

Appellate Court Case Number
A05-1837

STATE OF MINNESOTA
IN COURT OF APPEALS

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.

**RESPONDENTS JAMES J. KELLOGG AND TARI L. KELLOGGS'
BRIEF AND APPENDIX**

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ISSUES PRESENTED

- I. Was the Trial Court's finding that defendant/Appellant knew or should have known of the damaged condition of his septic tank before closing of the sale of his property reasonably supported by the evidence?

The trial court held: *In the affirmative.*

TABLE OF AUTHORITIES

Citations

<i>Fletcher v. St. Paul Pioneer Ins.</i> , 589 N.W.2d 96, 102 (Minn. 1999)	8
<i>Gjovik v. Strope</i> , 401 N.W.2d 664, 667 (Minn. 1987)	8
<i>Reinsurance Association of Minnesota v. Farm Bureau Mutual Ins. Co.</i> , 202 Minn. App. Lexis 268, 271 (Ct. App. 2002)	8
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STATEMENT OF FACTS

I. BACKGROUND/INTRODUCTION

The plaintiffs/Respondents James and Tari Kellog (“Respondents” or “Kelloggs”) bought lake property from defendant/Appellant William B. Woods (“Appellant” or “Woods”) at a closing which occurred on April 27, 2001 (T. 47). As part of the purchase, Appellant was directed to have the septic tank on the property inspected prior to closing. (App. 5).

Within two months of the closing, after only using the cabin on two occasions, the Kelloggs discovered that the septic tank on the property was full. (T. 16). The Kelloggs had the tank emptied. (T. 16). When the Kelloggs returned for the first time to use the cabin two weeks later, they discovered the tank required emptying again. (T. 17).

Inspection ultimately determined that the tank had numerous cracks along its base. (App. 9 and 23). The cracks appeared to have been there “for some time”. (App. 23).

The Kelloggs initiated this lawsuit against Appellant asserting, among other claims, that Appellant knew or should have known of the damaged septic tank - and that Respondents are entitled to recoup their damages and attorneys fees for Appellant’s failure to disclose this information to the Kelloggs in violation of Minn. Stat. Section 115.55 Subd. 6(b).

II. THE PROPERTY

Appellant Woods purchased the subject property, located at 1153 East Clark

Road, Nisswa, Minnesota, in the fall of 1996. (T. 61). The property was located on a peninsula of land jutting into Clark Lake. Two sides of the property were surrounded by a creek, with a third side adjoining the lake. (T. 158).

Appellant put the property up for sale in the fall of 2000.

III. THE SEPTIC SYSTEM

The cabin's waste was drained into a concrete septic system. (T. 24). Although Mr. Woods represented to Respondents that the tank held only 500 gallons, in fact the tank held 1,250 gallons of waste. (T. 112). The concrete tank was set down into the water table. (T. 163-5). The septic system was equipped with a PVC tank indicator rod, (the "Septic Rod"), which would rise above the ground, indicating the tank was filling or full. (T. 68-9; 93-5).

IV. APPELLANT'S REPRESENTATIONS ABOUT THE SEPTIC SYSTEM.

A. Appellant's Representations

When Appellant placed the subject property up for sale in the fall of 2000, he authorized his agents to place the following information in a disclosure statement relating to the sewer system:

"Is the sewer system(s) in compliance with applicable septic treatment system laws and rules?" ['Yes ']"

(T. 22; App. 17). The disclosure statement went on to identify how often the tank had been pumped:

"How often is the tank pumped? *Three times per year.*"

(T. 22; App. 17). In that disclosure, Mr. Woods further warranted that the subject property had a sewage holding tank which was 500 gallons in size. That disclosure statement was signed with Appellant Woods' name by Appellant's neighbor - with Appellant's authorization and consent - on September 13, 2000. (T. 23; T.101-2; App. 17-18).

Appellant Woods testified at trial that when he bought the property in the fall of 1996, the prior owners said the septic system was "fine" (T. 93); that they had emptied the septic tank once a year (T. 68); and that they had been careful to conserve water to avoid filling the septic tank (T. 68).

Mr. Woods went on to acknowledge that he and his wife only used the cabin two times the entire period between his purchase of the property in the fall of 1996 and the end of 1997 - apparently totaling no more than a few days (T. 64). When he first purchased the property in 1996, Mr. Woods had not seen the Septic Rod extended. (T. 95)¹. Yet by the following fall - after Appellant and his wife had only visited the cabin for a matter of a few days - Woods noticed that the Septic Rod was sufficiently extended to indicate that tank required emptying. (T. 95). He did, in fact, empty the tank on that occasion in November, 1997. (App. 24).

