CITATION: Austin v. MacFarlane, 2026 ONSC 463
COURT FILE NO.: CV-20-00000023-0000
DATE: 2026/01/23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Dale Robert Austin	)	Joseph D. Kennedy, for the Plaintiff
Plaintiff	)	
– and –	)	
Lynn Melanie MacFarlane	)	Paul E. Trenker, for the Defendant
Defendant	)	
	)	**HEARD:** September 7-12, 2025

BELLOWS, J.

REASONS FOR DECISION

[1] This action is based on an allegation of latent defects discovered after the plaintiff, Dale Austin, purchased a house located at 113 Sable Crescent in North Bay from the defendant, Lynn MacFarlane, in May 2019. Both parties had real estate agents; they did not meet or communicate directly.

[2] The plaintiff argues that the defendant is liable through breach of contract, negligent construction, and/or negligent misrepresentation. The plaintiff argues that the defendant took active steps to conceal moisture infiltration, mould, and damage to the house's foundation.

[3] The plaintiff seeks damages as follows:

1. $119,595.75 for repairs and expenses incurred;
2. $100,000.00 for loss of enjoyment, inconvenience, and mental stress; and
3. $100,000.00 in punitive damages.

[4] The plaintiff also seeks costs and interest.

2026 ONSC 463 (CanLII)

[5] There were two other defendants in this case who were released through *Perringer* agreements. The plaintiff received $10,000.00 as a settlement from the home inspector, Brad Grasser. The settlement agreement with Better Choice 4 Home Inspections ("BC4HI") did not include any payment between the parties.

[6] The defendant, Lynn MacFarlane, denies ever having significant water infiltration in the basement when she owned and resided at the house. She denies being aware of any issues with the foundation and does not accept liability for any of the claims made by the plaintiff.

[7] Liability and damages are both at issue in this case.

EVIDENCE

[8] The plaintiff testified and called two additional witnesses: contractor Josef Falk and engineer Eugene Longstreet. The defendant also testified and called her father, Dean MacFarlane.

[9] Many documents and photos were submitted as exhibits. Where appropriate, I have reviewed and considered these exhibits.

[10] I will provide a summary of each witness's evidence. Although it will not be exhaustive, I have carefully reviewed the evidence in its entirety for this decision.

The Plaintiff – Dale Austin, purchaser of 113 Sable Crescent

[11] The plaintiff testified that he was looking for a house in the neighbourhood for him and his elderly mother, for whom he was the caregiver. He first viewed 113 Sable Crescent ("the house") on January 18, 2019, with his real estate agent, Jennifer Kane. The next day, he made an offer to purchase, conditional on financing and a home inspection.

[12] Brad Grasser, contracted through BC4HI, was hired to complete a home inspection. He reviewed his report with the plaintiff on January 21, 2019.[1] The plaintiff estimates the review took about an hour, having attended each room of the house.

[13] Due to the accumulated snow in January of 2019, the plaintiff's inspection of the exterior was limited. He denied being able to access the west side of the house or anything under the deck.

[14] In cross-examination, he was asked about a photo in Brad Grasser's report that appeared to show a window and the foundation wall under the deck. The plaintiff was adamant that

[1] Filed as Exhibit 6.

2026 ONSC 463 (CanLII)

it would not have been possible, as he did not see any snow in the photo. On this basis, he concluded that he did not see this photo in January 2019.[2] Mr. Grasser did not testify.

[15] Following that review, the plaintiff believed the most significant concerns were several outlets lacking ground-fault interrupter switches and bulging basement windows. He planned to replace the windows eventually as they were old single-pane windows.

[16] About two days before closing, the plaintiff attended a final walkthrough; he did not notice anything concerning at that time. On May 1, 2019, he took possession. When he arrived, he noticed that the electric fireplace in the rec room was running and set very high/hot.

[17] On May 3, 2019, movers assisted with their belongings. They brought the piano to the basement, and when it was placed on the floor in the rec room, water "squished up" through the flooring. As the piano was moved through the rec room, water began to seep through the flooring wherever the piano rested.

[18] This was the first time the plaintiff noticed any water issues. He immediately called his real estate agent. The movers offered to help stop the water infiltration. The plaintiff paid the movers $800.00 to dig out the northwest corner of the house and fix a crack with a combination of tar, Blueskin, spray foam and silicone.

