

Citation: Firman Sales & Service Ltd et al v Winnipeg
Building and Decorating Ltd, 2017 MBCA 120

Date: 20171208
Docket: AI17-30-08743

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella

BETWEEN:

<i>FIRMAN SALES & SERVICE LTD. and</i>)	
<i>DENNIS FIRMAN and LENORE</i>)	<i>R. A. McFadyen</i>
<i>CHARTRAND carrying on business under</i>)	<i>for the Appellants</i>
<i>the firm name and style of HEAVEN SCENT</i>)	
<i>FLOWERS & GIFTS</i>)	
)	
)	<i>✓M. G. Finlayson</i>
)	<i>for the Respondent</i>
<i>- and -</i>)	
)	
<i>WINNIPEG BUILDING &</i>)	
<i>DECORATING LTD.</i>)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
)	<i>December 8, 2017</i>
)	
<i>- and -</i>)	
)	
<i>ERWIN BUECKERT and ISAAK</i>)	
<i>BUECKERT and HAROLD REIMER and</i>)	
<i>the said ERWIN BUECKERT and ISAAK</i>)	
<i>BUECKERT and HAROLD REIMER</i>)	
<i>carrying on business under the firm name</i>)	
<i>and style of PRO-TAC ROOFING &</i>)	
<i>RENOVATIONS 2007 and JOHN DOE</i>)	
)	
)	<i>(Defendants)</i>

On appeal from *Firman Sales & Service Ltd et al v Bueckert et al*, 2016 MBQB 206

CHARTIER CJM (for the Court):

[1] The plaintiffs appeal the decision of the trial judge dismissing their negligence claim against the defendant contractor, Winnipeg Building & Decorating Ltd. (WBD). After hearing the appeal, we dismissed it with brief reasons to follow. These are those reasons.

[2] The roof of the plaintiffs' building suffered fire damage. A contractor, not WBD, was hired to perform clean-up work and temporary emergency roof repairs. At the insurer's request, that contractor prepared specifications for the permanent repair project based on a structural engineering report of the condition of the building post-fire. The roof renovation project was tendered out and WBD was the lowest bidder. After WBD started stripping the drywall from the walls, it discovered that three of the walls were rotten and could not support a roof. WBD removed the roof, leaving the building exposed to the elements. Seven weeks later, the rest of the building was demolished.

[3] The plaintiffs claimed that WBD's negligence caused their building to be demolished and lost. Their negligence claim was focussed firstly, on WBD's failure to adequately inspect and assess the conditions of the walls prior to removing the roof, and secondly, on WBD's failure to stop the work after discovering the rotten walls.

[4] The plaintiffs raised two grounds. First, that the trial judge erred by finding that expert evidence was necessary to establish a breach of the standard of care and second, that he erred in the application of the "but for" causation test. These two grounds are reviewable on the palpable and overriding error standard.

[5] The respondent concedes that while the trial judge did make some mistakes with respects to the facts, none of them were reversible error. We agree.

[6] On the first issue, where the conduct of a professional is alleged to be negligent, the general rule is that expert evidence is necessary to establish the requisite standard of care unless the question is a non-technical matter or a matter within the common understanding of the ordinary person (*ter Neuzen v Korn*, [1995] 3 SCR 674 at para 51; and *Krawchuk v Scherbak*, 2011 ONCA 352 at para 132, leave to appeal to SCC refused, 2011 CarswellOnt 13567). The nature of the standard of care in a particular circumstance, and whether that obligation has been met, is a question of fact and is owed deference (*Galaske v O'Donnell*, [1994] 1 SCR 670 at 694).

[7] The trial judge stated it was not clear to him, without expert evidence, that WBD was required to assess and inspect walls that had not suffered structural fire damage. A number of features of the case are important to consider. A third-party contractor, not WBD, based on recommendations prepared by a structural engineering firm, prepared the specifications for the repair work to be performed. The uncontroverted evidence was that the fire was extinguished in the roof before it reached the walls. One of the walls of the building displayed movement after the fire and had to be shored up before WBD began their work. At least three of the four walls were rotten due to their age.

[8] Was WBD required to go beyond the scope of the fire claim repair specifications and the engineering report by removing the drywall and inspecting the walls prior to removing the roof, when neither the specifications nor the engineering report made any mention of any structural

concerns with respect to the walls? The plaintiffs led no expert evidence on standard of care of a roofing contractor. In these circumstances, we are all of the view, the matter was sufficiently technical that it was open to the trial judge to decide that an expert was required to establish the standard of care, before he could conclude whether WBD had breached its duty of care. We see no basis to interfere with his conclusion.

[9] With respect to the failure to suspend the work, WBD presented uncontradicted evidence from a structural engineer that the rotten walls compromised the structure to the point that it would have been dangerous to have suspended the work and left the roof in place. In our view, appellate interference is unwarranted.

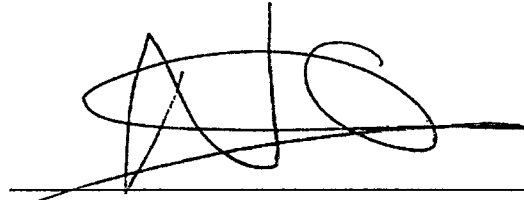
[10] On the causation issue, the trial judge correctly stated the test for causation. He then reviewed at some length the evidence before him, which was in large part undisputed. He was not persuaded, on a balance of probabilities, that the loss of the plaintiffs' building would have been avoided had WBD inspected the walls before commencement of the work and/or suspended the work after the discovery of the rotten walls. That analysis is factual in nature and is owed deference (*Ediger v Johnston*, 2013 SCC 18, paras 28-29).

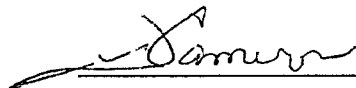
[11] The uncontradicted evidence was that, given the condition of the rotten walls, the plaintiffs' building was structurally unsound before any involvement by WBD. Moreover, the work associated with the repair of the walls was outside the scope of the insurance claim and fell upon the plaintiffs to finance. Shortly after discovering that three walls were rotten, WBD gave the plaintiffs, through their lawyer, an estimate of the costs to repair the walls, yet they took no action to cause these repairs to begin, leaving the building to

the elements. In the end, we are all of the view that it was open to the trial judge, on the evidence before him, to find that the reason the building was lost was because the plaintiffs were not ready to pay for the reconstruction of the rotten walls, a responsibility which fell entirely upon them to fund.

[12] Despite the able argument of counsel for the plaintiffs, we remained unconvinced that the trial judge committed any reversible error.

[13] We therefore dismissed the appeal with costs.


_____ CJM


_____ JA


_____ JA