



**Bob Aaron** bob@aaron.ca

June 30, 2007

## Vendor who signs SPIS invites future litigation

When Matthew Morrill bought his house in Thunder Bay in October 2005, he did everything "by the book."

He visited the house three times, viewing every room on all three visits. Twice he was accompanied by the real estate agent, and once he brought a professional home inspector. Before he signed the agreement of purchase and sale, he carefully reviewed the Seller Property Information Statement (SPIS), which was signed by the vendors and delivered to Morrill by the agent.

Unfortunately, nobody noticed prior to closing that there were serious structural and moisture problems in the finished basement.

On moving into the house, Morrill discovered for the first time a smell of mildew in the basement that was not there before closing. On removing some of the panelling, he discovered mould and mildew behind the walls, and cracks as much as 2.5 centimetres thick between some of the concrete foundation blocks.

Eventually, Morrill removed all of the panelling and insulation in the basement. There was no vapour barrier installed between the walls and the panelling, and there was mould on the strapping to which the panels were nailed.

The whole south wall was cracked, and one of the foundation blocks could be removed by hand. As well, the wall was buckled in toward the interior by 7 to 10 centimetres. Ice was building up on the inside of the wall, and water was leaking in.

A structural engineer gave the owner an opinion that the only way to repair the problem would be to excavate around the entire house and install a weeping tile system connected to an interior sump pump.

When Morrill found out that total repair costs were in the neighbourhood of \$30,000 a third of the \$90,000 price tag of the whole house he sued the sellers, Jennifer and Spencer Bourgeois, for misrepresentation and failing to disclose the problems with the basement.

The claim was based on the SPIS signed by the sellers. Under the heading "improvements and structural," they indicated that:

They were not aware of any moisture or water problems.

They were not aware of any damage due to water or wood rot, among other things.

When the case went to trial this April, Justice Douglas Shaw noted that the information in the SPIS is not a warranty and is provided "for information purposes only."

In general, sellers have an obligation to disclose hidden or "latent" defects that render the property unfit for habitation, or defects that render the property dangerous or likely to be dangerous. They are not liable, however, if they have no knowledge of the hidden defect.

Based on the evidence heard at trial, Justice Shaw ruled that there was, in fact, a latent defect in the basement. It was not apparent to the purchaser, the vendors, the agents or the home inspector. The judge believed the evidence of the sellers that they really did not know about the water or structural problems since their master bedroom was in the basement room with the problems.

The purchaser in this case failed to prove that the sellers were guilty of fraudulent misrepresentation concerning the problems with the basement, and the action was dismissed.

It's tempting to wonder whether the buyer would have sued at all if the vendors had not signed the SPIS. It's also worth wondering whether an agent is negligent if he or she invites a seller to sign one of these statements, and the seller winds up getting sued as a result.

In my view, a vendor who signs an SPIS is inviting litigation. And for a purchaser to rely on the statement or even read it is even riskier.

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## Morrill v. Bourgeois, 2007 CanLII 16635 (ON S.C.)

PDF Format

Date: 2007-05-01

Docket: CV-06-0159-SR

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**Noteup**

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COURT FILE NO.: CV-06-0159-SR

DATE: 2007-05-01

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

BETWEEN:	)	
	)	
MATTHEW MORRILL,	)	<i>Terry L. Gilbert, for the Plaintiff</i>
	)	
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
SPENCER BOURGEOIS and JENNIFER BOURGEOIS,	)	<i>David A. Scott, for the Defendants</i>
	)	
	)	
	)	
Defendants	)	
	)	
	)	
	))	<b>HEARD:</b> April 2 & 3, 2007, at Thunder Bay, Ontario

**Mr. Justice D. C. Shaw**

## Reasons For Judgment

### Nature of the Claim:

[1] Mr. Morrill brings this action for damages in connection with a home which he purchased from Mr. and Mrs. Bourgeois. Shortly after he purchased the home, Mr. Morrill discovered problems with water in the basement. He claims that Mr. and Mrs. Bourgeois knew that water leaked into the basement and misrepresented to him that there were no problems. Mr. and Mrs. Bourgeois claim that during the time they resided in the home they had no water problems and that they were not aware of any water problems.

