



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Nolan v. O'Connor*, 2026 NLCA 27

Date: July 24, 2026

Docket Number: 202401H0037

BETWEEN:	KEVIN NOLAN	FIRST APPELLANT
AND:	ROBERT HALL	SECOND APPELLANT
AND:	ROXANNE O'CONNOR	FIRST RESPONDENT
AND:	CYNTHIA MANNERS	SECOND RESPONDENT
AND:	LYNN CALAFIORE	THIRD RESPONDENT
AND:	MARTHA O'CONNOR	FOURTH RESPONDENT
AND:	ANNE HARRISON	FIFTH RESPONDENT
AND:	LOUISE PAQUETTE-NEVILLE	SIXTH RESPONDENT
AND:	KATHRYN SINCLAIR	SEVENTH RESPONDENT
AND:	FRANK O'CONNOR	EIGHTH RESPONDENT
AND:	NOLAN HALL REAL ESTATE SERVICES LIMITED	NINTH RESPONDENT

Coram: F.P. O'Brien, F.J. Knickle and K.J. O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201401G7843 (2024 NLSC 5)

Application Heard: October 14, 2025
Supplementary Submissions: November 13, 19 and December 11, 12, 2025
Judgment Rendered: July 24, 2026

Reasons for Judgment by: F.P. O'Brien J.A.
Concurred in by: F.J. Knickle and K.J. O'Brien JJ.A.

Counsel for the First Appellant: Self-Represented
Counsel for the Second Appellant: Self-Represented (No appearance)
Counsel for the First, Second, Third, Fourth, Fifth, Sixth, and Eighth Respondents: Geoffrey D.E. Adair, K.C.
Counsel for the Seventh Respondent: John B. French
Counsel for the Ninth Respondent: No appearance

Authorities Cited:

CASES CITED: *O'Connor v. Nolan*, 2024 NLSC 5; *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; *Fiander v. Mills*, 2015 NLCA 31; *Walsh v. Johnson*, 2010 NLCA 6; *Cabana v. Newfoundland and Labrador*, 2018 NLCA 52; *Pearce v. Anderson*, 2017 NLCA 44; *McDonald v. Hickey*, 2011 NLCA 60; *Roman Catholic Episcopal Corporation of St. John's v. Guardian Insurance Company of Canada*, 2025 NLCA 5; *Holloway Estate v. Giles*, 2002 NLCA 68; *Lesyork v. Munden Acres Ltd. et al.*, 1976 CanLII 793; *National Life Assur. Co. of Canada v. McCoubrey*, [1926] S.C.R. 277; *Housen v. Nikolaisen* 2002 SCC 33, [2002] 2 S.C.R. 235; *GRI Simulations Inc. v. Pro-Dive Oceaneering Co.*, 2004 NLCA 74; *Eco Zone Engineering Limited v. Grand Falls-Windsor (Town)*, 2010 NLCA 15; *Henley Estate (Re)*, 2026 NLCA 9; *Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.*, 1997 CanLII 14645 (NL CA).

RULES CONSIDERED: Court of Appeal Civil Rules, 2025, NLR 44/25, rules 16, 36, 28, 27, 46, 47

F.P. O'Brien J.A.:

Overview

[1] Following a trial in the Supreme Court of Newfoundland and Labrador, a Judge determined that Kevin Nolan and Robert Hall (the “Appellants”) were liable to eight plaintiffs for negligent misrepresentation in connection with the sale of real property in St. John’s. The Judge ordered the Appellants to pay damages resulting from the negligent misrepresentation.

[2] The Appellants filed a notice of appeal in this Court. The appeal has not yet been heard.

[3] The Respondents to the appeal, with the exception of the Ninth Respondent, were the plaintiffs at trial.

[4] The Respondents applied to this Court to strike out the notice of appeal or to dismiss the appeal. The Appellants contest the applications to strike out or dismiss, and contend that the appeal should be heard on the merits.

[5] Having considered the requirements to strike out a notice of appeal or dismiss an appeal, I would conclude that the requirements to strike out or dismiss have not been satisfied in the present circumstances. Accordingly, I would dismiss the applications and provide clarification regarding the issues to be argued on appeal and the documents that can be referenced at the appeal hearing.

Background

[6] In the trial decision (*O’Connor v. Nolan*, 2024 NLSC 5) (the “Decision”) the Supreme Court Judge described the real estate transactions between the parties and provided background information regarding the claims for negligent misrepresentation:

[1] 23 Rennie’s Mill Road is an historic property in St. John’s heritage district. It was reportedly built about 150 years ago and is said to have been designed by famed architect John Thomas Southcott for the Honourable Dan Ryan, a fabulously wealthy businessman of the time. Eventually, the First and Second Defendants, Kevin Nolan and Robert Hall, acquired the property. They subdivided it into eight residential units in or about 2009,

styled it “The Merchant’s House” then and in 2012 set out to sell the eight units as exclusive parts of a condominium development.

[2] Ultimately the eight Plaintiffs acquired the eight units from the First and Second Defendants, not as one Plaintiff to each unit, but more randomly, as I will show later. The Defendants created the Merchant’s House Condominium Corporation to operate the development. Then they sold the units to the Plaintiffs personally to be administered according to a Declaration and Plan that the Defendants filed for the Corporation at the Registry of Deeds for the province.

