Citation: *Whitehorse Condominium Corporation #2 v. Environmental Refuelling Systems Inc.,* 2015 YKSM 2

Date: 20150925
Docket: 14-S0083
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Luther

WHITEHORSE CONDOMINIUM CORPORATION #2

Plaintiff

v.

ENVIRONMENTAL REFUELLING SYSTEMS INC.

Defendant

Appearances:
Norman Eady — Appearing on behalf of Plaintiff
Tammy Ward — Appearing on behalf of Defendant

REASONS FOR JUDGMENT

[1] On 21 November 2014, a lighting pole belonging to the plaintiff was damaged. No witness was available to tell the Court what damaged the pole. The pole was repaired at a cost of $1,983.32. The amount of the damages is not in dispute.

[2] Norman Eady, the Property Manager for Condominium Corporation #2, investigated the matter and determined that the defendant was responsible.

[3] The defendant company carried out its own investigation, and through its witness, Tammy Ward, Yukon Operations Manager for Environmental Refuelling Systems Inc. ("ERS") denies responsibility. Ms. Ward has been in her current role since 6 December 2014 but worked with ERS in another role on 21 November 2014.

[4] The plaintiff's evidence includes testimony from Patricia Fortier who has lived in the complex since 2003. At the time she lived in unit 20 which had fuel delivered on 21 November 2014. The fuel truck was just idling when she saw it and she did not see the fill take place. It was not until the next day that she saw the pole noticeably bent.

[5] There is no doubt that an ERS truck was at the complex on 21 November 2014. A "fill slip" was dropped inside Ms. Fortier's door followed by an email. Ms. Fortier thought the truck was yellow and was sure it had ERS on it.

[6] She also advised that the complex has 90 plus units and that fuel companies' trucks will come into the common area from time to time.

[7] Mr. Eady indicated that the area is divided into sections such that units 1 – 20 have a common entrance and parking area. In the course of his employment he determined that units 11, 12, and 19 did not have fuel delivered. If a fuel truck were ever to set up for delivery in that particular area near the lighting pole so that it would be close to the unit being serviced, it was the opinion of Mr. Eady as Property Manager that only units 11, 12, 19 or 20 would be involved.

[8] Furthermore, there was only one set of double truck tire tracks visible in the snow in that part of the complex.

[9] In his investigation, Mr. Eady found that the only possible delivery trucks that could have provided fills at any of the units were the defendant and another company, AFD Petroleum. In his investigation, Mr. Eady talked to Brian Williams of AFD Petroleum whom he had no reason to disbelieve that he denied having a truck in the

area that day. Mr. Williams should have been called as a witness. Brian Williams would then have been able in open court, under oath, and subject to cross examination to state that it was not one of AFD's trucks that damaged the lighting pole on 21 November 2014.

[10] The area leading to the units is chained off with a sign "Absolutely no fuel trucks allowed 1 April to 31 October".

[11] While possible, it is unlikely that a car or truck entered during that time and caused the damage. Although the chain did not have a lock because of fire truck access, a regular car would probably get stuck in there even in a mild winter, but a 4X4 truck would have no difficulties maneuvering.

[12] There were numerous contacts between the plaintiff and defendant, all to no avail. The plaintiff launched this action in the Small Claims Court of Yukon.

[13] Ms. Ward testified that Chris Sutherland was the truck driver on 21 November 2014. Obviously Mr. Sutherland was the key witness but he is nowhere to be found. He and ERS parted ways in mid-January 2015 on account of tardiness or not showing up at all. While at work, there were no complaints about his driving. In fact, it was said of him that he had substantial experience as a driver and was certified as a heavy equipment operator. Apparently this was his first time driving into the complex with ERS.

[14] It is clear that the ERS truck would have been red and not yellow, but the truck itself is only a fraction of the tractor-trailer as a whole. This is really not an issue as both

sides readily admit that an ERS truck delivered fuel to unit 20 that day.

[15] We do not know for sure how the light pole was damaged. Certainty is not often achieved, especially in civil cases.

[16] If this were a case of willful damage in a criminal court, I would be inclined to rule that the *actus reus* had not been proven beyond a reasonable doubt. However, here, the plaintiff is only required to make its case on a balance of probabilities. Examples of the Supreme Court of Canada guidance in criminal cases are found in *Lifchus* and *Starr*.

[17] In *R. v. Lifchus*, [1997] 3 S.C.R. 320, proof beyond a reasonable doubt "does not involve proof to an absolute certainty, it is not proof beyond any doubt nor is it an imaginary or frivolous doubt."

[18] Later in *R. v. Starr*, [2000] 2 S.C.R. 144, the Supreme Court of Canada gave us further guidance that the burden on the Crown lies 'much closer to "absolute certainty" than to "a balance of probabilities".'

[19] In Sopinka, Lederman & Bryant - *The Law of Evidence in Canada*, Fourth Edition (2014) at page 14, we have a statement of the evidentiary law in circumstantial cases for civil actions.