### General Background:

[2] In 1957 the home was purchased by Mrs. Mary Dobrzynski and her late husband. Mrs. Dobrzynski is the grandmother of Mrs. Bourgeois. In 2003, Mrs. Dobrzynski moved from the home into an apartment. In September 2003, Mr. and Mrs. Bourgeois and their infant child moved into the home on their return to Thunder Bay from Calgary. Mrs. Dobrzynski had previously listed the home for sale, for three months, at an asking price of \$115,000. In January 2004, Mr. and Mrs. Bourgeois purchased the home from Mrs. Dobrzynski for \$60,000.

[3] The home is a relatively small, one-storey house, approximately 680 to 700 square feet. When Mr. and Mrs. Bourgeois moved into the home, it consisted of two bedrooms, a kitchen and a bathroom on the main floor. In the basement there was a cold room under the front steps and a computer room and a small storage room on the south side of the basement. Mr. and Mrs. Bourgeois had their second child in May 2005. After Mr. and Mrs. Bourgeois learned that Mrs. Bourgeois was pregnant, Mr. Bourgeois, with the help of his father, constructed a master bedroom in the northwest corner of the basement, putting up two interior walls, made of 2 x 4 s and drywall. They put up strapping and tile for the ceiling of the bedroom. They put Berber carpet directly on the concrete floor. They painted the interior of the new walls of the master bedroom and painted over the existing paneling on the north and west walls of the basement that formed the other two walls of the bedroom.

[4] Mr. and Mrs. Bourgeois testified that with the birth of their second child in May 2005, the house was too small for their family. They decided to sell the home and purchase a larger house.

[5] In September 2005 Mr. and Mrs. Bourgeois listed the home for sale, at an asking price of \$97,500. They listed the home with Ms. Wendy Ferris and Mr. Ron Ferris, real estate agents. On the day the property was listed for sale, Ms. Ferris provided a Seller Property Information Statement to Mr. and Mrs.

Bourgeois, which they completed. The Seller Property Information Statement contained 46 questions to be answered by a vendor. Under the heading Improvements and Structural, Mr. and Mrs. Bourgeois indicated the following:

- that they had not made any renovations, additions or improvements to the property;
- that they were not aware of any moisture and/or water problems;
- that they were not aware of any damage due to wind, fire, water, insects, termites, rodents, pets or wood rot;
- that they were not aware of any problems with the plumbing system.

[6] Mr. Morrill first visited the home, as a prospective purchaser, in early October 2005. About a week later he returned to the home for a second visit. On October 22, 2006, Mr. Morrill entered into an Agreement of Purchase and Sale with Mr. and Mrs. Bourgeois to buy the home for \$90,000. Mr. Morrill testified that before he entered into the Agreement of Purchase and Sale he read the Seller Property Information Statement and relied on its accuracy. On November 2, 2005, Mr. Morrill attended at the home for a third visit, accompanied by a home inspector, Mr. Glen Ferland who prepared an inspection report. Mr. Ferland did not testify, but on consent his report was entered as an exhibit. On all three visits to the home, Mr. Morrill viewed the basement. On the first two visits Mr. Ferris also attended.