Thereafter, Mr. Woods testified that he returned to the cabin only 6-8 times from

¹ Specifically, Appellant testified that, although the Septic Rod was not difficult to see (T. 153), the *only* time Woods ever saw the Septic Rod extended throughout his ownership of the property was in the spring of 1997 - at which time he had the tank emptied (T. 95)

the fall of 1997 through 2000. (T. 64-66) Appellant Woods testified that, with the exception of the fall of 1997, he never saw the Septic Rod extended - including in the years 1998, 1999 or 2000 (T. 95) - even though, testimony confirmed that if the Septic Rod was extended, it was not difficult to see (T. 153):

Q. How many times did you see [the Septic Rod] where it indicated the tank was full?

A. The only time that I noticed was the '97 pumping. . . .

Q. After you had it pumped in 1997, you never saw the indicator at full again?

A. No.

(T. 95-6).

Yet when confronted with the difference between his representation that the tank held 500 gallons and evidence that the tank was actually 1,250 gallons in size, Mr. Woods let slip that he had tested the Septic Rod or "bobber":

Q. Knowing that the tank is now two and a half times the size of what you thought it was there, might that explain why there wasn't subsequent pumping? . . .

A. That would explain to me why the bobber kept going up and down. *When I would push it down, it would go back up and down.*

(T. 112). (Emphasis supplied).

Moreover, when Respondents first signed a Purchase Agreement for the property in late March, 2001, the Septic Rod was obviously fully extended - resulting in Respondents' insistence upon a further inspection and emptying before closing. (T. 15).

B. Pumping of the Subject Septic System

Evidence at trial established that the septic system at the Clark Lake property was emptied by a service entitled "Fyle's Honey Wagon" ("Fyles"). (T. 18-19; App. 24). Fyle's records confirmed that the subject tank had been emptied *twice* in 1995 and 1997 respectively, and once in 1996 (T. 19-20; App. 8). The two services performed in 1997 were after Mr. Woods purchased the property - and directly contrary to Appellant's testimony that he only emptied the tank once that year. Notably, this was the year in which Appellant testified, referenced *supra*, that he and his wife only used the cabin on two occasions, totaling only a matter of days.

As noted above, in March, 2001, when the Kelloggs viewed the property, they noticed that an external Septic Rod "flag" was raised in the yard. That rod was intended to indicate when the septic system was filling or full. (T. 15). Arrangements were made to have the tank pumped. However, on the date the company arrived to pump it - roughly seven days after the Respondents saw the raised flag - the driver observed that the tank was really only half full. (T. 15). Accordingly, the company did not empty the tank.

Within weeks after Respondents began using the tank, they decided to have the tank emptied. This was done on June 4, 2001. (T. 16). Thereafter, they did not use the cabin until their return on June 22, 2001. When Respondents returned to the cabin, the Septic Rod indicated the tank needed emptying again. (T. 17). They had the tank

emptied once more on July 19th. However, within twelve hours, the tank had already filled again to a depth of 10 inches. (T. 17).

The Kelloggs had the tank emptied and inspected. The inspector discovered that the bottom of the tank had numerous cracks which appeared to have been there for “a long time”. (App. 9-12 and 23).

Ultimately, the Respondents were forced to replace the septic tank before selling the property.

V. EFFECT OF DAMAGE TO SEPTIC SYSTEM

Because the subject septic tank was set down into the water table, the cracks in the bottom of the tank would cause the level of waste in the tank to settle at a level roughly the same as the water table level. (T. 163-5).

VI. PROCEDURAL POSTURE

This matter was tried to the bench, before the Honorable David J. Ten Eyck at the Crow Wing County Courthouse, Crow Wing County, on January 11, 2005. Based upon the evidence presented to him, Judge Ten Eyck entered judgment for plaintiffs/Respondents and against defendant/Appellant Woods in the amount of \$7751.12. The Court specifically found that defendant/Respondent Woods was liable under Minn. Stat. Section 115.55, subd. 6(b) for the costs of bringing the septic system into compliance, and for reasonable attorneys fees.

ARGUMENT

I. THE TRIAL COURT'S VERDICT WAS NOT "CLEARLY ERRONEOUS" - I.E. IT IS SUPPORTED BY REASONABLE EVIDENCE.

Findings of Fact determined by a judge sitting as the trier of fact are not to be reversed on appeal unless they are "clearly erroneous." *Minn. R. Civ. P. 52.01*; *Reinsurance Association of Minnesota v. Farm Bureau Mutual Ins. Co.*, 202 Minn. App. Lexis 268, 271 (Ct. App. 2002) (App. 25-A27). Findings of Fact are considered clearly erroneous only if they are "not reasonably supported by the evidence". *Fletcher v. St. Paul Pioneer Ins.*, 589 N.W.2d 96, 102 (Minn. 1999). A finding that a bench decision is "clearly erroneous" should only be made if the reviewing court is "left with a definite and firm conviction that a mistake has been made." *Gjovik v. Strobe*, 401 N.W.2d, 664, 667 (Minn. 1987). If there is any reasonable evidence to support the trial court's factual findings, the reviewing court should not disturb those findings. *State v. DNAH*, 516 N.W.2d 539, 544 (Minn. 1994).

