor had requested the holding tank be pumped (T. 133).

Anderson testified that when he conducted the inspection there were approximately 6 - 7 inches of snow on the ground (T. 133). Anderson described his inspection in the following fashion:

...we got to the site and I started probing, and it was obvious to me that the tank was not where I was told it was. Its not underneath the shed. It sat to the immediate right of the shed...

...my probe showed that the tank was approximately three - four inches underneath the actual surface of the sand that was over the top of the tank. I asked Tom to remove all the snow...and with a pry bar and big chisel we were able to remove the manhole cover and visually see down inside the tank.

The first thing I did was to...measure the depth of the fluid [in the holding tank] which was 24 inches in depth...

In this particular case, the baffle on the inlet pipe was in existence and the tank could be seen with a flashlight very easily...I shined the light on all the walls of the tank, one of the tools that I always take with me in a ten foot quarter inch rebar. Its flexible....*that was run across the bottom of the tank two of three different times... below the fluid of the water to see if the bottom of the tank is*

*cracked. It did not catch in any location, and in my opinion, it was not cracked at the time of the inspection.*

...I was well aware of the fact that there was 24 inches [of fluid] in the tank and that did not ring any bells...Typically fyles or anyone else that pumps tanks try to pump them early in the fall so that there is fluid in the in the winter and if there is no fluid—if they don't stay full during the winter there is a potential for them to crack.

(T. 135 - 137). (Emphasis supplied). After completing his inspection, Anderson issued a document stating the system he inspected was “in compliance” (A. 2)<sup>4</sup>.

Later, on approximately April 15, 2001, Anderson had a telephone conversation with James Kellogg after Kellogg received the compliance report. Anderson recalled that Kellogg's questioning focused on “what in the heck is a holding tank” and how did the depth gauge functioned (T. 139). According to Anderson, he returned to the cabin roughly one week later and again measured the fluid level in the tank “and it was exactly where it had been the prior time I had been there” (T. 140). Anderson then contacted Fyles, the local effluent pumping contractor, to confirm the tank had not been pumped since the date of his initial inspection. Anderson was told that Fyles had not drained the tank (T. 153) and felt nothing was amiss.

The purchase was completed on April 27, 2001. It is unclear when Kelloggs first visited the property or opened the cabin after the closing (T. 13). Kelloggs apparently used the property regularly throughout the summer of 2001. Kellogg estimated that he and his family visited the cabin approximately one dozen times during that season (T. 34) and that he could not estimate how many times the holding tank was pumped that summer (T. 35). Kellogg conceded that he

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<sup>4</sup> The document issued by Anderson did not make any specific representations concerning the condition of the holding tank but stated that Anderson did not observe a situation which would “immediately and adversely impact or threaten public health or safety.

began using the cabin sometime before June 4, 2001 (T. 16).

Kellogg apparently arranged for the tank to be pumped on June 4, 2001 (T. 16)<sup>5</sup>. Kellogg returned to the cabin on June 22 and believed the holding tank was again full and needed to be pumped (T. 17). According to Kellogg, he called Woods at this time to ask about the operation of the septic system. Woods apparently had little information for Kellogg beyond suggesting that he contact Fyles “because they were the ones who always had the tank pumped” (T. 18). Kellogg apparently contacted Fyles again and inquired about the frequency of prior tank pumpings. Kellogg claimed that Fyles reported draining the tank twice in 1995, once in 1996, twice again in 1997 (T. 19 - 20) but no additional pumpings after that time<sup>6</sup>.

Kellogg next made arrangements to have the tank pumped and reinspected by Bud Sergent (“Sergent”) on August 28, 2001 (T. 24 - 25). Kellogg claimed Sergent’s inspection revealed the holding tank had numerous cracks in its base (T. 28). Apparently Kelloggs took no immediate steps to address this situation until 2002, after reselling the property for \$140,000.00 (T. 28, 35, 42). Because the new purchaser required a compliance certificate, Kelloggs replaced the existing holding tank with two 750 gallon storage tanks resulting in an improved system and a larger capacity (T. 30). The cost of this new system totaled \$3,285.00 (T. 30). After reselling the property, Kelloggs brought a conciliation court action against Woods and Anderson in September 2002. According to their conciliation court claim, Kelloggs based their theory of

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<sup>5</sup> Apparently Kellogg asked to have the tank pumped earlier but stated that he was told by the pumping contractor, Fyles “that the tank did not need to be pumped because it was only half full” (T. 15).

