COURT OF APPEAL FOR ONTARIO

CITATION: Painchaud v. Krimker, 2026 ONCA 494
DATE: 20260707
DOCKET: COA-25-CV-1036

Roberts, Coroza and Pomerance JJ.A.

BETWEEN

Heidi Painchaud and Guy Painchaud

Plaintiffs

and

Joseph Krimker and Kathleen Krimker

Defendants (Appellants)

and

Joshua Chisvin and PSR Brokerage

Third Parties (Respondents)

Simon Bieber and David Ionis, for the appellants

Gavin J. Tighe and Daria Risteska, for the respondents

Heard: June 23, 2026

On appeal from the order of Justice Grant R. Dow of the Superior Court of Justice, dated July 21, 2025.

REASONS FOR DECISION

Overview

[1] The appellants appeal from the dismissal of their third-party claim against the respondent real estate agent and broker.

[2] This appeal arises out of a failed residential real estate purchase. The appellants worked with the respondent, Joshua Chisvin, as their real estate agent, to purchase an expensive property in the Bridle Path area of Toronto. The appellants entered into an unconditional agreement of purchase and sale that required the delivery of a $350,000 deposit. The appellants decided not to proceed with the purchase and did not deliver the deposit. They mistakenly understood that they could walk away from the purchase and sign a mutual release. They asserted that Mr. Chisvin had told them they could do this and that the mutual release clause in the agreement was an “escape hatch”.

[3] According to his evidence, Mr. Chisvin did not correct the appellants’ misunderstanding or advise that they would be in breach of the agreement of purchase and sale if they did not deliver the deposit and could be liable in damages to the vendors. He admitted that he lied to the vendors of the property and their agent that the purchase was going ahead. Ultimately, the vendors learned that the purchase would not go ahead and brought an action against the appellants for breach of the agreement.

[4] The appellants settled the vendors’ claim and brought a third-party claim against the respondents for negligence, asserting that Mr. Chisvin was in a

relationship of trust with the appellants. The trial judge dismissed the claim. He accepted that Mr. Chisvin owed fiduciary duties to the appellants; however he concluded that Mr. Chisvin did not actively mislead the appellants, accepting his evidence that "he did not tell the [appellants] if they did not pay the deposit, the Mutual Release Clause would absolve them of any liability".

[5] Although Mr. Chisvin could not recall what he discussed with the appellants, the trial judge found that he did review the agreement of purchase and sale with the appellants, largely because of the appearance of the appellants' signatures and initials on the agreement. He found that Mr. Chisvin was at fault for not keeping contemporaneous notes or some form of record and additionally that he had been untruthful with the vendors and their agent and failed to make records of his conduct or adopt best practices, which undermined any entitlement to costs at the requested substantial indemnity level. He ordered the appellants pay the respondents costs in the amount of $185,451.16.

Issues and the Parties' Positions

[6] The appellants raise several issues. At their core, they challenge the trial judge's approach to the law of professional negligence and, in particular, to the applicable standard of care. Specifically, they say that the trial judge failed to address the appellants' argument that the respondents were negligent because Mr. Chisvin did not disabuse the appellants of their understanding that they could walk away with impunity from the purchase by not paying the deposit.

[7] The respondents submit that the trial judge made no reversible error and that the appellants are essentially asking this court to step into the trial judge's shoes and redo his findings of fact, which is not our role. They argue that the trial judge dealt with the only real issue, namely, whether Mr. Chisvin had actively misled the appellants as they testified. Moreover, they say that the appellants cannot prove the causation element of negligence: even if Mr. Chisvin failed to correct any misunderstanding the appellants may have had, they were made aware by their legal counsel of the consequences of breaching the agreement and chose nevertheless to do so.

[8] For the reasons that follow, we agree that the trial judge made reversible errors and that the appeal should be allowed.

Analysis

[9] The trial judge's fundamental error is that he failed to adequately grapple with the question of negligence, which was not simply limited to the allegation that Mr. Chisvin had actively misled the appellants. The appellants' evidence and their counsel's submissions put squarely in issue the questions of Mr. Chisvin's other conduct that could amount to negligence and breach of fiduciary duty, which were not subsumed into their allegation of Mr. Chisvin actively misleading them. These included:

(1) Mr. Chisvin's failure to advise the appellants of their potential liability for breaching the agreement at all stages of the negotiation of the agreement of purchase and sale including after the agreement of purchase and sale was finalized; and

(2) His actively lying to and misleading, in his capacity as the appellants' agent, the vendors and their agent about the status of the purchase, and his apparent failure to keep the appellants apprised of his communications with the vendors and their agent.

[10] It was open to the trial judge to find that Mr. Chisvin did not actively mislead the appellants about walking away from the agreement by not paying the deposit. However, his analysis could not stop there. He had to go on and determine whether Mr. Chisvin's other conduct, including his lying to the vendors and their agent, was negligent because it fell below the standard of care expected of a real estate agent in these circumstances.

[11] The applicable standard of care does not appear to have been seriously in issue. As the appellants' expert testified and as Mr. Chisvin agreed during cross-examination, he was required to advise the appellants of: 1) any important terms in an agreement of purchase and sale; 2) the consequences of signing an agreement of purchase and sale; and 3) their potential risks and liabilities.

[12] Mr. Chisvin's evidence was that he generally recalled reviewing the terms of the agreement with the appellants. However, he admitted that the mutual release clause that his office inserted into the agreement was "meaningless" in the context of an unconditional offer and that he did not recall specifically talking to the appellants about it. Moreover, he testified that he did not recall advising them of the consequences of signing the unconditional offer or of their potential liability under the agreement, including if they did not go through with the purchase.

[13] The trial judge was required to make findings about Mr. Chisvin's conduct in all the circumstances of this case. He failed to do so. We also note that it is not possible to discern, one way or the other, whether he found that the appellants were operating under a misapprehension of the consequences of not paying the deposit, even if Mr. Chisvin did not actively mislead them. While he states their evidence that they had this misunderstanding, he does not make a finding that they did. There was oral and documentary evidence in the record, if accepted, that would support that the appellants did have this misunderstanding and that Mr. Chisvin did not correct it.

[14] In light of this evidence, it was an error for the trial judge to rely principally on the existence of the appellants' signatures and initials to support his finding that Mr. Chisvin had gone through and explained the agreement of purchase and sale to the appellants. The fact that the agreement of purchase and sale may be read in a certain way does not resolve the question of whether the appellants

reasonably misunderstood the meaning of the agreement and whether Mr. Chisvin contributed to this misunderstanding and fell below the standard of care because he failed to correct this misunderstanding. The trial judge had to resolve these conflicting issues. He erred by failing to do so. His judgment therefore cannot stand.

[15] The appellants urge this court to make a determination that Mr. Chisvin breached the standard of care. This would require us to make numerous findings of fact and credibility, which we decline to do on this record. A new trial is required.

Disposition

[16] The appeal is allowed, the judgment and the costs order are set aside, and a new trial before a different judge is ordered.

[17] In accordance with their agreement, as the successful parties on appeal, the appellants are entitled to their costs of the appeal from the respondents in the amount of $20,000. They also agree that the costs of the trial below should be left in the discretion of the trial judge at the new trial.

L.B. Roberts J.A.

S. Coroza J.A.

R. Pomerance J.A.