> "In civil cases the treatment of circumstantial evidence is quite straightforward. It is treated as any other kind of evidence. The weight accorded to it depends on the strength of the inference that can be drawn from it and this is a task for the trier of fact."

[20] On that very subject of circumstantial evidence in a civil proceeding, the Supreme Court of Canada as recently as 2012 observed in *Opitz v. Wrzesnewskyz*, 2012 SCC 55 at para 170:

> …a judge may also rely on circumstantial evidence to conclude, on a balance of probabilities, that voters who did not comply with the entitlement provisions of the Act were improperly permitted to vote. …

[21] The Newfoundland and Labrador Court of Appeal in *Squires v. Corner Brook Pulp and Paper Ltd.* (1999), 175 Nfld. & P.E.I. R. 202, referred to two railway cases as follows:

> [113] In *Canadian Pacific Railway Co. v. Murray,* [1932] S.C.R. 112, at pp. 115-117 the Court approved the following from *Jones v. Great West Railway Co*. (1930), 47 T.L.R. 39:
>
> > "The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability."

[22] The Court went on further to quote from the House of Lords:

> [114] The House of Lords in *Caswell v. Powell Duffryn Association Collieries Ltd.* [1940] A.C. 152, noted the difference between conjecture and the drawing of an inference in these terms at pp. 169-70.
>
> > "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been

> actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."
>
> [115] This statement has been approved by the British Columbia Court of Appeal in *Lee v. Jaconsen et al*. (1994), 53 B.C.A.C. 75; 87 W.A.C. 75; 120 D.L.R.(4th) 155 (C.A.) and by the Saskatchewan Court of Appeal in *Kozak v. Funk*; *Kozak v. Nutter* (1997) , 158 Sask.R. 283; 153 W.A.C. 283 (C.A.).

[23] The *Caswell* case was also followed by the Yukon Court of Appeal in *Trans North Turbo Air Ltd. v. North 60 Petro Ltd*., 2004 YKCA 9.

[24] A further understanding of the proof required in civil cases has been historically set out by Lord Denning in *Miller v. Minister of Pension*, [1947] 2 All E. R. 372 at 374:

> It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "we think it more probable than not" the burden is discharged, but if the probabilities are equal it is not.

[25] Additional guidance comes from *Miller v. Merck Frosst Canada Ltd*., 2015 BCCA 353, at paragraph 66:

> …Taken together, I am also satisfied that the evidence, both circumstantial and directly related to the finasteride mechanism, is sufficient to meet the evidentiary threshold that there is a plausible method by which general causation could be proven at a trial of the common issues.

[26] Judge Wong in *Amos v. Yukon Tire Centre Ltd.,* 2005 YKSC 41 stated casually but accurately at para 2:

> The law is that the onus and degree of proof is on the plaintiff to establish fault on a balance of probabilities; in other words, at least 51 percent. If

> the balance of probabilities is equivocal or even, in other words, in a circumstantial evidence case, as this is, if the inference of non-fault is as consistent with fault, the plaintiff at law has not met the onus and cannot succeed.

[27] Finally, in *F.H. v. McDougall* 2008 SCC 53 at paras. 41 & 42, Rothstein J. explained:

> 41 Since *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at pp. 158-64, it has been clear that the criminal standard is not to be applied to civil cases in Canada. The criminal standard of proof beyond a reasonable doubt is linked to the presumption of innocence in criminal trials. The burden of proof always remains with the prosecution. As explained by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 27:
>
> > First, it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the presumption of innocence. The two concepts are forever as closely linked as Romeo with Juliet or Oberon with Titania and they must be presented together as a unit. If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law. Jurors must be reminded that the burden of proving beyond a reasonable doubt [page59] that the accused committed the crime rests with the prosecution throughout the trial and never shifts to the accused.
>
> 42 By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 154:
>
> > Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.
>
> It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.

[28] In applying the foregoing principles to this case it must be asked whether it is more likely than not that the ERS truck damaged the light pole. Does the evidence of the plaintiff go beyond conjecture or a mere guess, and rise to the level of an inference based on a reasonable deduction?

[29] The ERS truck delivered fuel the day before the damage was noticed. There were 20 condo units in that immediate area. The 15 degree leaning of the pole would have been noticed reasonably quickly. I am satisfied that the damage occurred in the time frame put forward by the plaintiff. As to that common area there was somewhat limited vehicular access and on 22 November 2014 only one set of a truck's double tire tracks visible in the snow. There is only a remote possibility that the pole was damaged by another vehicle or some other source.

[30] Based on the evidence before me, I am persuaded on a preponderance of the evidence that the damage was caused by Chris Sutherland, employee of the defendant, driving the defendant's vehicle. Given the type of pole and the size and weight of the truck, based on the photos, it may well be that he never even noticed the damage done to the pole and that little or no damage was caused to the ERS truck.

[31] In conclusion, it is more probable than not that the defendant's employee and truck were the cause of the damage to the plaintiff's light pole.

[32] Judgment is entered for the plaintiff in the amount sought plus costs related only to the filing and service of documents.

_____

LUTHER T.C.J.