...

[4] About a year and a half after the Plaintiffs bought the eight units, they learned that the City of St. John’s was concerned about how The Merchant’s House was being operated and the Plaintiffs soon learned that the rental operation contravened the St. John’s Development Regulations. Before long the City advised the Plaintiffs and the Defendants to cease operations for all units and to vacate those located on the second and third floors of the property.

[5] In effect, the City found that Plaintiffs and/or the Defendants operated the units as standalone residential properties, either offering or intending to provide full services to tenants who rented them, including kitchen services. The City had permitted the Defendants to operate the property generally as a B & B or a lodging house and not as self-sufficient residential units. The Plaintiffs say they tried to get the Defendants to remediate the property to comply with the City’s Development Regulations but the Defendants declined or failed to act. The Plaintiffs filed their Statement of Claim in this Court on November 7, 2014, about six months after the City shut The Merchant’s House down.

...

[7] The Plaintiffs claimed that the Defendants negligently misrepresented the properties to them. They say that the Defendants presented the Merchant’s House as a collection of stand-alone, fully equipped “residential condominiums” when the City actually limited the use of the property to no more than a lodging house or a B&B. The Plaintiffs claim that they relied on the Defendants’ representations and that they suffered losses because of that reliance.

[7] The Judge identified the issues to be decided respecting the claims for negligent misrepresentation, including whether Nolan and/or Hall misrepresented to the plaintiffs “the character of the units that they acquired ... in The Merchant’s House” and whether the plaintiffs suffered damages as a result (Decision, at para. 24). The Judge reviewed the law of negligent misrepresentation and noted its

elements, as set out by the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, at 110, which require that:

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

[8] The Judge applied the *Cognos* test, determined that the claims for negligent misrepresentation were established, and awarded damages to the plaintiffs.

[9] The Appellants appealed the Decision to this Court, and the Respondents have applied to this Court to have the notice of appeal struck out or the appeal dismissed.

The Respondents’ applications

[10] Two applications were brought by the Respondents. Both applications point to similar alleged deficiencies in both the substance of the appeal, the manner in which the appeal has been litigated, and the materials filed by the Appellants.

[11] An application to dismiss the appeal was brought by the First, Second, Third, Fourth, Fifth, Sixth, and Eighth Respondents on the grounds that: the appeal is “without merit”; “the Appellants have unduly delayed its perfection”; and “the Appeal Book and Factum contravene the Rules of this Honourable Court to a degree that renders proceeding with the appeal unjust”. This application was supported by an affidavit of the First Respondent, Roxanne O’Connor, and the Fourth Respondent, Martha O’Connor (the O’Connor Application).

[12] The other application was brought by the Seventh Respondent, Kathryn Sinclair, who applies for an order, “pursuant to Rules 16(2) and 36(1) ... striking out

the within notice of appeal or dismissing the within appeal” (the Sinclair Application). The Sinclair Application requests that the notice of appeal be struck out or the appeal be dismissed on the grounds that the appeal is “frivolous, vexatious or without merit”, and because the Appellants have “unduly delayed the preparation and perfection of the appeal”.

[13] The Sinclair Application also requests that the “appeal be dismissed on the grounds that the Appeal Book and Factum filed contravenes the Court of Appeal Rules to a degree that renders proceeding with the appeal unjust and prejudicial to Sinclair”.

Issues

[14] The issues presently before this Court are whether the notice of appeal should be struck out or the appeal dismissed because:

1. the appeal is frivolous, vexatious or without merit;
2. the Appellants have unduly delayed the preparation and perfection of the appeal; or
3. the Appellants, in filing the appeal book(s) and factum, have contravened the Court of Appeal’s Rules “to a degree that renders proceeding with the appeal unjust”.

Analysis

Court of Appeal Civil Rules, 2025

[15] The following sections of Rules 16 and 36 of the *Court of Appeal Civil Rules, 2025* (the “Rules”) are relevant to the applications:

Failure to proceed with an appeal

16. (1) An appellant shall diligently carry forward the appeal in accordance with the principle of proportionality and shall perfect the appeal within the time periods prescribed by these rules.

(2) Where an appellant fails to carry forward the appeal in accordance with subsection (1), a respondent may apply to the Court for directions and the Court may give such directions or make such orders as may be appropriate, including an order striking out the notice of appeal.

Striking out a notice of appeal or dismissing an appeal

36. (1) A party to an appeal may apply at any time before or at the hearing of the appeal for an order

(a) striking out the notice of appeal; or

(b) dismissing the appeal

on the grounds that

(i) no appeal lies to the Court;

(ii) the appeal is frivolous, vexatious or without merit;

(iii) the appellant has unduly delayed the preparation and perfection of the appeal; or

(iv) the appellant has failed to apply to have the appeal set down for hearing.

(2) An application to dismiss an appeal shall be heard and determined by a panel of not fewer than 3 judges sitting together.

(3) A notice of appeal may be struck out by a single judge, and where a notice of appeal has been struck out, the appellant may apply within 6 months to have the notice reinstated for good reason.