[19] Over the next few days, the plaintiff met with Josef Falk, who conducted an initial assessment of the property and the necessary repairs.

[20] Mr. Falk provided his opinion on the issues he identified, and later gave him a written estimate for the required repairs. The plaintiff also sought an estimate from Sargent Seal, but Sargent Seal was unable to start the job promptly.[3]

[21] The plaintiff hired Mr. Falk. The plaintiff and his mother resided at the house during the repairs. His mother was elderly and unwell. As a result, she was unable to endure a lengthy drive to relocate to her daughter's residence during the construction. The plaintiff testified that it would have been too expensive to stay at a hotel during construction. Remaining in the house mitigated his costs.

[22] The construction took place from May to November 2019 and required:

1. the removal of the deck;
2. excavation of the north side of the residence;
3. jacking the house;
4. replacement of the cement blocks down the northeast and northwest sides of the home; and

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[2] The photo referenced in Exhibit 6, page 4 (top left image). This photo was correlated to a photo taken in May 2019 by Josef Falk in Exhibit 10, page 10, showing a large crack in the foundation, identified by Mr. Falk as one of the main causes of water infiltration.

[3] Sergeant Seal estimate filed as Exhibit 11.

2026 ONSC 463 (CanLII)

5. demolition in the basement rec room and laundry room, involving the removal of drywall, vapour barrier, and insulation, leaving only the studs.

[23] Mould was located during the construction, necessitating the installation of a temporary exhaust hose to remove "bad air". These repairs and the fans/exhaust were loud and unrelenting, contributing to the plaintiff's claims for loss of enjoyment, inconvenience, and mental stress.

[24] The plaintiff paid a total of $119,595.75 for the necessary work to repair the foundation and water infiltration damage, comprised of the following:

1. $118,595.75 to Dale's Contracting, Inc. (Josef Falk);
2. $800.00 to Robert Smith (the mover); and
3. $400.00 to the City of North Bay for a building permit.

[25] The plaintiff submitted a claim through his insurance and received $15,594.88 in total for repairs to the interior of the basement. The rest of his claim was denied under the policy's exclusions.[4]

Contractor – Josef Falk, Dale's Construction, Inc.

[26] Josef Falk testified that the plaintiff hired him to assess the property for water infiltration and to make the necessary repairs. He first visited the property in May 2019 and observed a large crack in the foundation on the north side, near the east corner of the structure. The crack extended into the ground, and near the top, it was wide enough for his fingers to fit into. Mr. Falk specialized in basement repairs. Structural repairs to houses and buildings account for about eighty percent of his work.

[27] After inspecting the house, including removing drywall in the affected areas of the rec room and laundry room, he observed significant mould, water-damaged drywall, and numerous cracks in the foundation. He also observed that a door or a large window had been closed some time previously. He believed this previous work was not done "to code". He further observed that the windows were pushed in significantly. He concluded this was due to the way the deck was constructed and attached to the house. As a result, the deck had to be entirely removed and rebuilt after the work was completed. The deck was rebuilt to the same size with pressure-treated lumber.

[28] Mr. Falk testified that some of the drywall removed from the water-damaged areas in the basement had a manufacturer's date stamp from the years 2015 and 2017. He testified that those pieces of drywall could not have been installed before 2015 or 2017, respectively. He testified that he had removed six or seven pieces of drywall with those date stamps along the north wall in the rec room and the laundry room.

[4] Insurance claim outcome filed as Exhibit 27.

2026 ONSC 463 (CanLII)

[29] Other observations supported his belief that repairs had taken place in the home:

1. some studs appeared to be newer than others;
2. some drywall was installed with screws and some with nails;
3. two types of insulation were used; and
4. the vapour barrier had been cut and resealed with tuck tape.

[30] In the examples of nails/screws and different kinds of insulation found, Mr. Falk indicated that it would be highly irregular to use both during initial construction, suggesting that repairs had been done.

[31] Mr. Falk identified himself as the photographer for all 25 photos in Exhibit 10. He testified to the contents of the images and, whenever possible, oriented them to the location on the property and/or in the house.