In the present case, the Court found Appellant liable under Minn. Stat. §115.55, subd. 6(b). That statute provides in relevant part:

"Unless the buyer or transferee and seller or transferor agree to the contrary in writing before the closing of [a real estate sale], 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 of the existence or known status of the system*, is liable to the buyer or transferee for costs related to bringing the system into compliance with the individual sewage treatment rules and for reasonable attorneys' fees for collection of costs from the seller or transferor."

§115.55, subd. 6(b) (Emphasis supplied).

Although Appellant attempts to couch his appeal as legal in nature, the sole argument raised by Appellant on appeal is that there was insufficient evidence to support the trial court's finding that Appellant "knew or should have known" that the septic system was damaged. This argument is completely without foundation: ample evidence supported the Court's verdict.

First, Appellant's own history of emptying the subject septic system from 1996 through 2001 should have alerted Appellant that the septic system was not functioning properly. Appellant testified that he purchased the subject property in the fall of 1996. At that time, he testified that he saw no evidence that the Septic Rod was extended - indicating that the septic system was full or partially full - even though that Septic Rod would have been easily visible. (T. 95, 153). Over the course of the next year, Appellant and his wife proceeded to use the cabin on only two occasions - lasting a matter of days. Yet in the fall of 1997, despite such limited use, Appellant testified that the Septic Rod indicated it was necessary to empty the septic system.

This evidence is sufficient, by itself, to support the Court's verdict. Yet evidence was also introduced at trial, referenced supra, that the subject system was emptied not once by Appellant during 1997 - but twice. (T. 19-20; App: 8). Clearly the use of the subject cabin for a matter of days could not have filled a 1,250 gallon septic system twice in less than one year - absent damage or a malfunction.

This miraculous filling of the septic tank after only a few days use by two people was sufficient - standing alone - to alert Appellant to damage to his system. But Appellant had further proof of something wrong with his system. Mr. Woods testified that when he bought the property, he believed that the tank only held 500 gallons of waste. Yet, when Appellant had the tank emptied in November, 1997, the receipt from "Fyle's Honey Wagon" informed Mr. Woods that they had removed 700 gallons of waste from the system.

This clear evidence of 700 gallons of waste reflected on the receipt - apparently occurring within less than a year after only two visits to the cabin - should have alerted an ordinary homeowner that there must be a problem with the septic tank. The probability of a leak in the tank, particularly in view of Mr. Woods' testimony that he believed the tank only *held* 500 gallons, was then overwhelming and should have resulted in further investigation.

After being forced to empty his septic tank after only two visits to the cabin the first year of occupancy, Mr. Woods testified that he returned to the cabin six to eight times from the fall of 1997 through 2000. As noted above, the first two visits had resulted in the necessity that Appellant empty the cabin's septic system. After four times that number of visits over the next three years, Mr. Woods testified that he never saw evidence of the necessity to empty the tank again - i.e. that he did not notice the Septic Rod extended. (T. 153). Yet on only one visit to the site, Respondents saw the extended

rod - and, as a result, required Appellant to have the tank checked.

Appellant's testimony that he never saw the Septic Rod extended after 1997 was simply not credible. Appellant ultimately put the lie to this testimony himself by admitting, under questioning by his own counsel, that he had pushed the rod down and "it would go back up and down." (T. 112). This testimony, directly contradictory to Woods' earlier contention that he never saw the rod extended, was an effective acknowledgment that Appellant *had* seen the extended rod; had investigated it; and ultimately chose to ignore it and its implications of damage to the sewer system. Accordingly, the Trial Court's implicit refusal to accept Appellant's testimony that he was unaware of the evidence pointing to damage to his septic system was well founded.

Finally, the uncontroverted trial evidence established that Respondents apprized Mr. Woods before the closing on the property that the Septic Rod was extended. Accordingly, even if Mr. Woods was not aware of an apparent problem with the septic tank prior to March 28, 2001, Respondents' statements alerting him that the Septic Rod was extended in March, 2001 - despite the very limited visits Appellant's family made of the cabin since the fall of 1997 - should further have alerted him to the potential for a damaged or inoperable septic tank.

In light of the foregoing, the Trial Court's decision that Appellant "knew or should have known" of a problem with his septic system during the period 1996-2001 is

well supported by the evidence. Appellant cannot meet his burden to establish that the trial court's verdict was "clearly erroneous", or that a mistake had been made.

CONCLUSION

Based upon the foregoing, Appellant cannot meet his burden to establish that the trial court's verdict was "clearly erroneous." This Court should affirm the trial court's decision in favor of Respondents.

Dated: March 13, 2006

JOHNSON LAW GROUP LLP

A handwritten signature in black ink, appearing to be "Todd M. Johnson", written over a horizontal line.

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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).