[7] On December 5, 2005, Mr. Morrill took possession of the home. He testified that he cleaned up some garbage that was lying around and then went into the basement. When he was in the basement, he testified that he smelled mildew. He stated that he had not smelled mildew when he had previously been in the home. He said that during those visits the heat had been on in the house and candles had been burning. On smelling the mildew, Mr. Morrill looked into the storage room on the south side of the property. In an area under old insulation on the south wall he observed greenish, bluish mildew. He pulled back a piece of insulation and saw cracks of 1/2 to 1 between some of the concrete blocks of the foundation. He went to the computer room and began to rip the wood paneling which covered the basement walls. There was insulation between the paneling and the concrete blocks. He discovered that the south wall of the basement had extensive cracks between the concrete blocks. An area of the south wall was bowed in by several inches. Certain of the blocks could be pulled out, by hand. On removing the paneling from the east wall of the basement, Mr. Morrill found mould and mildew and some hairline cracks in the mortar between the blocks. The same was true on the north wall. Over the course of the next 1 weeks Mr. Morrill removed all the paneling and insulation from the basement walls, and similar conditions were observed. There was no vapour barrier between the walls and the paneling. There was mold on the strapping to which the panels were nailed.

[8] Mr. Morrill testified that when he purchased the home he had no intention to renovate the basement.

[9] Mr. Morrill's father, Mr. Vico Rocco, saw the home a day or two after Mr. Morrill purchased it. Mr. Rocco saw mould on the south wall in the storage area. He helped his son remove the paneling in the storage room and the computer room. He testified that the plywood floor and strapping in those rooms were rotten. On removing the paneling and the strapping, he saw that the whole south wall was cracked, with gaps of between the blocks. Mr. Rocco took out one of the blocks with his hand. He put a straightedge on the south wall and saw that the wall was buckled in towards the interior by 3 to 4 , a bow that could only be seen after the paneling had been removed.

[10] Mr. Donald Frederickson, a friend of Mr. Morrill saw the home on December 5, 2005, after Mr. Morrill took possession. He also observed cracks in the walls and the bow in the south wall. He also saw ice and heavy frost on the wall of the cold room and the computer room.

[11] On February 22, 2006, Mr. Morrill saw water leaking from the south wall into the basement. Mr. Morrill testified that he later saw the basement leak about half-a-dozen times when it rained or when there was a build-up of snow. Mr. Frederickson confirmed that he had also seen the basement leak.

[12] Mr. Morrill took photographs of the basement. These photographs show ice build-up on the inside of the south wall, water leaking from the south east wall, flowing into the floor drain, mould and mildew, and cracks in the wall, and insects on the concrete floor of the storage room where the sub-floor was removed.

[13] Mr. Morrill discovered a small leak from the main floor toilet, in the area of an ABS pipe, which ran into the drain in the basement. This was fixed by a plumber with glue. He also found a pie plate on the top of the ceiling tile in the master bedroom to catch drips from the shower on the main floor. This problem was fixed.

[14] Mr. Sidney Czinkota, a structural engineer, was contacted by Mr. Morrill to look at the basement. Mr. Czinkota testified that the basement walls were constructed of 8 unreinforced concrete blocks. The concrete blocks have shifted inwards. Many of the joints between the blocks are cracked. Mr. Czinkota was of the opinion that rainwater from the roof flowed through a downspout near the south wall. The water would then enter the hollow block wall. He also noted that vehicles using the driveway next to the south wall would overstress the unreinforced block wall. As well, when snow on the driveway was removed, frost would penetrate deeper than normal. Freezing, wet soil could set up significant lateral loads which in turn could damage the foundation.

[15] In Mr. Czinkota's opinion, the only way to repair the problem would be to excavate around the house and install a weeping tile system, connected to an interior sump pit, from which water would be pumped into a buried pit in the backyard.

[16] Mr. Morrill obtained two estimates to do the work recommended by Mr. Czinkota. Those estimates were \$17,013 and \$28,462 respectively, although the latter estimate also included the removal and replacement of a wood patio. Another estimate, in the amount of \$16,000, was obtained for renovation of the interior of the basement. The lower of the two estimates for the excavation and weeping tile, plus the estimate for the renovation of the basement, total \$33,013. Mr. Morrill's Statement of Claim claims damages of \$30,000. Counsel for Mr. Morrill advised that he was satisfied to set the damages at \$30,000. The damage figure was not strongly contested by the Defendants.