[32] He corroborated the plaintiff's evidence regarding the construction timeline, the scope of completed work, and the exhaust tube installed in the basement. He believed that the plaintiff's mother resided at the house and was there most of the time. However, he did not recall that the plaintiff lived there with his mother.

[33] Mr. Falk confirmed that the plaintiff had paid his invoices in full.

Engineer – Eugene Longstreet, E.T. Engineering Inc.

[34] Mr. Longstreet is a local structural engineer with a wealth of experience, beginning his career in 1968. He was hired to assess the plaintiff's property by Mr. Falk in May 2019. He provided a report of his findings in December 2019.

[35] He testified to observing damage to the foundation, including vertical and horizontal cracks, a place where the block wall was pushed in approximately two inches, and a location where there appeared to be an old doorway that had been filled.

[36] He further testified that he observed the locations of the deck piers. Although they were no longer in place, he observed the hole to be three feet, six inches deep, which, in his experience, was an insufficient depth. The frost depth is a minimum of four feet for construction in North Bay.

[37] He agreed that if a building inspector had examined how the deck was built or how the door was filled in, an order to comply with either or both might have been issued. However, he noted that it would depend on the inspector and what they could observe.

The Defendant – Lynn MacFarlane, vendor of 113 Sable Crescent

[38] The defendant, Lynn MacFarlane, testified that she purchased the house in the fall of 2010 and resided there with her daughter until the end of April 2019.

2026 ONSC 463 (CanLII)

[39] The defendant testified that she listed the house in January 2019, after deciding to buy a new house, and expected to close in May 2019. In the end, she purchased a different house later in 2019.

[40] The defendant maintains that she had no water infiltration in the basement during her ownership of the house. She denied knowing that the window in the basement was not plum/flush, and she denied ever removing large areas of drywall, any vapour barrier, or insulation. She was unaware of any cracks in the foundation.

[41] In 2017, the defendant had her father fill a small hole ("smaller than a dime") at the front of the house in the crawl space and replace a piece of drywall in the rec room, about 3 feet by 3 to 4 feet, to repair damage from furniture. She saw a vapour barrier under the removed drywall section and pink insulation behind it, but the vapour barrier was not removed, so she never saw the insulation.

[42] She testified that her father replaced a section of the drywall on the north wall under the window in the rec room.

[43] The defendant was told by a neighbour that an exterior doorway to the basement had been removed and filled in by a previous owner.

[44] The defendant hired a contractor to paint the interior of her house a couple of years before she sold it. This painting included the basement rec room, but none of the baseboards. The defendant touched up the paint on the baseboards' corners to cover where her dog chewed. She denied painting the entire baseboard or replacing any other drywall.

[45] Other than the small hole in the crawlspace, the defendant denied doing any non-cosmetic work on the house. She denied having any water infiltration issues. She denied knowledge of any cracks in the house's foundation. She denied having repaired or replaced any flooring in the house.

[46] When asked whether she knew that some cracks in the foundation on the north end of the house had previously been parged, she replied, "Honestly, I don't remember", adding a question, "When you mean rear, you mean under the deck? I never went under the deck." Again, when asked if she was aware of any cracks on the exterior of the north wall, she reiterated: "No, I did not go under the deck and was not aware of any cracks."

[47] The defendant described having a great relationship with her parents, noting that she speaks with them most days. She described being very close to her parents, and that they are also close with her daughter. That they enjoyed family dinners and that they were at her house often – "They were always there at the house."

[48] She testified that she had insurance with water infiltration coverage while living at the house. The defendant testified that she had never filed a claim with her insurance company, except for coverage to litigate the claim against her.

2026 ONSC 463 (CanLII)

[49] She did not testify about the condition of the house or whether she had an inspection report completed when she purchased the house in 2010.

The Defendant's Father – Dean MacFarlane

[50] Mr. MacFarlane testified that he has a close relationship with his daughter, Lynn MacFarlane. He described helping her by cutting her grass and clearing snow as needed, every week during the summer and winter months. Outside of that, he was probably there once a month.

[51] The defendant was his only daughter. He acknowledged that he would probably do anything for her.

[52] Mr. MacFarlane described himself as an experienced handyman who installed many sheets of drywall, though he does not do drywall finishing. He testified that he had donated drywall to Elk's Lodge and had been working on drywall repairs there for several years.

