



Amended Pursuant to Rule 6-2
Originally filed October 21, 2019

No. VIC-S-S-194660
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SHANNON KARNER and CHRISTOPHER CLARKE

PLAINTIFFS

AND:

MATTHEW KUHNKE and DAWN KUHNKE

DEFENDANTS

AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

The Plaintiffs, Shannon Karner and Christopher Clarke, claim the right to serve this pleading on the Defendants Matthew Kuhnke and Dawn Kuhnke, outside British Columbia on the ground that the proceeding concerns a tort committed in British Columbia.

CLAIM OF THE PLAINTIFFS

Part 1: STATEMENT OF FACTS

1. The Plaintiff Shannon Karner is a business analyst and the Plaintiff Christopher Clarke is a teacher. The Plaintiffs have an address for service in this proceeding care of Velletta & Company, 4th Floor, 931 Fort Street, Victoria, British Columbia.
2. The Defendants Matthew Kuhnke and Dawn Kuhnke are individuals whose occupations and address are unknown to the Plaintiffs.

The Property and Unstable Rock Face

3. At all material times prior to December 15, 2017 the Defendants were the registered owners of lands and premises situated in the City of Victoria, with the residential address of 511 Ker Avenue, and legally described as:

PID: 004-169-981

THE WEST ½ OF LOT 2, BLOCK 4, SECTION 15, VICTORIA DISTRICT, PLAN 1070, HAVING A FRONTAGE OF 51.1 FEET ON KER AVENUE

(the “**Property**”)

4. Constructed upon the Property is a 2 storey residential house of wood frame construction (the “**House**”). Immediately behind the House is a large rock face of approximately 8 meters in height, with an average slope of 70-80 degrees and some overhanging blocks (the “**Rock Face**”). On the rear of the second storey of the House, a concrete deck extends from the House up to the Rock Face (the “**Deck**”). The Rock Face is significantly taller than the second storey Deck.
5. In or around summer 2017 several boulders fell off of the Rock Face, falling onto and damaging the Deck.
6. The Defendants, or in the alternative the Defendant Matthew Kuhnke, retained Ryzuk Geotechnical to provide a geotechnical field review of the Rock Face. On or about June 12, 2017, Ryzuk attended at the Property to review the Rock Face. On June 22, 2017 Ryzuk issued a geotechnical report, the findings and opinions of which included, *inter alia*, the following:

- a. Upon attendance at the Property it was determined that 6 angular blocks between 0.5 to 1 m in diameter had fallen from the Rock Face onto the Deck;
- b. Based upon the site rock slope conditions, including the poor quality of joints in the Rock Face, rockfall posed a significant hazard to the residence;
- c. A wedge of rock estimated to be between 15 – 20 cubic meters appeared to be in an unstable configuration perched on a small natural bench;
- d. Root action, the flow of surface and groundwater into open fissures, and frost action might all contribute to the likelihood that a failure of the wedge will occur;
- e. A small to moderate seismic event could result in further destabilization of the wedge and movement of some or all associated blocks;
- f. Ryzuk recommended not allowing persons onto the Deck or the top of the Rock Face; and
- g. Ryzuk suggested that the risk of rockfall be mitigated through either scaling of the Rock Face to remove material, or installation of a mesh system to prevent or mitigate rockfall.

(the “**Geotechnical Report**”)

7. In or about summer 2017, and in response to the concerns raised in the Geotechnical Report, the Defendants, or in the alternative the Defendant Matthew Kuhnke, obtained a quotation from Western Grater Contracting Ltd. for the installation of a rock slope stabilization system on the Property, at a cost of \$70,000 (the “**Remediation Quote**”).
8. The Defendants did not proceed with the Remediation Quote, and did not perform any work to mitigate the hazards of the Rock Face.

Misrepresentation and Sale of the Property

9. With knowledge of the Geotechnical Report, the Remediation Quote and the hazards posed by the Rock Face, the Defendants listed the Property for sale in or about fall 2017.
10. On or about November 15, 2017 the Defendants completed a Property Disclosure Statement (“**PDS**”), on which they crossed out the disclosure sections, and indicated that they had not resided in the Property. The PDS did not disclose the hazard posed by the Rock Face. On or about November 16, 2017, the Defendants completed a Latent Defect Disclosure Form relating to the Property, which stated only that

“During the summer of 2017 some rock fell onto the back deck, damaging the deck surface and the a portion of the structure. The structure has since been reinforced but the surface will need to be repaired.”