Issue 1:

Should the notice of appeal be struck out or the appeal be dismissed because the appeal is frivolous, vexatious, or without merit?

The requirements to strike or dismiss

[16] Rule 36 refers to striking out a notice of appeal or dismissing an appeal on the grounds that the appeal is frivolous, vexatious, or without merit. These concepts are overlapping and interrelated, in that a “claim that does not disclose a cause of action, clearly has no merit and raises no claim that can be connected with or result in the relief claimed, can also be regarded as a frivolous claim” (*Fiander v. Mills*, 2015 NLCA 31, at para. 34)

[17] In *Walsh v. Johnson*, 2010 NLCA 6, this Court stated at paragraph 15 that “a notice of appeal will only be struck out if it is plain and obvious that the grounds of appeal cannot succeed”, and at paragraph 14 that the “threshold that an appellant must meet to demonstrate a potentially arguable ground of appeal, and thereby keep the notice of appeal alive, is a low one”. The proper approach is not “to assess the likelihood of success on appeal”, but rather “to determine whether the appellant has stated a ground of appeal that is justiciable and engages, on some basis known to the law, the correctness of the decision under appeal” (*Walsh*, at para. 15).

[18] This Court must “determine whether it was ‘plain and obvious’ that the appeal could not succeed (was ‘without merit’) or was otherwise frivolous or vexatious” (*Cabana v. Newfoundland and Labrador*, 2018 NLCA 52, at para. 68).

[19] On an application to dismiss, “the analysis is more intensive...because the consequence of a dismissal...is much more serious; a dismissal...unlike a notice of appeal that has been struck out is not capable of being re-instated” (*Walsh*, at para. 16). If there is an arguable case, such that it is not plain and obvious that the appeal could not succeed, dismissal would not be available, and the case would proceed to be heard on appeal (*Cabana*, at para. 69).

[20] A frivolous appeal “has no substance”, and a vexatious appeal “is one that is brought for an improper purpose such as to harass, annoy, or embarrass a party and not for the legitimate purpose of seeking the vindication of legal rights” (*Walsh*, at paras. 19-20; *Pearce v. Anderson*, 2017 NLCA 44, at para. 12).

[21] A frivolous appeal would have no substance “in the sense that it presents no justiciable question of law to be dealt with, raises no arguable points of law or is otherwise devoid of merit or an abuse of the court’s process” (*McDonald v. Hickey*, 2011 NLCA 60, at para. 8; *Roman Catholic Episcopal Corporation of St. John’s v. Guardian Insurance Company of Canada*, 2025 NLCA 5, at para. 8).

[22] An appeal that is “obviously unsustainable or without arguable merit will also be regarded as frivolous” (*Walsh*, at para. 21). In contrast, an appeal “that raises ‘clearly arguable questions of law’ will not generally be regarded as frivolous” (*Walsh*, at para. 22, citing *Holloway Estate v. Gillies*, 2002 NLCA 68, at para 10).

[23] The First through Sixth and Eighth Respondents note in their Factum at paragraph 34 that the “test for determining whether an appeal is without merit has been put in various ways by different courts over the years”. The Respondents submit that “some have referred to it as ‘manifestly devoid of merit’” (*Lesyork Holdings Ltd. et. al. v. Munden Acres Ltd. et. al.*, 1976 CanLII 793 (ONCA)), or a “manifest lack of substance” (*National Life Assur. Co. of Canada v. McCoubrey*, [1926] S.C.R. 277). The Respondents confirm that this Court has recently identified the test as whether an appeal is “doomed to fail and for that reason it is plain and obvious that it cannot succeed” (*Walsh*, at para. 17).

[24] In light of the legal tests outlined in the above cases, a review of the notice of appeal and other filed materials is necessary to determine whether the requirements are satisfied to strike out the notice of appeal or dismiss the appeal as frivolous, vexatious, or without merit.

Issues raised in the Notice of Appeal

[25] Many of the Appellants’ grounds of appeal that are included in the notice of appeal relate directly to the Judge’s application of the *Cognos* test for negligent misrepresentation.

[26] The notice of appeal includes allegations, reproduced as follows, that the Judge erred:

- in finding that Kevin Nolan and Robert Hall had made a misrepresentation or misrepresentations;

- in finding a special relationship between the plaintiffs and Kevin Nolan and Robert Hall, including that positive previous business dealings, created a “special relationship”;
- in finding that the Plaintiffs had “relied, in a reasonable manner”, on the apparent misrepresentation(s) by Kevin Nolan and Robert Hall, as the Plaintiffs could have created contractual terms to protect themselves, obtained a compliance letter to satisfy themselves of the zoning and permitted use, and otherwise carried out the simple due diligence of viewing the units;
- by failing to consider and properly apply the doctrine of *caveat emptor*;
- by failing to consider the doctrine of merger;
- by failing to consider the implications of the disclaimer in the promotional material;
- by failing to consider that if [the lawyer representing the parties to the transactions] had obtained a compliance letter, the purchasers would have had the necessary information to make an informed purchase under normal due diligence standards; and
- by failing to properly consider the written contract of the parties that did not contractually specify items the Plaintiffs claimed were important, including the zoning of the property and whether or not there was a “kitchen” that satisfied them.