[53] Mr. MacFarlane testified to repairing a pin-sized hole in the foundation on the south side (front) of the house; initially, remedying it with gray compound caulking from the inside of the crawl space. He later dug up the ground in that area, applied tar, refilled and levelled it with gravel dust, and reinstalled the interlocking brick pathway he had disturbed. This was 5-6 years before she sold the house.

[54] The defendant had also asked him to repair a section of drywall in the rec room where her furniture had scraped or gouged it. He repaired it by cutting out a section about 3 feet high between the studs, starting at the top of the baseboard. He replaced a second piece about 16 inches square. He did not remove the baseboard. This was 2-3 years before she sold the house to the plaintiff.

[55] Mr. MacFarlane did not remove the vapour barrier but did cut it when removing the section of drywall. He repaired it with tape. He denied removing any vapour barrier or insulation. He did not notice any moisture or water when he removed those sections of drywall. He used drywall from Elk's Lodge and his son's house. He did not buy it new and did not notice any dates stamped on the drywall.

[56] When asked about the window in the basement, he said he had not noticed that it was not flush with the wall.

[57] He was not aware of any cracks in the foundation and did not do any parging.

POSITION OF THE PARTIES

Plaintiff's Position

[58] The plaintiff argues that the question of liability hinges on the evidence of the date stamps found in the rec room and laundry room. That evidence is definitive proof that renovations were completed in those rooms sometime in or after 2015 and 2017, and that the work was

2026 ONSC 463 (CanLII)

more extensive than the defendant admitted. If I accept this as a fact, and the plaintiff submits that I must, then the defendant's evidence must be rejected.

[59] The plaintiff suggests that the admission of fixing a small hole in the crawl space at the front of the house is a red herring to distract from the extensive water infiltration issues at the back of the house.

[60] The plaintiff relies on a breach of contract based on the Agreement for Purchase and Sale and the defendant's warranty, provided in May 2019, that there have been no changes in the condition of the house from the condition described in the January 2019 sale agreement and from May 1, 2019, when the plaintiff took possession.

[61] The damages are based on the exhibits filed. Neither the plaintiff nor Mr. Falk was cross-examined on the nature of the work done and whether it was all resulting from the damage. Counsel for the defendant merely questioned it in submissions. In the absence of evidence to the contrary, the plaintiff submits that I must accept the invoiced amounts at face value.

Defendant's Position

[62] The defendant maintains that she had no water issues in the house. She denies having replaced any drywall in the laundry room or doing any non-cosmetic repairs in the rec room. She denies replacing any baseboards.

[63] The defendant denies that there were any latent defects that she knew of or ought to have known of, and staunchly defends herself against this action.

[64] The defendant and her father both testified about a small hole in the foundation at the front of the house that he repaired, but neither testified to any repairs or to knowing of any such need elsewhere along the foundation. The defendant maintains that the small hole in the crawl space cannot serve as the basis for liability.

[65] There is no evidence that she was aware of the water. She testified that she had an insurance policy with water damage coverage and that she never made a claim.

[66] The defendant's father, Mr. MacFarlane, corroborates the plaintiff's evidence insofar as he stated that he never saw evidence of water in her basement. His work on drywall was limited to two small sections in the rec room for cosmetic reasons, and he never looked behind the vapour barrier or insulation.

[67] The defendant submits that the warranty does not cover any and every defect.

[68] The defendant seeks dismissal of the action in its entirety and costs.

Absence of Evidence

[69] There is no evidence of whether the defendant had a home inspection conducted when she purchased the home.

2026 ONSC 463 (CanLII)

[70] There was no evidence as to the condition of the home and the defendant's knowledge thereof at the time she purchased the house.

[71] Although the report was filed as an exhibit by the plaintiff, neither party called its author, Brad Grasser, to speak to the photos or findings in the report. The defendant did not admit this. It is hearsay and inadmissible. I cannot rely on it for the truth of its contents. The only thing I can take from the report is that the plaintiff said he got a Home Inspection Report, and he did, in fact, get one.

LEGAL PRINCIPLES AND DISCUSSION

Liability

[72] This is a latent defect case. A latent defect is a hidden flaw in a property that is not discoverable by a reasonable inspection that makes it dangerous or unfit for habitation or significantly affects its value.