[17] Mr. Morrill called Mrs. Dobrzynski as a witness. Mrs. Dobrzynski testified that the basement never leaked during the 46 years that she lived in the home. Mrs. Dobrzynski said that the paneling and a new concrete floor were put in the basement after she and her husband moved in 1957. She testified that she had never noticed a mildew smell in the basement and that neither Mr. or Mrs. Bourgeois ever told her that the basement leaked.

[18] Counsel for Mr. Morrill produced a tape recording of a telephone discussion which Mr. Morrill had on September 6, 2006 with Mrs. Dobrzynski. The tape recording was made without the knowledge of Mrs. Dobrzynski. A transcript of the tape recording was prepared by a court reporter. Counsel for the Defendants agreed that the transcript was an accurate rendering of the telephone discussion. I allowed counsel for Mr. Morrill to put the transcript to Mrs.

Dobrzynski, as an adverse witness, pursuant to s. 23 of the *Evidence Act*. The transcript refers to a telephone discussion which Mr. Morrill previously had with Mrs. Dobrzynski concerning the basement. The transcript contains the following:

- Mathew: And what was the other thing you were going to tell, you, you, you mentioned to say something about to keep the snow away from the side of the house because it leaks or ?
- Mary: I told you for the house, for the, for the driveway, for the, for the basement, yes the basement because water will leak in.
- Matthew: So, keep the snow from the, like the driveway side out
- Mary: Yeah.
- Matthew: because it leaks.
- Mary: Yeah.

[19] When presented with the tape recording and with the transcript Mrs. Dobrzynski denied making those remarks. Because of the clear contradiction between her testimony and what she said to Mr. Morrill, I cannot accept the evidence of Mrs. Dobrzynski. However, because she did not adopt the statements in the tape recording or the transcript, the most I can do is disregard her evidence. In any event, the key issue is the knowledge of Mr. and Mrs. Bourgeois.

[20] Mr. Bourgeois testified that while he and his family resided in the home, he was in the basement daily. He said that he never noticed any mildew, odours or water problems. He stated that he knew a purchaser would read the Seller Property Information Statement before buying the home. He agreed that a portion of the Seller Property Information Statement, which indicated that the vendors had not made any renovations, additions or improvements to the property, was not accurate. He agreed that the master bedroom, and a deck that he had constructed at the rear of the home, were improvements. He explained that he and his wife had not acknowledged these improvements because the wording of the question indicated to him that it was in reference to those improvements for which a building permit had been obtained. He stated that he and Mrs. Bourgeois had not got building permits for the master bedroom or the deck. He denied knowledge of any leak from the toilet. With respect to the pie plate above the ceiling in the master bedroom, he stated that the seal on the overflow of the bathroom had gone and that water would drip down. He replaced the seal and caulking and, at his father's suggestion, put the pie plate above the ceiling to catch any drips if the repair did not hold. He had not seen any problems with the repair.

[21] He stated that the family stored food goods, cereal, Christmas tree boxes and hockey equipment in the cold room.

[22] Mrs. Bourgeois testified that she was not aware of any leaks or structural problems in the basement, mildew or odd smells and was totally surprised when she learned of the problems related by Mr. Morrill. She said that when she was growing up, she went to the home once or twice per month and never saw any problems. She testified that in the closet in the storage room she kept her clothes that she wore daily. Part of the closet was for folded clothes. The other half contained her dresses and shirts that could be hung. In the cold room, she said, they stored canned goods, cereals, seasonal items, papers and books. Mrs. Bourgeois agreed that the master bedroom was an improvement. Her explanation why this was not acknowledged on the Seller Property Information Statement was similar to that of Mr. Bourgeois, namely, that no permit had been obtained for the construction and therefore they did not believe the question had to be answered in the affirmative. Mrs. Bourgeois stated that she had expressly told the realtor, Mrs. Ferris, that they had added the master bedroom. She denied any knowledge of a leak in the toilet. She confirmed Mr. Bourgeois' evidence regarding the pie plate in the ceiling of the basement. She said that she was aware, when she and her husband purchased the home from Mrs. Dobrzynski, that her grandmother was asking \$115,000. She explained that the \$60,000 purchase price that she and Mr. Bourgeois paid was set by her grandmother and was based on the fact that her grandmother wanted to help them. She noted that she and her family had initially lived in the home for four months without paying any rent to her grandmother.