<sup>6</sup> Anderson testified this schedule was consistent with Woods’ described use of the property (T. 162).

liability on Woods' representation the property had "a working septic system" and that Anderson "wrongfully inspected the system...and authorized a certificate of compliance so the property could be sold." Kelloggs alleged "the septic system was failing at the time of sale" and sought "reimbursement for costs incurred to replace the failing septic system" (A. 5).

Following an October 2002 trial the conciliation court referee awarded Kelloggs judgment against Woods alone in the amount of \$3,935.00. The conciliation court referee's decision was accompanied by a memorandum in which he found that Anderson had no liability to Kelloggs because there was no contract between Anderson and Kelloggs (A. 8). He found Woods responsible for the cost of replacing the septic system (A. 6). The conciliation court referee believed that Anderson's March 2001 inspection was negligently performed but did not order a judgment in Woods' favor because "Woods did not file a crossclaim against Mr. Anderson for his negligent inspection of the septic system..." (A. 9).

Woods then sought a trial de novo before a district court judge. As part of that process, Woods asserted an indemnification claim against Anderson. Following a January 11, 2005, court trial, the Honorable David J. TenEyck issued Findings of Fact, Conclusions of Law, and an Order for Judgment. Judge TenEyck found:

- That Anderson was hired by Woods realtor to perform a septic inspection and was aware that this inspection was needed due to a possible sale (Findings 5 and 6).
- That Anderson failed to exercise reasonable care when inspecting the septic tank (Finding 7).
- The septic tank was cracked and not in compliance at the time of the April 27, 2001, closing (Finding 12).
- That Woods had reason to know the system was not in compliance at the time of the

closing (Finding 13).

From these findings the trial court judge made a series of legal conclusions. Judge TenEyck concluded that the doctrine of merger barred any legal action for a violation of the purchase agreement (Conclusion of Law 2) but that Kelloggs had a viable claim against Woods under Minn. Stat. §115.55 Subd.6(b). Accordingly, the district court judge directed entry of judgment against Woods for \$7,751.12 which included the cost of replacing the septic system and an additional \$3,861.20 in attorney's fees. Although Judge TenEyck concluded that Anderson was liable to Woods for "negligently supplying incorrect information" the judge also concluded that Woods "was not in privity of contract with...Anderson..." and accordingly Woods was not entitled to any meaningful damages for breach of contract" (A. 16). Woods' trial counsel promptly filed, an April 20, 2005, a motion for amended findings and conclusions of law (A. 18). Judge TenEyck denied these motions pursuant to a July 20, 2005, Order (A. 29). This appeal followed.

## ARGUMENT

### **I. RESPONDENTS FAILED TO ESTABLISH A VIOLATION OF MINN. STAT. § 115.55 SUBD.6.**

In the instant case, Woods' liability was predicated entirely upon the trial court judge's conclusion that Woods violated Minn. Stat. § 115.55 Subd.6 in connection with the sale of this real estate to Kelloggs. This determination was based on factual findings which wholly misconstrued the trial testimony and on an unjustifiably expansive understanding of the pertinent statute. The trial court's findings of fact should not be set aside unless clearly errorneous.

*Fletcher v St Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). Nonetheless, there still

must be “reasonable evidence” to support the district court’s findings. *Id* at 101, *Automotive 36, Inc. v IMYGE Motorcars of America*, 2003 WL 22480322 (Minn. App. 2003). However, a reviewing appellate tribunal is not bound by the district court’s decision on purely legal issues and is not required to give any particular deference to its analysis. *Modrow v JP Food Service, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

**A. Kelloggs failed to present any credible evidence that the septic holding tank was defective on the date they purchased the real estate.**

At the outset, the trial judge mistakenly accepted Kelloggs’ claim that the holding tank was defective on the date they acquired the property (Findings 12 and 13). Under Minn. Stat. § 115.55 Subd.6(b):

...a seller or transferor who fails to disclose the existence or known status of an individual sewage treatment system at the time of sale and who knew or had reason to know the existence of known status of the system is liable to the buyer or transferee for costs relating to bringing the system into compliance with the individual sewage treatment system rules and for reasonable attorney’s fees for collection of costs from the seller or transferor.

A buyer acquires a cause of action under the Statute only when the system is not in compliance. Here, the seller provided Kelloggs with a compliance certificate prior to the sale.