[73] The plaintiff asked me to find liability based on breach of contract, negligent construction, and/or negligent misrepresentation. They maintain that either the defendant was aware of the water infiltration and concealed it or, at a minimum, was willfully blind.

[74] The plaintiff bears the burden of proving that the defendant knew, or ought to have known, of the water infiltration issues at the property. They must further prove that these defects were known to the defendant, and she purposely concealed them in order to sell her house, or in the alternative, there was a reckless disregard for the truth or falsity of any of the representations made by the defendant: see *Cotton v. Monahan et al,* 2010 ONSC 1644, at para. 50, aff'd 2011 ONCA 697. The standard of proof is a balance of probabilities.

[75] In *Kelly v. Pires*, 2015 ONSC 2871, the Court reviewed the law related to latent defects. The Court found that there was no warranty or representation signed by the parties that survives the closing of the transaction, and as a result, the "action must be founded upon fraudulent misrepresentation in order to survive that long-standing principle of Caveat Emptor (buyer beware)": see para. 52.

[76] In this case, the plaintiff also relies on negligent misrepresentation, in addition to breach of contract. This is a distinguishing fact from *Kelly* because, in this case, the Agreement of Purchase and Sale – signed on January 15, 2019 – and the Warranties and Bill of Sale – signed on April 30, 2019, by the defendant – specifically stated that they survive the closing.[5] The defendant warranted as follows:

> 2. THAT no damage has occurred to the property, including the buildings situate on the subject property as well as the chattels and fixtures included in the purchase price, since the same were inspected by the purchaser.

[5] Exhibit 31 of the trial.

2026 ONSC 463 (CanLII)

…

> 5. THAT the warranties contained in the Agreement of Purchase and Sale, as well as those contained herein, shall survive closing.

[77] In addition to those warranties surviving the close of the transaction, I find that they, along with the MLS listing for the property, are relevant factors in my assessment of whether the defendant engaged in fraudulent or negligent misrepresentation.

[78] In the leading case on negligent misrepresentation, *Queen v. Cognos*, [1993] 1 S.C.R. 87, the Supreme Court sets out the five-part test at p. 110:[6]

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

[79] If the answer to each of those questions is affirmative, then the principle of caveat emptor has reached its limit and such conduct amounts to fraudulent misrepresentation: see *Kelly*, at para. 56.

Was there a duty of care between Ms. MacFarlane and Mr. Austin?

[80] In *Krawchuk v. Scherbak*, 2011 ONCA 352, the Court of Appeal accepted the trial judge's finding that there was a special relationship giving rise to a duty of care as between a purchaser and vendor in a real estate transaction: at para. 75. This finding has been accepted in case law since: see for example *Gladu v. Robineau*, 2017 ONSC 37, at para. 296; *Wesley v. Geneau*, 2020 ONSC 868, at para. 117.

[81] I find that the defendant provided information in the MLS listing, the Agreement for Purchase and Sale, and the Warranty on closing, which, combined, create a special relationship between them, giving rise to a duty of care pursuant to *Krawchuk* and *Gladu*.

Were Ms. MacFarlane's representations untrue, inaccurate or misleading?

[6] As also referenced in *Wesley v. Geneau*, 2020 ONSC 868, at para. 115.

2026 ONSC 463 (CanLII)

[82] The representations the plaintiff refers to come from the MLS listing, the Agreement of Purchase and Sale, and the Warranties and Bill of Sale. The MLS listing was filed as Exhibit 2 during the trial.

[83] The MLS listing describes 113 Sable Crescent as a "[v]ery well maintained home in a great neighbourhood", is "[e]conomical to operate," and states that it is in "[m]ove-in condition." These representations are also located on the MLS data entry form filed as Exhibit 40. The data entry form is significant because it demonstrates that the defendant reviewed and signed off on all representations in the MLS listing noted above. Each page is initialled by the defendant and, on the last page, signed and dated January 4, 2019. Many pages include checked boxes and handwritten notes. For instance, on page 5, typewritten, it states: "Very well maintained home in a great neighbourhood." On the same page, there are several additional handwritten notes, including: "move in condition" and "economical to operate." The defendant has initialled this page.