[23] The Defendants called Mr. Bourgeois' employer, Mr. Adam Campbell, as a witness. Mr. Campbell was aware that Mr. and Mrs. Bourgeois had purchased the home. Mr. Campbell owns several companies, including a structural company that lifts houses and buildings. This company has heavy equipment which Mr. Campbell has offered to his employees at no cost, to excavate and install weeping tile. Mr. Campbell stated that Mr. Bourgeois had never mentioned any concerns about the home.

[24] Both realtors, Mr. and Mrs. Ferris, testified that it was impossible to see the foundation of the home because of the paneling. Both of them had been in the basement when the house was listed for sale. They saw no indication of water leaks, they saw no efflorescence on the basement walls, which would be indicative of moisture, they saw no staining on the basement floor or on the basement walls. They did not smell any mildew, although they both smelled a strong odour of a dog, a large Rotweiler, that Mr. and Mrs. Bourgeois owned.

#### **Discussion:**

[25] I am satisfied that there are serious water problems with the basement, including leaking, moisture and mildew. It is clear that the south wall has buckled and that a number of the concrete blocks are loose. The problem can only be remedied by the installation of weeping tile and a sump pit, as recommended by Mr. Czinkota. I accept that if there is liability, Mr. Morrill should have damages assessed at \$30,000.

[26] The information in the Seller Property Information Statement is not a warranty. The Seller Property Information Statement contains the following clause:

the information is being provided for information purposes only and is not a warranty as to the matters recited hereinafter even if attached to an Agreement of Purchase and Sale.

To succeed in his action, Mr. Morrill must therefore prove misrepresentation.

[27] In *Swayze v. Robertson*, [2001] O.J. No. 968, LaForme J. discussed the law with respect to misrepresentation, latent defects and the purchase of real property. At paras. 25-27, he stated:

Generally, it is accepted law that in a purchase and sale of real property, the notion of caveat emptor applies in respect of the physical amenities and condition of the property. And absent fraud, mistake or misrepresentation, a purchaser takes existing property as he or she finds it unless the purchaser protects himself or herself by contract terms. A latent defect as it relates to the case at bar is in effect some fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection. And ordinarily, if a vendor actively conceals a latent defect, the rule of caveat emptor no longer applies and the purchaser is entitled, at their option, to ask for a rescission of the contract or compensation for damages.

[28] There is a question whether, in an action for fraudulent concealment against a vendor, the concealed defect must go to the fitness of the home for habitation. This arises out of a comment by Dubin J.A. in *McGrath v. Maclean* (1979), 22 O.R. (2d) 784, (Ont. C.A.) at p. 791, where he stated:

I am prepared to assume that, in an appropriate case, a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation. But in such a case it is incumbent upon the purchaser to establish that the latent defect was known to the vendor, or that the circumstances were such that it could be said that the vendor was guilty of concealment or a reckless disregard of the truth or falsity of any representations made

[29] In *Swayze*, LaForme J. noted that there are a number of authorities that have departed from the opinion of Dubin J.A. that the latent defect must render the premises uninhabitable. LaForme J. stated, at paras. 30-32:

I do not take issue with any of those decisions other than to note that habitability in connection with a latent defect seems to have disappeared as a principle for analysis. Furthermore, I am of the opinion that the term premises unfit for habitation does not mean that the defect must be such that the entire residence must be rendered uninhabitable. Rather, in cases such as this I am of the view that application of the principle can, and must mean something more qualified.