Further issues raised in the materials

[27] In the Appellants’ factum, further issues are identified. These include arguments that:

- the “trial decision made findings of fraud and dishonesty despite no such pleadings, and without the proper evidentiary basis”;
- the trial judge’s “findings of dishonesty and fraudulent misrepresentation were improper and procedurally unfair”;

- there was “improper financial information supplied to appraisers...that were later contradicted by independent data”; and
- “the judge improperly relied on unsupported revenue assumptions”.

[28] The Appellants’ appeal book, Volume 6, identifies an additional issue on appeal regarding the damages awarded at trial. Mr. Nolan notes that the property was listed for sale after the Decision, and states that the property “is currently listed for public sale at \$1,800,000 plus HST. This contradicts the Respondents’ sworn appraisal evidence.” This issue relates to information that did not exist at trial. Any consideration of this issue on appeal would require an application for additional evidence.

[29] The Appeal Book, Volume 6, also identifies various other issues on appeal, including the right to procedural fairness at trial, and the burden of mitigation of damages.

Should the notice of appeal be struck out or the appeal be dismissed because the appeal is frivolous, vexatious or without merit?

[30] Upon consideration of the notice of appeal and the additional documents filed by the parties (including the factums and appeal books, and documents related to the applications to strike out and dismiss), and upon consideration of the materials in the record on appeal, I would not conclude that the appeal discloses no cause of action, or that there is no arguable case, or that it is plain and obvious that the grounds of appeal cannot succeed. Nor is it apparent, upon review of the documents on appeal, that the appeal proceedings are frivolous or vexatious. This conclusion recognizes the relatively low threshold the Appellants must meet to demonstrate a potentially arguable ground of appeal (*Walsh*, at para. 14).

[31] The Respondents correctly note that, in assessing an application to dismiss, the Court must go beyond merely considering the notice of appeal. The Respondents submit in this respect that the “Appellants’ Notice of Appeal states in a bare unsupported way the kind of arguments that arise on appeals all the time. That, however, is not the end of the matter. The Court must examine the record put before it and hear the submissions to be made in order to identify whether there is any specific arguable point that might succeed”.

[32] In this regard, the Respondents maintain that the Judge did not err in his application of the test for negligent misrepresentation, nor in assessing damages, and that an appeal would be fruitless and only increase costs. The Respondents submit that this “was almost exclusively a case of well-known legal principles being applied to relatively straightforward facts”, and that “there is a fundamental inability to identify any truly specific palpable and overriding error of fact or incorrect application/omission of the law”.

[33] The Respondents argue that the Judge “carefully reviewed the law governing the tort of negligent misrepresentation... reviewed all of the relevant facts... and concluded that: Nolan and Hall stood in a special relationship to the Plaintiffs; ... there were representations made by Nolan and Hall that were ‘untrue, inaccurate and misleading’, [and] the plaintiffs relied on [the Appellants’] representations in purchasing the property.”

[34] The Respondents, in the materials filed with the Court, provide submissions rebutting the Appellants’ various contentions that the Appellants did not make a misrepresentation to the Respondents, that any reliance by the Respondents on the Appellants’ alleged representations was unreasonable, that the doctrines of *caveat emptor* or merger would apply to defeat the Respondents’ claims, or that there was a failure to mitigate.

[35] In doing so, the Respondents invite this Court to conclude that the Appellants appeal is without merit, and to dismiss it at this stage, without requiring a hearing on the merits.

[36] With respect, I am unable to agree with this proposition. Even with the more extensive analysis that is required to assess an application to dismiss an appeal, this Court has held that if there is an arguable case articulated on appeal, such that it is not plain and obvious that the appeal could not succeed, dismissal is not available and the appeal should proceed to be heard on its merits (*Cabana*, at para. 69).

[37] Many of the articulated grounds of appeal relate directly to the Judge’s analysis and application of the test for negligent misrepresentation, as outlined by the Supreme Court of Canada in *Cognos*. These include whether there was a special relationship, and whether damages were appropriately awarded.

[38] The Appellants have argued in the materials why, in their submission, the evidence demonstrates that there was no special relationship that was sufficient to

ground a duty of care. For example, the Appellants argue they did not have direct contact with all of the Respondents. The Appellants further argue that, in their submission, the damage award was incorrect because it was based on inaccurate financial evidence. Additionally, based on their interpretation of the Decision, the Appellants also argue that the Judge assessed the Appellants' actions in terms of whether they had fraudulently misled the Respondents, even though fraudulent misrepresentation was not pleaded by the plaintiffs at trial.

[39] The above examples of the Appellants' arguments are not meant to suggest that the arguments will, or will not, succeed on appeal. It would of course be for the Appellants, on an appeal of the merits, to demonstrate that the Judge erred and that appellate intervention is warranted. However, at this stage, the Appellants have raised arguable issues such that it is not plain and obvious that the appeal cannot succeed.