11. When completing the PDS and Latent Defect Disclosure Form, the Defendants ought reasonably to have foreseen that potential purchasers, including the Plaintiffs, would rely upon the Defendants representations regarding the Property.
12. The Defendants completed the PDS and the Latent Defect Disclosure Form fraudulently by failing to disclose the Geotechnical Report or the hazard posed by the Rock Face, or in the alternative the Defendants completed the PDS and Latent Defect Disclosure Form without belief in the truth of the forms, or recklessly, not caring whether the forms were true or accurate.
13. In the alternative, the Defendants were negligent in making the representations set out in the Latent Defect Disclosure Form, by failing to accurately and sufficiently disclose the true state of affairs regarding the Rock Face and its hazard to the Property.
14. On or about November 19, 2017 the Plaintiffs viewed the Property at an open house. Neither the Defendants, nor the realtor retained by the Defendants, Mr. Shane King, disclosed the Geotechnical Report or Remediation Quote to the Plaintiffs. During the open house, neither the Defendants nor their realtor provided any warning to the persons viewing the Property, including the Plaintiffs, regarding the Rock Face or the hazard of falling rock.
15. The Defendants or Mr. King provided the PDS and the Latent Defect Disclosure Form to the Plaintiffs' real estate agent.
16. The Plaintiffs reasonably relied upon the PDS and the Latent Defect Disclosure Form and were induced by the PDS and Latent Defect Disclosure Form into purchasing the Property. On or about November 21, 2017, the Plaintiffs entered into a contract of purchase and sale in the standard form, agreeing to purchase the Property for the sum of \$660,000 (the "Contract").
- 17A. The PDS and the Latent Defect Disclosure Form were incorporated into and formed a part of the Contract, and constituted contractual representations made by the Defendants regarding the condition of the Property.
17. On December 15, 2017 the Plaintiffs took possession of the Property.
18. The representations in the PDS and Latent Defect Disclosure Form were false, inaccurate, and misleading, in that the Defendants failed to disclose the unstable nature of the Rock Face, and the hazard posed to the House and its occupants, as identified in the Geotechnical Report. Instead, the representations in the PDS and Latent Defect Disclosure Form implied that the only issue arising from the rock fall was the damage to the Deck.
19. The upper level of the House contained tenants who had lived in the House prior to December 15, 2017 and these tenants continued residing in the House after the Plaintiffs purchased the Property. On or about July 3, 2018, one of the tenants disclosed that they had been warned, prior to the Plaintiffs purchasing the Property, not to use the Deck due to the hazard of the Rock Face. The Plaintiffs became concerned about potential rock fall from the Rock Face, and contacted Ryzuk Geotechnical to obtain an opinion on the Rock Face.

Ryzuk Geotechnical informed the Plaintiffs that Ryzuk had already reviewed the Rock Face and provided the Geotechnical Report to the Defendants.

20. The instability of the Rock Face poses a danger to occupants of the House, particularly anyone utilizing the Deck.
21. The Plaintiffs would not have purchased the Property if they had known of the true state of the Property and the Rock Face, or would have been willing to offer less than the purchase price of \$660,000.
22. The Plaintiffs have been put to inconvenience and stress as a result of the misrepresentations and breach of contract of the Defendants.
23. As a result of the Defendant's actions, the Plaintiffs have suffered, and will continue to suffer, loss and damage, particulars of which include, *inter alia*, the following:
 - a. Diminution in value of the Property;
 - b. Loss of use and enjoyment of the Property;
 - c. The cost of mitigating the hazard of the Rock Face;
 - d. Such further particulars as may be determined.

Part 2:RELIEF SOUGHT

1. The Plaintiffs claim against the Defendants, and each of them, for general damages.
2. The Plaintiffs claim against the Defendants, and each of them, for special damages.
3. The Plaintiffs claim against the Defendants, and each of them, for punitive damages.
4. The Plaintiffs claim against the Defendants, and each of them, for aggravated damages.
5. The Plaintiffs claim against the Defendants, and each of them, for interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.
6. The Plaintiffs claim against the Defendants, and each of them, for costs.
7. The Plaintiffs claim such further and other relief as this Honourable Court deems just.

Part 3:LEGAL BASIS

- 1A. The PDS and Latent Defect Disclosure Form were incorporated into and formed part of the Contract. The Defendants' breached the Contract by misrepresenting the Property in the PDS and Latent Defect Disclosure Form. The Plaintiffs have suffered loss and damage as a result of the Defendants' breach of contract.

1. The representations in the PDS and Latent Defect Disclosure Form were intended to be relied upon by the Plaintiffs, and were in fact relied upon by the Plaintiffs.
 2. The Defendants fraudulently misrepresented the nature and condition of the Rock Face, the Plaintiffs relied on the Defendants' misrepresentation, and were induced into purchasing the Property.
 3. In the alternative, the Defendants owed a duty of care to the Plaintiffs, and breached that duty by negligently misrepresenting the Property to the Plaintiffs. The Plaintiffs reasonably relied on the Defendants misrepresentation and were induced into purchasing the Property.
- 3A. As a result of the Defendants' fraudulent misrepresentation, or in the alternative negligent misrepresentation, the Plaintiffs suffered loss and damage.
4. A vendor bears a positive responsibility to disclose defects in the property which the vendor knows of, and which render the property dangerous or unfit for habitation.

Hanslo v. Barry, 2011 BCSC 1624, at para 84

5. The Plaintiffs are entitled to modest damages for mental distress, inconvenience, and damages at large.
6. The Defendants have engaged in conduct which is harsh, reprehensible, calculated to earn a profit by misrepresenting the condition of the Property and the Rock Face. The conduct of the Defendants is deserving of condemnation and punishment in the form of an award of punitive damages.

Plaintiffs' address for service: c/o Velletta & Company
Attn: **Cadeyrn N. Christie**
4th Floor, 931 Fort Street
Victoria, BC V8V 3K3

Fax number address for service (if any): 250-383-1922

E-mail address for service (if any): N/A

Place of trial: Victoria, British Columbia

The address of the registry is: 850 Burdett Avenue, Victoria, BC

Date: ~~21/Oct/2019~~ 31/Jan/2020



Signature of lawyer for plaintiffs
CADEYRN N. CHRISTIE

Rule 7-1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

The Plaintiffs claim against the Defendants for misrepresentation of a residential property, and concealment of a dangerous defect in regard to same.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☐ another cause

A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☒ real property (real estate)
- ☐ personal property
- ☒ the provision of goods or services or other general commercial matters
- ☐ investment losses
- ☐ the lending of money
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☐ a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- ☐ a class action
- ☐ maritime law
- ☐ aboriginal law

- ☐ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

Part 4:

1. *Court Order Interest Act*, R.S.B.C. 1996, c. 79