For Kelloggs’ theory of recovery to be valid, the certificate must have been mistakenly issued and meaningless. Unfortunately, beyond his own conjecture, Kellogg presented no legitimate evidence to support that assertion. At most, Kellogg produced evidence that the tank was cracked and broken in August 2001. Sergeant’s August 2001 noncompliance certificate revealed nothing about the condition of the holding tank five months earlier when it was inspected by Anderson. Tellingly, Kelloggs “expert,” Sergeant, was never produced as a witness. To support their assertions, Kelloggs relied exclusively on the frequency of septic system

pumpings during summer 2001 and a handwritten notation on Sergeant's May 2002 invoice for replacement of the tank (reportedly authored by Sergeant but unsubstantiated) that the cracks appeared "old."

The trial court appeared to rely heavily on Kelloggs' testimony concerning the frequency of pumping during the summer of 2001. In his post trial memorandum, Judge TenEyck explained:

In this case, circumstantial evidence of cracks in the tank came from James Kelloggs' testimony. Mr. Kellogg testified that he had to have the tank pumped three times over the course of two months despite the fact that his family had not been adding material to the tank. The fact that the Kelloggs had to have the tank pumped multiple times leads to the reasonable inference that liquid was getting into the tank through some method other than normal use.

(A. 33).

There are several problems with this reasoning. First, Kellogg, in fact, testified that he could not recall how many times the tank was pumped that summer (T. 35). Second, of the three tank drainings found by Judge TenEyck, only two were attributable to usage during 2001. The un rebutted evidence in this case was that the holding tank was not drained by a septic contractor between 1997 and June 2001. Third, Kellogg testified that his family frequently visited the cabin during the summer of 2001. Consequently, it does not appear unreasonable for the tank to be pumped on two subsequent occasions that summer when Kellogg admitted that he and his family "went up fairly often" – roughly "a dozen times" (T. 34)<sup>7</sup>.

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<sup>7</sup> Kellogg claimed that approximately 700 - 750 gallons were drained from the tank in June and July 2001. However, Anderson testified this was merely guess work on Kellogg's part because the pumping contractor, Fyles, never had any such data. Anderson testified "they don't collect volume data" (T. 142). Anderson testified that each toilet flush would discharge 7 - 9 gallons into the holding tank and each shower an additional 2 - 3 gallons (T. 162). As a result, it

Moreover, Anderson testified he remained confident the tank was intact in March 2001 (T. 137, 140, 143, 149). Anderson specifically stated that he probed the bottom of the tank was unable to identify any cracks (T. 137, 149). Although Kellogg argued that Anderson could not have possibly known this because the tank contained effluent at the time, Anderson reported that many inspections take place when a holding tank contains liquid (T. 154, 155). Anderson added that if he even suspected a rupture in the holding tank he would request that it be drained (T. 155) but added that because the “water is gray...even if the water is an inch deep you couldn’t see through the water” (T. 150). As a result, even if the tank had been drained, it appeared use of the probing device would have been the vehicle from which any cracks would have been discovered.

Anderson explained that although he was confident the holding tank was intact at the time of inspection and believed that if cracking occurred that took place “well after [Anderson’s March 2001 visit]” (T. 142). Anderson observed the bottom of the tank could have cracked anytime between March and August 2001. He bluntly explained “God knows when a tank decides to and when a tank decides not to split. No one ever knows...its something buried in the ground and it just happens...on the date I did that [March 2001] inspection it was fine” (T. 143). Anderson also testified, without rebuttal, that it would be impossible to evaluate the age of a crack by its appearance (T. 170 - 171).

In essence, to conclude that the holding tank was cracked at the time this sale occurred, Judge TenEyck entirely disregarded Anderson’s un rebutted testimony, accepted without question a handwritten statement supposedly authored by another inspector who did not testify at trial,

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would hardly be surprising for Kellogg and his family to generate 1,500 gallons of discharge if they visited the cabin one dozen times—presumably for more than one day on each occasion—during the summer.

added to that notation the conclusion that the “old” appearing cracks in the tank predated Kellogg’s purchase of the property five months earlier, and discounted all testimony which was inconsistent with Kellogg’s circumstantial claims. While the judge’s sympathy toward Kelloggs may be understandable, this is a blatant overreaching requiring corrective action. Under Minn. Stat. § 115.55, a certificate of compliance does not guarantee a septic tank’s future performance, but is merely a statement of its condition at the time of inspection. *Tristate Insurance Co. v Soderstroms Sales and Service, Inc*, 2001 WL 316149 (Minn. App. 2001). Here, viewed most charitably, Kellogg presented testimony suggesting the bottom of the tank was cracked by the summer of 2001. Kelloggs presented no testimony or other evidence that the tank was cracked before August 2001.