[40] As noted above, this Court does not assess the likelihood of success on appeal at this stage, but rather whether an appellant has demonstrated a ground of appeal or an arguable case that is justiciable, and engages the correctness of the decision under appeal (*Walsh*, at para. 15; *Cabana*, at para. 69).

[41] In this respect, an application to dismiss an appeal or strike out a notice of appeal is not analogous to a "summary proceeding" hearing on the merits. Applications to dismiss or strike have a more limited scope. This Court has previously rejected the invitation to "treat a without-merit application as akin to a summary trial – a 'summary appeal' as it were, where... a determination could be made on the merits" (*Cabana*, at paras. 70-71).

[42] The Court must be cautious not to conflate these two different proceedings. There is not, on an application to dismiss, the same weighing of the merits as there would be on what *Cabana* refers to as an "application akin to a summary trial". The threshold to be satisfied by an appellant on an application to dismiss is lower. It is also lower than what an appellant must demonstrate to succeed on a merits appeal, where appellate standards would apply when reviewing for alleged errors of law, fact, or mixed fact and law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[43] The Respondents also submit that this appeal should be dismissed because it is vexatious. As noted above, a vexatious appeal "is one that is brought for an improper purpose such as to harass, annoy, or embarrass a party and not for the

legitimate purpose of seeking the vindication of legal rights” (*Walsh*, at paras. 19 - 20).

[44] In their submissions, the Respondents contend that there is “good reason to believe that Messrs. Nolan and Hall are advancing this appeal for collateral reasons, namely, to harass the Respondents with a view to having them give up their claims”. The Respondents argue that “this proclivity to harass is evident from an action recently commenced [in the Supreme Court of Newfoundland and Labrador] by Nolan against 23 defendants, including lawyers and witnesses in the case below”.

[45] However, notwithstanding that a separate action has been brought in Supreme Court, and notwithstanding the Appellants’ procedural shortcomings with respect to the *Rules* on appeal, there is nothing to demonstrate that the appeal in this Court has been brought to harass, annoy, embarrass, or that it has been brought for an illegitimate purpose. In the application hearing, the Appellant Mr. Nolan articulated his position that the Decision contained errors, and that the appeal process would provide the opportunity to show how the Judge erred.

[46] The Supreme Court litigation referenced by the Respondents was commenced in September 2025, after the trial, the Decision, and the commencement of appeal proceedings in this matter. Should the Respondents believe that this recent Supreme Court litigation was brought for an improper purpose, then action may be taken in the Supreme Court to address this. However, this would not warrant having the appeal dismissed as vexatious, thereby foreclosing the right to appeal.

[47] As noted by this Court in *Cabana*, at paragraph 38, a “determination that an appeal is frivolous, vexatious or without merit requires a conclusion that all potential grounds of appeal contemplated by the appellant do not rise above a frivolous, vexatious and meritless characterization”. Such a conclusion is not evident in the present appeal proceedings.

[48] Further, in *GRI Simulations Inc. v. Pro-Dive Oceaneering Co.*, 2004 NLCA 74, this Court noted at paragraph 13 that “... a plaintiff should not be readily driven from the judgment seat. Proceedings should, if possible, be disposed of on their merits”.

[49] While the Respondents contend that the grounds of appeal are weak, the arguments presented in the applications are not sufficient to foreclose the Appellants’ right to an appeal.

[50] Guided by the authorities discussed above, I would conclude that the requirements to strike out the notice of appeal or dismiss the appeal because it is frivolous, vexatious or without merit have not been satisfied.

Issue 2:

Should the notice of appeal be struck out or the appeal be dismissed because the Appellants have unduly delayed the preparation and perfection of the appeal?

Issue 3:

Should the notice of appeal be struck out or the appeal be dismissed because the Appellants, in filing the appeal book(s) and factum, have contravened the *Rules* “to a degree that renders proceeding with the appeal unjust”?

[51] The second and third issues are related and will be considered together. They both concern the Appellants’ conduct in prosecuting the appeal.

[52] The Respondents point to the Appellants’ failure to comply with the *Rules* with respect to the time requirements for service of the notice of appeal and filing of the appeal book and factum; failing to file the proper materials on appeal; and filing materials that are extraneous and unrelated to the trial proceedings.

[53] The Respondents outline numerous deficiencies in the Appellants’ conduct of the appeal and contend that the Appellants’ actions in this respect warrant the dismissal of the appeal without a hearing on the merits.

[54] For example, while the Appellants filed a notice of appeal in this Court on May 8, 2024, they did not serve the Respondents until April 2025, at which time the Appellants also filed a partial appeal book and factum.

[55] The O’Connor Application states that the first indication that there may be an active appeal was in June 2024, when the Respondents became aware of correspondence from Kevin Nolan to the Court. However, the Appellants did not notify the Respondents of the appeal until almost one year later, in April 2025, “when they purported to serve [the appeal book and factum] ...by couriering copies of the said documents to the Second Respondent”.

[56] Further, the submissions in support of the O'Connor Application state that the "Appellants have never provided [the Respondents] with any audio recording of the trial or even partial transcript". It is further submitted that "the Appellants' Appeal Book and indeed their factum is filled with all manner of material not introduced into evidence at trial and is devoid of any List of Exhibits, proper List of Witnesses or any copy of Exhibits of evidence necessary for the proper conduct of the appeal".