[84] The defendant testified that she repainted baseboards on the main floor and the basement in preparation for listing the house for sale but did no remedial work. The only work she testified to doing in the house was cosmetic, and she repeated that the house was clean and immaculate.

[85] The plaintiff maintains that these representations were untrue, misleading, and inaccurate. The defendant maintains that these representations were true and accurate.

[86] When the defendant was asked in chief whether she was aware of any cracks in the foundation that had been parged at the rear of the home, she replied, "Honestly, I don't remember. When you mean rear, you mean under the deck? I never went under the deck."

[87] The defendant was also asked whether she had ever noticed that the window in the basement north wall was not plum, and she replied that she had not.

[88] The defendant denied doing any work in the house other than some cosmetic touch-ups. This includes the drywall patching she asked her father to complete and the painted baseboards on the main floor and in the basement in preparation for sale. The defendant testified to painting the baseboards in the basement, which were later shown in photos introduced by Mr. Falk.

[89] [89] On Mr. Falk's initial inspection of the basement, he observed evidence of water damage but no standing water. He stated that the most evident damage was near the closet opening. This area was photographed later during repairs and appears in photo 9 of Exhibit 10. In that photo, a small section of baseboard and part of the drywall have been removed. To say that the damage and mould seem significant is an understatement – Mr. Falk was in the residence for his first observations within days of the plaintiff moving in.

[90] [90] Mr. Falk also testified that there was evidence of water damage on the north and east walls of the laundry room. No drywall had been removed at this time. There was evidence of water damage on the bottom of the north wall along the floor. Although he did not see

2026 ONSC 463 (CanLII)

mould on the drywall, he testified that the indicators that it had gotten wet – noting that drywall gets "kind of mushy and coloured" if it has become wet.

[91] While it is true that the defendant provided an image of a well-maintained, move-in-ready home, I find that the water infiltration issues, which appear to be longstanding and significant, render the image untrue, inaccurate, and misleading. Therefore, I find the concealment represents a misrepresentation for which the defendant is liable.

Did Ms. MacFarlane act negligently in her representations?

[92] In *Cognos*, the Supreme Court explained the standard used to determine whether a misrepresentation is negligent at p. 121:

> The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, "reasonable person". The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading. [Citations omitted.]

[93] I find that the defendant knew or displayed wilful disregard for the water infiltration in the basement. I find that there was water infiltration prior to May 2019, as evidenced by Mr. Falk's testimony and the photo exhibits showing the extensive mould. I find that the drywall repairs completed for the defendant exceed the small area in the rec room she acknowledges and were more extensive than she acknowledges, based on Mr. Falk's evidence regarding the dates on the drywall, the inconsistencies in the insulation, and the studs.

[94] I reject the defendant's evidence that she merely did some touch-up painting on the baseboards as a result of her dog chewing them. While her dog may well have damaged the baseboards, on a balance of probabilities, I find it impossible to accept that she would have been unaware of the water damage on the corner between the rec room and the laundry room. If she was unaware, she was wilfully blind to it.

[95] I find, on a balance of probabilities, that Mr. MacFarlane would have observed evidence of water damage when he completed the drywall repairs. I reject his evidence that he only repaired two small sections of drywall in the rec room. I find that he was mistaken or dishonest about the extent of the work he completed in the basement. He acknowledged in his testimony that he would do whatever he could for his daughter.

[96] On a walkthrough with freshly painted baseboards, I can see how this damage may have been missed, but I find it impossible to believe that the defendant, while painting the baseboards in the basement, would not have noticed evidence of water infiltration. I find that, at best, the defendant was wilfully blind or reckless as to the reality of the water infiltration issues in the basement.

[97] I note that the intention to deceive is not a requirement – even if the drywall work done in the basement was completed a few years before and the defendant had no plans to move at

2026 ONSC 463 (CanLII)

that time, and even if she painted the baseboards purely so there was a fresh coat of paint, "[a]ny active concealment by the vendor of defects which would otherwise be patent is treated as fraudulent and the contract is voidable by the purchaser if he has been deceived by it": *Hamel v. Racioppi*, [1993] O.J. No. 1393 (Ont. Gen. Div.), at para. 15,[7] aff'd [1994] O.J. No. 2499 (C.A.).

[98] I find that the defendant's statements were, at a minimum, negligent.

Did Mr. Austin reasonably rely on those representations?