**B. The trial court misread the seller’s obligations under § 115.55 and, by doing so, substantially and unreasonably expanded a seller’s liability.**

Minn. Stat. § 115.55 Subd.6(a)(2) requires that a seller:

must indicate whether the individual sewage treatment system is in use and, to the sellers or transferors knowledge, in compliance with applicable sewage treatment laws and rules.

A seller is liable, under Minn. Stat. § 115.55 Subd.6(b) when he or she:

...fails to disclose the existence or known status of an individual sewage treatment system at the time of the sale, and who knew or had reason to know of the existence or known status of the system...

Nothing in the explicit language of the statute makes the seller a guarantor of the system’s condition. Instead, a seller is responsible only for knowing misrepresentations of the system’s condition. During the course of this trial, Woods testified that he was unaware of any reason why the operation of the septic system posed a concern at the time of sale (T. 71). He was not

particularly pressed on this point at trial but, nonetheless, the district court judge found that Woods “had reason to know the system was not in compliance prior to the closing” (Finding 13). Woods liability to Kelloggs arose from this Finding.

This raises two possibilities. Either the trial court judge made this finding without any logical basis or did so by misunderstanding the legal obligations imposed on Woods by § 115.55.

In his post trial memorandum, Judge TenEyck explained:

There was...evidence presented at trial that permitted the court to make this finding. Woods testified that he purchased the property in the fall of 1996. He owned the property until the spring of 2001. He used the property multiple times during that period. Despite the fact that he was using the property he had the septic tank pumped on only one occasion, in 1997...Woods belief about the relatively small size of the tank, plus his awareness of the lack of pumping, should have alerted him to a problem. Woods himself admitted during recross examination that he did not pay attention to the septic tank. Inattention does not relieve Woods of his responsibility to have noticed trouble signs.

(A. 35).

This explanation is disturbing on several levels. At the outset, it is, frankly, nonsensical. Woods testified that he first used the cabin in 1997 and had the septic tank pumped that year. Woods explained, for a variety of reasons, including his daughter’s medical condition, that it was difficult for his family to use the property and they rarely did so. Woods’ family often missed entire seasons at the cabin and used the property no more than 6 - 8 times during the course of the next three years. The only expert who testified, Anderson, stated that with this type of infrequent usage, it was unsurprisingly Woods did not have the tank emptied after 1997 (T. 162)<sup>8</sup>. Not only

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<sup>8</sup> Specifically, Anderson testified:

In addition...I would also like to stipulate here as to why, perhaps, Mr. Woods never pumped for a couple of years.... This is a 1,250 gallon tank, and its very possible for a tank to still have ample room after three, four years...as he described his usage of it.

did the trial judge ignore this testimony in his fervor to find misconduct by Woods, but his reasoning defies all logic. How could the fact that Woods' holding tank retained ample capacity lead Woods to suspect ground water was permeating the tank and artificially raising its level? Moreover, it is puzzling why the district court judge felt that Woods and his family—who visited the cabin 6 - 8 times—should have expected to have the tank drained on more than one occasion while simultaneously concluding that Kelloggs need to have the tank drained twice—after a dozen visits to the cabin—constituted circumstantial evidence of unwarranted seepage into the tank?

The final passage of the judge's post trial memorandum quoted above suggests the judge misunderstood the legal standard for liability under § 115.55. Judge TenEyck suggested Woods was culpable because he “did not pay attention to the septic tank” and added that “inattention” did not relieve Woods of responsibility. No Minnesota appellate court appears to have construed the parameters of § 115.55 Subd.6. However, the plain language of the statute states that information provided to the buyer must be based on “the sellers or transferors knowledge” and that a seller “who fails to disclose the existence or *known status* of an individual sewage system treatment at the time of the sale and who *knew* or had reason to know of the existence of *known status* of the system is liable to the buyer for costs relating to bringing the system into compliance...” (Emphasis supplied). The statutory language is clear and unambiguous. Nothing in the language of the statute implies an obligation on the part of the seller to investigate the condition of a septic system or to be held accountable for the failure to do so. Yet this is precisely the burden the district court judge placed on Woods.