[57] The O'Connor submissions contend that the Appellants have not properly perfected the appeal in accordance with the *Rules*, and that there "has been much delay; an egregious failure of service; an ignoring of the *Rules* regarding audio and transcript versions of the evidence and the production of materials that violate the requirements to include material necessary for the disposition of the appeal".

[58] The O'Connor Application argues that the "Appellants' materials (Appeal Book and Factum) are filled with direct or oblique reference to all manner of documents and references to 'evidence' not before the court below at trial". Further, it is submitted that "there is no semblance of even an attempt to place before the Court the many exhibits at trial and or even a partial transcript of evidence necessary for the proper conduct of the appeal". The Respondents contend that the Appeal Book "contains a substantial volume of communications with strangers to the action; extensive examination for discovery transcripts including those of the Appellant Nolan who did not testify at trial, and even documents evidencing settlement discussions, none of which were admitted as evidence at trial."

[59] Similarly, Sinclair contends that the Appellants: "failed to serve a copy of the Notice of Appeal on the Respondents 'without delay', pursuant to Rule 28"; have not "diligently carried forward the appeal in accordance with the principle of proportionality"; have not "perfected the appeal within the time periods prescribed by the Rules (Rule 16)"; and have "unduly delayed the preparation and perfection of the appeal". Sinclair further submits that the Appellants have "brought new documents before the Court, otherwise referred to as 'fresh' evidence, contravening the procedure set out in Rule 37 of the *Rules* regarding the submission of additional evidence on appeal".

[60] Regarding the allegation of undue delay, Sinclair notes that: the audio recording of the trial was not delivered; the Appellants did not provide details "regarding how they intended to proceed with the preparation of the transcript or a portion thereof; the Appeal Book lacked an index of witnesses or exhibits; the Appeal Books contain discovery evidence and other numerous documents not

introduced in evidence at trial; and the Factum contains documents not introduced into evidence at trial”.

[61] Sinclair further notes that, regarding the various documents that were filed in this Court but were not part of the trial, “there has been no application filed by the Appellants pursuant to Rule 37 to permit additional evidence for purposes of the Appeal”. Sinclair states that the “Appellants, in essence, appear to be seeking a ‘redo’ of the trial by introducing additional... evidence”.

[62] Based on the above, the Respondents request that the notice of appeal be struck out or the appeal be dismissed. The Respondents submit that the Appellants’ failure to comply with the *Rules* and appellate process creates difficulties for them in addressing and properly responding to an appeal.

[63] The Appellants submit that the actions and deficiencies, as outlined by the Respondents, do not justify striking out the notice of appeal or dismissing the appeal without a hearing on the merits.

[64] A review of the appeal proceedings to date confirms examples of the Appellants’ non-conformity with the *Rules*. However, the issue for the Court in deciding the two applications is whether the Appellants’ conduct in prosecuting the appeal to date requires that the notice of appeal be struck out or the appeal dismissed, or whether the appeal should be permitted to proceed to a hearing, and be decided on the merits in a manner that is procedurally just to all parties.

[65] The Court must consider the concerns raised by the Respondents as to why the notice of appeal should be struck out or the appeal should be dismissed. These include, *inter alia*, the Appellants: delaying the preparation and perfection of the appeal; filing documents on appeal that were not considered at trial; failing to file a complete transcript and complete trial record; and failing to properly define the issues on appeal. These will be considered next.

Undue delay

[66] In *Eco Zone Engineering Limited v. Grand Falls-Windsor (Town)*, 2010 NLCA 15, and more recently in *Henley Estate (Re)*, 2026 NLCA 9, this Court has considered whether an appeal should be dismissed for undue delay.

[67] In *Henley* this Court, referencing *Eco Zone* at paragraph 13, noted that “the fundamental principle to be observed on an application to dismiss an appeal for delay is that an appellant is entitled to have their case decided on its merits unless they are responsible for undue delay which has prejudiced the other side” (*Henley*, at para. 16).

[68] *Eco Zone* described the Court’s role in balancing delay and prejudice against the presumption that an appeal will be heard on its merits:

[14] It is therefore necessary for the party seeking to dismiss the appeal to demonstrate, first, that there has been “undue delay”; secondly, that he or she will suffer “prejudice” if the appeal were to proceed, and then, to balance the significance of the established delay and prejudice against the presumption in favour of allowing cases to be heard on their merits as well as other relevant considerations.

[69] In both *Eco Zone*, at paragraph 15, and *Henley*, at paragraph 17, this Court identified factors to be considered in this context, including: the subject-matter of the litigation; the complexity of the issues between the parties; the length of the delay; the explanation for the delay; the prejudice to the other litigant; and the potential merits of the appeal.

[70] *Henley*, at paragraph 18, noted that the first four factors relate to determining whether there has been undue delay, which was described as “delay that is excessive or disproportionate to the specific circumstances of the case”, citing *Eco Zone* at para. 16.

[71] With respect to the subject matter of the litigation, as described above, this appeal is from the Judge’s finding that the Appellants are liable in the tort of negligent misrepresentation and responsible for the Respondents’ losses relating to the purchase of real property.