I take the position that any decisions regarding habitability of the premises must be made in a common sense and reasoned approach based on the facts of each case. It seems to me that the correct approach must be to consider it in the context of whether the latent defect has caused any loss of use, occupation and enjoyment of any meaningful or material portion of the premises or residence that results in the loss of enjoyment of the premises or residence as a whole

[30] I am satisfied, following the approach taken by LaForme J., that there was a latent defect with respect to the basement, a defect that was not readily apparent to Mr. Morrill (nor indeed to Mr. Ferland, nor to Mr. and Mrs. Ferris) during a routine inspection. The defect has resulted in the loss of enjoyment of a meaningful portion of the home.

[31] Mr. Morrill has pleaded that Mr. and Mrs. Bourgeois were aware of the latent defect and fraudulently misrepresented the condition of the basement. Negligence or carelessness is not sufficient to constitute a fraudulent misrepresentation if the defendant honestly believed the statement was true. Fraud is proved if a false representation is made knowingly, or without an honest belief in its truth or recklessly as to whether the statement was true or false. (See Anger and Honsberger, *Law of Real Property* 3<sup>rd</sup> ed. (Aurora: Canada Law Book), at p. 23-117.)

[32] The standard of proof in establishing fraudulent misrepresentation is the balance of probability, with the proof commensurate with the gravity of the allegations. As stated by Laskin C.J., in *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] S.C.J. No. 116 (S.C.C.), at p. 5:

There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered.

[33] Mr. Morrill submits, based on the conditions of the basement as depicted in the photographs, that it defies belief to conclude that the basement did not leak before he bought the home. He points to the fact that Mr. and Mrs. Bourgeois did not accurately complete the Seller Property Information Statement with respect to improvements in that they knew the master bedroom and the rear deck were improvements. Mr. Morrill submits that the existence of the pie plate shows that Mr. and Mrs. Bourgeois knew there were problems with the plumbing. Mr. Morrill questions why Mr. and Mrs. Bourgeois sold the home and takes issue with their evidence that the home had become too small. The inference that I am asked to draw is that Mr. and Mrs. Bourgeois sold the home because they knew of the problems in the basement. It is also submitted by Mr. Morrill that I can use the tape recording of the telephone call between Mrs. Dobrzynski and Mr. Morrill as evidence that Mrs. Dobrzynski knew of the leak and from that infer that she told Mr. and Mrs. Bourgeois.

[34] Weighing the evidence as a whole, with the proof commensurate with the gravity of the allegations, I am not satisfied that Mr. Morrill has proved on the balance of probability that Mr. and Mrs. Bourgeois, or either of them, were guilty of fraudulent misrepresentation concerning the problems with the basement.

[35] I accept that the basement walls had been a problem long before Mr. Morrill purchased the home. The nature of the damage to the walls and the underside of the paneling and the strapping can admit of no other conclusion. However, the home had been visited on a number of occasions before the sale by Mr. Morrill, Mr. Ferland and Mr. and Mrs. Ferris. While this was the first home purchase for Mr. Morrill, Mr. Ferland and Mr. and Mrs. Ferris had experience in the purchase and sale of homes. Mr. Ferland has been a Registered Home Inspector since 2001. Mr. and Mrs. Ferris were in business as realtors. They all looked at the basement. None of them saw any evidence, such as stains, or mildew or rust or efflorescence that would have led them to suspect that water had been leaking into the basement. Mrs. Ferris went into the basement specifically to look at the foundation when she was gathering information for the listing. Because of the paneling she could not see what the foundation was made of. If there had been a history of water leaking into the basement, one would expect some visible indicators. The problems, apart from Mr. Morrill's detection of the smell of mildew, were apparent only once the paneling was removed.

[36] There was no evidence of any act of concealment. The paneling had been installed long before Mr. and Mrs. Bourgeois moved in. There was no evidence that Mr. and Mrs. Bourgeois had removed any of the paneling. Indeed, when Mr. Bourgeois built the master bedroom, rather than remove the paneling, he simply painted over it. There was no evidence that boxes or contents had been put against the walls by Mr. and Mrs. Bourgeois to cover any telltale signs of problems.