[99] The plaintiff reasonably relied on the representations that the house was move-in ready and well-maintained. He was acting responsibly by contracting for a home inspection.

[100] The facts in *Wesley* are similar to the facts before me insofar as defects to the foundation wall were latent (the stud wall hid the efflorescence from view), and the view under the deck was obstructed: at paras. 157-158.

[101] Also, similar to the facts in *Wesley*, the defendant led no evidence, expert or otherwise, to suggest that the plaintiff or their home inspector failed to exercise due diligence or inspected negligently: at para. 159.

[102] Patent defects are those which are discoverable by inspection and ordinary vigilance. To the contrary, latent defects are not discoverable by any means open to the purchaser before entering the contract: see *Wesley*, at para. 156, citing *Gladu*, at para. 292.[8]

[103] Latent defects, by definition, are a limitation of a home inspection report – it is not intended to find such defects: *Wesley*, at para. 155, citing *Gladu*, at para. 293. The defendant cannot rely on a home inspection report to absolve herself of liability for misrepresentation.

[104] I find that the plaintiff acted reasonably in relying on the defendant's misrepresentations and is entitled to be compensated for resulting damages.

Was that reliance detrimental to Mr. Austin?

[105] By relying on the defendant's misrepresentations, I find that the plaintiff purchased a home that he believed was move-in ready, well-maintained, and economical to operate and what he received was a lengthy history of water infiltration and a foundation wall that required extensive, expensive repairs to be habitable and safe.

The Result

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[7] Referencing *Unrau v. Gay*, [1983] N.S.J. No. 54, at para. 27, citing *Halsbury's Laws of England*, 4th ed. vol. 42 (London: Butterworths, 1984 Reissue), at p. 48, para. 52.
[8] Referencing *Halsbury's* (1998 Reissue), at para. 51.

2026 ONSC 463 (CanLII)

[106] For these reasons, I find the five-part test as set out in *Cognos* has been satisfied by the plaintiff. On a balance of probabilities, I find the plaintiff has satisfied his burden and is entitled to damages.

DAMAGES

Compensatory Damages

[107] The nature and extent of the repairs were not challenged in cross-examination. In submissions, the defendant questioned some of the listed repair items, including landscaping, the garage slab, and the garage window; however, these items were not explored with the plaintiff or Mr. Falk. What landscaping was done? Was it causally connected to the necessary repairs to the north wall? What about the garage slab and window? If I were to quantify a discount based on these items, what would be appropriate? None of these things was challenged in evidence, only in submissions.

[108] Both parties agree that the damage award is not reduced by the amount of the plaintiff's successful insurance claim, pursuant to the private insurance exception, also referred to as the Bradburn rule: see *Krawchuk,* at para. 99; *Gemeinhardt v. Babic,* 2016 ONSC 4707, at para. 609).

[109] I agree with the defendants that private insurance recovery is not, therefore, evidence of mitigation.

[110] The plaintiff had a duty to mitigate his damages. I find that he did so for the following reasons:

1. He took action quickly, preventing the water infiltration from worsening;

2. He repaired only the portions of the foundation that were damaged;

3. The removal of the deck was necessary. He replaced the deck with standard materials; and

4. He remained in the residence throughout the construction to avoid additional costs associated with relocating during the repairs.

[111] The plaintiff shall be awarded damages for the claimed repairs. Though I have considered the defendant's submission that certain items may have overreached (the garage window, for example), neither the plaintiff nor Mr. Falk was questioned about those repairs, and there has been no evidence or argument in this action about betterment.

[112] Damages for repairs shall be awarded as follows:

Receipt from Robert V. Smith	$800.00
Dale's Construction Invoice of June 28, 2019	$30,000.00
Application for Building Permit	$400.00

2026 ONSC 463 (CanLII)

Dale's Construction Invoice of August 18, 2019	$25,000.00
Dale's Construction Invoice of November 18, 2019	$56,728.75
Dale's Construction Invoice of August 11, 2020	$6,667.00
TOTAL	**$119,595.75**

2026 ONSC 463 (CanLII)

Non-compensatory Damages

General Damages – Mental Stress and Inconvenience

[113] There are competing findings with respect to whether damages for mental distress are recoverable in a breach of contract action. At para. 68 of *Cotton (ONSC)*, the court recognizes that the SCC held that it is no longer necessary that there be an independent actionable wrong before damages can be awarded but goes on to find that the plaintiff has failed to show that such damages were reasonably contemplated by the parties at the time they entered the contract as required by *Fidler v. Sun Life Assurance*, 2006 SCC 30. However, in several other, similar cases, including *Kelly*, *Wesley*, and *Fors v. Overaker*, 2014 ONSC 3084, each awarded damages for mental stress and inconvenience.