[72] Regarding the complexity of the issues, the trial occurred over a seven day period. There were numerous witnesses, including most of the Respondents (the plaintiffs at trial), legal counsel, an architect who worked on designing the property, a representative from the City of St. John’s regarding municipal zoning regulations, a witness who testified regarding the leasing of the property, and an expert witness who testified regarding damages. The Appellants indicated that the trial transcript would be voluminous as a result. The trial related to claims in negligent misrepresentation, and the application of the Supreme Court of Canada’s test in *Cognos*. As such, the trial would not be described as straightforward. The evidence,

number and type of witnesses testifying, the presence of expert witness testimony, and the application of the legal test of negligent misrepresentation to the facts in this context all suggest a degree of complexity to the issues at trial. Many of these trial issues would be issues on appeal.

[73] The remaining considerations in determining whether there has been an undue delay warranting a dismissal of the appeal relate to the length and explanation for the delay. As noted above, there was a lengthy delay in serving the Respondents with the notice of appeal and in filing an appeal book and factum.

[74] Mr. Nolan contends that any failure to comply with the requirements on appeal is due to his lack of familiarity with the procedural *Rules*, as a self-represented litigant. Mr. Nolan represented himself at trial and continued to do so on appeal. *Eco Zone* indicates that delay and prejudice are balanced against the presumption of having matters heard on their merits, “as well as other relevant circumstances”. In this respect, Mr. Nolan’s self-representation is a relevant consideration.

[75] This is not to suggest that self-represented litigants need not comply with the Court’s *Rules*. The *Rules* are clearly meant to apply to all litigants. However, a failure to comply with the *Rules* will not automatically be fatal, resulting in the appeal process coming to an end.

[76] As noted by this Court in *Canadian Paraplegic Assn. (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd.*, 1997 CanLII 14645 (NLCA), the *Rules* “are not hurdles of inconvenience to be gotten over, nor are they to be interpreted and applied without reference to the underlying spirit and purpose. The *Rules* attempt to further the fundamental goal of procedural justice.”

[77] With respect to the issue of undue delay, while there has been a lack of compliance with the time limits in the *Rules* for service of the notice of appeal and filing the appeal book and factum, this is not a situation where an appellant has provided a notice of appeal and done nothing further to perfect an appeal. Steps have been taken to perfect the appeal, through the filing of materials, though in a manner that was not fully compliant with the *Rules*.

[78] *Eco Zone* indicates that “the party seeking to dismiss the appeal” must demonstrate, “first, that there has been undue delay” (para. 14). *Henley* states that, for delay to be considered undue, it must be “excessive or disproportionate to the specific circumstances of the case” (para. 18). In this circumstance, I would

conclude that, while there has been a significant delay in perfecting the appeal, this would not constitute an undue delay under the *Rules* such as to warrant dismissal of the appeal without a hearing on the merits. As noted, the Appellants are self-represented and are litigating an appeal that is somewhat complex.

[79] As the delay is not undue, the additional factors in *Eco Zone*, dealing with prejudice and potential merits of the appeal, need not be considered or balanced. Had the delay been undue, prejudice would need to be considered. This Court's discussion of prejudice arising from an undue delay in *Henley* is helpful in this respect:

[61] Prejudice can be of two general kinds: *actual* prejudice and *inherent* prejudice. Inherent prejudice can be presumed from the fact of delay itself. In balancing the significance of the delay and prejudice against the presumption in favour of allowing cases to be heard on their merits, actual prejudice is more likely to have a controlling effect on the outcome than inherent prejudice. This is especially so if the actual prejudice is significant and difficult or impossible to ameliorate (*Eco Zone*, at para. 17).

[80] While inherent prejudice may result from undue delay, there is nothing demonstrating that the delay in this case caused actual prejudice that would be "significant and difficult or impossible to ameliorate" (*Henley*, at para. 61). Further, any inherent prejudice arising from the delay, when balanced against the presumption in favour of having an appeal heard on the merits, would not tip the balance toward dismissal of the appeal.

[81] With regard to the final factor, the potential merits of the appeal, as the delay is not undue, no detailed analysis of the potential merits is required. All that needs to be considered at this stage is that, based on the low threshold discussed above, the notice of appeal was not struck out for being without merit.

Materials filed on appeal that were not considered at trial

[82] Among the Respondents' other concerns is that materials have been filed in this Court by the Appellants that should not be considered on appeal. Therefore, the Court must consider whether the filing of these materials, which were not considered at trial, would preclude a fair appeal.

[83] This is not an insurmountable issue, as the Court can direct that only materials that were part of the record at trial may be considered by this Court on appeal. This is consistent with the *Rules* and with maintaining fairness to all parties on appeal.

[84] Further, should the Appellants wish the Court to consider documents on appeal that were not considered at trial, the requirements for additional evidence must be satisfied in a separate application under Rule 37.

[85] In this regard, it would be difficult for materials such as discovery transcripts, testimonials, and other extrinsic documents, that were available at trial but were not part of the evidence at trial, to meet the requirements to admit additional evidence under Rule 37. Without predetermining any potential Rule 37 application, materials that were available but not considered at trial are generally not considered on appeal.