The lower courts construction of the statute is inconsistent with a fundamental mandate of

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(T. 162).

statutory interpretation. When the language of the statute is unambiguous a court is required to give effect to the plain meaning of the statute. *State v Stevenson*, 656 N.W.2d 235 (Minn. 2003), *State by Beaulieu v RSJ, Inc.*, 552 N.W.2d 695 (Minn. 1996), *Grimm v Commissioner of Public Safety*, 469 N.W.2d 746 Minn. App. 1991. Where the language of a statute embodies a definite meaning, a court cannot modify its obvious requirements by clever construction. *Kiges v City of St. Paul*, 240 Minn. 522, 62 N.W.2d 363 (1953). That is what the district court judge did here. The statute itself requires that a seller disclose only that information within the seller's actual or constructive knowledge. There is no question that Woods was unaware of any deficiency in the septic system nor did he suspect a deficiency at the time of sale. Absent proof that Woods consciously or recklessly misrepresented his knowledge, § 115.55 does not confer liability upon him. However, the district court judge expanded this concept by making Woods culpable for "inattention" to the operation of his septic system. That is not a basis for liability found within the statute. In essence, the trial judge made Woods as insurer of the system's future operation.

## **II. ANDERSON MUST INDEMNIFY WOODS FOR ANY LIABILITY OCCURRING THROUGH ANDERSON'S POOR PERFORMANCE.**

Ultimately, Woods asserts that the district court also incorrectly failed to hold Anderson accountable for his inadequate inspection. At least initially, Judge TenEyck concluded that Woods had no indemnification claim against Anderson "because....Woods was not in privity of contract with....Anderson..." (Conclusion of Law 4). This result is inexplicable. The trial court judge seemed to believe Anderson's contract was with the realtor and not with Woods. This understanding overlooks the fact that Anderson was well aware Christensen was acting as Woods' agent and that Woods himself paid for Anderson's services. As a consequence, Woods

is a party to the contract.

Where an agent, acting for a disclosed principal, enters into a contract with third persons for and on account of his principal and in his name, the contract is that of the principal....

*Kost v Peterson*, 292 Minn. 46, 193 N.W.2d 291, 294 (1971).

The trial court's use of the phrase "privity of contract" to hold Anderson unaccountable for his shortcomings suggests a lack of meaningful analysis. In reality, "privity" exists whenever a party acquires rights or obligations under a contract. As this state's Supreme Court explained:

Privity, in the law of contracts, is merely the name for a legal relation arising from right and obligation....privity of contract...is but a descriptive term, designating effect rather than cause. In short, privity of contract is legal relationship to the contract or its parties. To affirm ones rights under a contract is therefore to affirm his privity with the party liable to him.

That simple truth removes the difficulty arising from the complicated notions expressed by judges and text writers concerning privity of contract. This term has been much misused...

...the beneficiaries right to recover...with the resulting obligation of the promissor in his favor...arises the relation we call privity.

*LaMourea v Rhede*, 209 Minn. 53, 295 N.W.304, 307 (1940). More simply, because Woods' status as a disclosed principal conferred rights upon him under the contract with Anderson, he has the requisite "privity" to press this claim.

The trial court judge seemingly recognized the error of his reasoning and, in his post trial memorandum, explained that Woods was entitled to damages against Anderson for only \$150.00 because:

...if Anderson had performed the contract as promised, he would have found the cracks in the septic tank. Anderson would then have informed Woods or the realtor of his discovery and Woods would have either replaced the septic tank prior to the sale at his own expense or reduced the sale price for the noncompliant

septic tank. Either choice would have cost Woods money.

(A. 31). Although this analysis is more reasoned, it ignores one critical measure of damages. If the cracks were in existence at the time Anderson performed his inspection and if they were discovered by Anderson, then Woods would have been spared the statutory attorney's fees awarded to Kelloggs. At minimum, Woods should receive judgment against Anderson for this cost<sup>9</sup>.

### CONCLUSION

For the above-stated reasons, Appellant requests that the trial court's decision be reversed.

Dated: 1/23/2006

MITCHELL, BRUDER & JOHNSON

By: 

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<sup>9</sup> It is also uncertain whether Woods' liability would have totalled approximately \$3,800.00 as the trial court judge cavalierly assumed. In this instance, Kelloggs replaced a single 1,250 gallon holding tank with two 750 gallon storage tanks (T. 52). At minimum, this increased the storage capacity of the septic system and constituted an improvement. It is uncertain whether Woods would have been wholly responsible for this expense. See *Mayavski v Bemboom*, 1999 WL 34383 (Minn. App. 1999).

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).