[37] I am struck by the fact that if Mr. and Mrs. Bourgeois knew that the basement leaked, it would seem likely that they would build a master bedroom in the basement and, in particular, that they would put down carpet without any sub-floor. The master bedroom is where they slept, nightly. One would reasonably expect that if there was a history of water running across the basement floor, they would not have done this work and would not have laid new carpet directly on the concrete floor. It would also be unusual, if they knew there was mildew behind the paneling, to keep the paneling on two of the walls of their bedroom, and paint over the paneling rather than remove it.



[38] I also find it significant that Mrs. Bourgeois kept her clothing, that she wore daily, in the closet in the storage room. If she had known of mildew, mould and moisture, it is difficult to believe that she would willingly hang her dresses in that environment. Nor does it seem reasonable, if Mr. and Mrs. Bourgeois suspected the disaster that lay behind the paneling and the insulation, that they would have kept cereal, papers and books adjacent to that wall in the cold room. Especially as parents of two young children, it would be unlikely that they would knowingly keep their foodstuffs in an area where there was such mould.

[39] I give some weight to the fact that, if Mr. and Mrs. Bourgeois were aware of the problems with the basement, there was an opportunity, through Mr. Campbell, to remedy the problem at a cost significantly less than is now faced by Mr. Morrill. Mr. Campbell stated that Mr. Bourgeois never voiced any concerns about the house to him. Mr. Bourgeois would have known that Mr. Campbell had the heavy equipment to do the necessary remedial work.

[40] I do have some concerns about the fact that the Seller Property Information Statement was not accurate with respect to improvements. The explanation given by the Defendants was somewhat unclear. However, Mrs. Bourgeois did testify that the realtor was fully aware that the master bedroom was new to the home. In any event, it is difficult to see any perceived advantage to the Defendants in denying that they had made improvements to the home. I therefore do not place a lot of weight on this inaccuracy.

[41] There is also the matter of the mildew which Mr. Morrill smelled on the day the sale of the home closed. However, Mr. Morrill did not notice the smell on his previous visits. Mr. and Mrs. Ferris who each were in the home on at least 3 occasions did not detect a smell. Mr. Ferland, who is trained as a home inspector, did not observe any mildew. His report contains a section pertaining to his inspection of the basement, with a box marked Mildew/Mold. The box has no check mark in it. In addition, Mr. Ferland's report indicates that there were normal moisture readings found at the time of his inspection of the basement. I understand from Mr. Morrill's evidence that at least on one visit to the home candles were burning. However, it is by no means clear that candles were burning on each and every occasion on which Mr. Morrill, Mr. Ferland and Mr. and Mrs. Ferris attended at the home. There is also the smell of the dog reported by Mr. and Mrs. Ferris, which may have masked any mildew smell.

**Conclusion:**

[42] While I have sympathy for Mr. Morrill, who has purchased a home with problems that will be very expensive to remedy, there is not sufficient evidence before me, commensurate with the gravity of the allegations, to conclude on the balance of probabilities that Mr. and Mrs. Bourgeois, or either of them, fraudulently, or negligently, misrepresented the condition of the basement.

[43] The claim therefore must be dismissed.

[44] If the Defendants seek costs, I will receive written submissions from them within 15 days. The Plaintiff shall have 10 days to respond.

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The Hon. Mr. Justice D. C. Shaw

**Released:** May 1, 2007

**COURT FILENO.:** CV-06-0159-SR

**DATE:** 2007-05-01

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

MATTHEW MORRILL,

Plaintiff

- and

SPENCER BOURGEOIS and JENNIFER  
BOURGEOIS,

Defendants

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**REASONS FOR JUDGMENT**

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Shaw J.

**Released:** May 1, 2007

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