[86] The only potentially additional or “new” evidence referenced by the Appellants in the documents filed in this Court relates to an issue of the listing of the subject property for sale. This listing of the property occurred after the Decision.

[87] As noted above, the Appellants identified potential additional evidence regarding damages awarded at trial. The Appellants alleged that the property that was the subject of the litigation at trial “is currently listed for public sale at \$1,800,000 plus HST. This contradicts the Respondents’ sworn appraisal evidence (Appeal Book, Volume 6).” As this issue relates to evidence that did not exist at trial, any consideration of the issue on appeal would require an application for additional evidence under Rule 37. Typically, an application under Rule 37 is made in advance of an appeal, and it would be considered at the same time as the appeal is heard.

Trial transcript

[88] A further consideration raised by the Respondents relates to the fact that a full trial transcript has not been provided to date. Rules 46 and 47 provide that an appellant shall arrange for the preparation of a transcript of the portion of the audio recording at trial that is necessary to enable the issues on appeal to be determined. The *Rules* further state that the entire transcript need not be filed unless it is necessary to determine the issues on appeal, and that a respondent may file additional portions of a transcript if the entire transcript has not been provided. The Appellant Mr. Nolan did not file a full trial transcript but filed excerpts from the trial proceedings. He explained that the cost of providing a full trial transcript was prohibitive. He later filed additional transcript excerpts.

[89] If an appellant wishes to argue that the Judge erred at trial, the relevant portions of the transcript that support such an argument may be important. Without the relevant portions of a transcript that might reveal an error, it may be difficult for an appellate court to conclude an error was made. In this case, the Appellants provided a partial transcript. The *Rules* provide that the Respondents may supplement the transcript excerpts provided by the Appellants should they wish to do so. It is therefore open to the Respondents to file additional transcript excerpts in this instance.

[90] In these circumstances, the absence of a full transcript does not preclude the appeal from proceeding or warrant the notice of appeal being struck out or the appeal being dismissed.

[91] Similarly, while the Respondents have noted that the record on appeal is not fully complete or wholly compliant with the *Rules*, (for example with respect to the filing of a complete witness list or list of exhibits at trial), a review of the documents filed in the record reveals that this would not preclude a proper consideration of the issues on appeal.

Issues on appeal

[92] As indicated above, in paragraph 26, the Appellants' notice of appeal itemizes the issues to be considered on appeal. The notice of appeal includes issues, principally relating to whether the Judge erred in applying the *Cognos* test and in finding the Appellants liable for damages arising from negligent misrepresentation.

[93] As the notice of appeal has not been struck out, issues contained therein can be considered on appeal. The Appellants and the Respondents have all previously filed their respective written briefs with this Court, addressing the issues in the notice of appeal.

[94] In addition, in various documents filed in this Court since the filing of the notice of appeal, the Appellants have appeared to raise additional issues, beyond those contained in the notice of appeal. The Respondents have argued that these additional issues, raised by the Appellants outside the notice of appeal, make it difficult for the Respondents to know the exact issues on appeal to which they must respond, and that this lack of clarification of the issues creates unfairness.

[95] Accordingly, at the hearing of these applications, the Court requested that the Appellants review the additional issues that they had raised in the materials filed with the Court since the notice of appeal, and identify which issues they would advance on appeal. In response to the Court's request, the Appellants filed a revised factum that listed the following additional issues, and the Respondents filed revised factums in reply, addressing these additional issues:

- Did the trial judge err in law by failing to apply caveat emptor?
- Did the trial judge misapprehend or selectively rely on material evidence?
- Did procedural restrictions deny a fair trial? and
- Did the judge err in accepting speculative appraisal evidence?

[96] No further additional issues will be considered on appeal, other than those set out above.

[97] Finally, as noted above, only materials that were part of the record at trial will be considered on appeal. Therefore, if any of the Appellants' arguments on the issues on appeal require this Court to consider additional evidence, as discussed above a Rule 37 application would be required to be made before the appeal hearing.

[98] In conclusion on these issues, while the Appellants have caused delay in the appeal process and have not been fully compliant with the *Rules*, the delay and non-compliance would not warrant either striking out the notice of appeal or dismissing the appeal.

[99] To permit a striking out or dismissal in the present circumstances, thereby foreclosing the right to have the appeal heard on its merits, would be disproportionate to the gravity of the delay and non-compliance, and would not "further the fundamental goal of procedural justice", as directed by this Court in *Canadian Paraplegic Association*.

Disposition

[100] The O'Connor Application to dismiss the appeal, and the Sinclair Application to strike out the notice of appeal or dismiss the appeal, are both dismissed.

[101] The appeal should proceed in the normal course. Any party may request that the appeal be set down for an oral hearing on the merits. The issues on appeal shall be restricted to the issues in the notice of appeal and the additional issues set out above in paragraph 95.

[102] Costs of these applications shall be costs in the cause on the appeal.

F.P. O'Brien J.A.

I Concur: _____
F.J. Knickle J.A.

I Concur: _____
K.J. O'Brien J.A.