[114] I accept the latter approach. However, the plaintiff must produce evidence to support their claim for general damages arising from mental stress and inconvenience.

[115] On general damages – as in *Kelly*, the defendant did not call evidence to substantiate the stress and other psychological harm resulting from residing in the house during the renovations. Despite this, the court found that the plaintiff's living circumstances created substantial stress and anxiety and went on to explain in paras. 62-63: the reasons for awarding general damages but limiting them to $30,000. The plaintiff had initially sought $200,000, but later submitted that $30,000-50,000 would be more appropriate.

[116] Several other cases address general damages for inconvenience and mental stress – damages in those cases were limited to $5,000: see *Wesley*; *Fors*. *Fors'* assessment for general damages for disappointment and inconvenience resulted in a $5,000.00 reward. The court noted that it may have awarded more; however, Mrs. Fors, who arguably dealt with more of the issues, was not a party to the action.

[117] The plaintiff seeks $100,000 in general damages. The evidence before me at this trial was limited. The plaintiff and his elderly mother resided in the house during the construction. He testified that a large exhaust fan was installed in the basement to remove bad air. This fan was noisy, and the very need for it raised concerns about their exposure. There is, however, no medical or other therapeutic evidence to quantify the impact it had on the plaintiff. Similar to *Fors*, I cannot award damages for the impact on the plaintiff's mother, as she was not a party to the action, and I have no evidence of that impact. I find that it would have an impact on the plaintiff but limit the general damages in this case to $10,000.

Punitive Damages

[118] The plaintiff seeks $100,000 in punitive damages on the basis that the defendant has repeatedly refused to admit that more drywall was replaced along the north wall, which is demonstrably false due to the dates found on the drywall and testimony of Mr. Falk. The plaintiff submits that a punitive damage award on this basis would be appropriate to set a precedent deterring sellers from making representations that are not true and accurate.

[119] In doing so, they rely on the organizing principle stated in *Bhasin v. Hrynew*, 2014 SCC 71, at para. 73, repeated in *Gemeinhardt*, at para. 583: "[P]arties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of contract."

[120] The defendant submits that punitive damages are to be reserved for the most exceptional cases and the most abhorrent behaviour. The defendant submits that punitive damages are not appropriate in this case.

[121] While there might be some merit in awarding punitive damages to send a message to the public that misleading, inaccurate or untrue statements in these circumstances must be discouraged, this is not a case with facts so abhorrent as to warrant such a large punitive damages award. In these circumstances, there will not be any punitive damages awarded.

CONCLUSION

[122] For these reasons, judgment is awarded in favour of the plaintiff against the defendant in the amount of $129,595.75 for negligent misrepresentation and general damages regarding 113 Sable Crescent, North Bay, Ontario, together with prejudgment and post-judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

COSTS

[123] The plaintiff was successful in this action. Therefore, he is entitled to costs. If the parties are not able to agree on costs, the parties shall provide their submissions with respect to the issue of costs in writing, limited to three typewritten pages, excluding attachments, as follows:

1. on behalf of the plaintiff, within 30 days of the date of these reasons; and

2. on behalf of the defendant, within 14 days of the receipt of the plaintiff's submissions.

[124] Submissions received beyond these deadlines will not be considered. Costs will be deemed settled.

Bellows, J.

2026 ONSC 463 (CanLII)

Released: January 23, 2026

2026 ONSC 463 (CanLII)

CITATION: Austin v. MacFarlane, 2026 ONSC 463
COURT FILE NO.: CV-20-00000023-0000
DATE: 2026/01/23

2026 ONSC 463 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Dale Robert Austin

Plaintiff

– and –

Lynn Melanie MacFarlane

Defendant

REASONS FOR DECISION

Bellows J.

Released: January 23, 2026