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Plaintiff fails to prove notary public's error was the cause of losses from real estate transaction

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In a professional negligence claim, a plaintiff must establish not only that a defendant breached the applicable standard of care but that the breach was the factual cause of the losses being claimed. Depending on the nature of the claim, a plaintiff may need evidence proving that they would have conducted themselves differently in the circumstances had they received different advice from the defendant.

In *Engman v. Canfield*, 2023 BCCA 56 (CanLII), the British Columbia Court of Appeal confirmed that causation in a professional negligence claim cannot be established with only speculative evidence about what the plaintiff "would have" done differently.

The case arose from the transfer of a 20-acre property owned by the plaintiff to a third party. The defendant was an experienced notary public. In 2012, the notary witnessed the plaintiff's signature on a British Columbia "Form A" Freehold Transfer. This was the only task the notary performed and he was paid $50 for his services.

When the plaintiff was not paid for the property, she brought a civil action against various defendants, including the (now retired) notary, who was sued for negligence. The claim against the notary finally went to trial nine years later, when the plaintiff was 82 years old.

The trial judge found that the notary owed the plaintiff a duty to act with reasonable care when he witnessed her signature on the form and that he breached the applicable standard of care by not inquiring into the plaintiff's capacity to sign the document, the voluntariness of the transfer, or her understanding of the content and legal effect of the form. The notary was held liable for $465,000 in damages, representing the adjusted fair market value of the property at the time of the 2012 transfer.

The key finding for the trial judge was that the notary did not confirm that the plaintiff had received independent legal advice about the transfer, or that she made an informed decision to proceed without advice. In the trial judge's view,

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had the notary refused to witness the form, the plaintiff could have arranged to have the agreement for the transaction rescinded. She could have then sold her property to another party at full market value and she would not have sustained the loss claimed.

On appeal, the notary argued the plaintiff failed to prove that she would have acted differently but for his alleged error. The Court of Appeal agreed and found that the inferences drawn by the trial judge were speculative and did not support a finding of factual causation.

The Court of Appeal referred to the Supreme Court of Canada's decision in *Nelson (City) v. Marchi*, 2021 SCC 41, at paragraph 46, which confirmed that it is "well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss".

A defendant may argue or call evidence to show that the injury sustained by the plaintiff would have happened in any event: *Clements v. Clements*, 2012 SCC 32 at para. 11.

The plaintiff's claim for damages against the notary was predicated on the assertion that before witnessing the plaintiff's signature on the form, the notary was duty-bound to confirm with her that she had received legal advice about the transfer or had made an informed decision to proceed without it. To claim damages, the plaintiff was required to prove that had the notary met the required standard of care, the sale and transfer of the property would have been stopped, either in its entirety or on the agreed-upon terms, and that she would have acted in a different manner. In the Court of Appeal's view, she failed to do so.

While the plaintiff testified at the trial, she did not address what she would have done had the notary made the requisite inquiries of her or declined to witness the form. Significantly, the trial judge did not find that the plaintiff was without the cognitive capacity to sign the documentation. Rather, the evidence was that the plaintiff had considerable experience in assessing the value of properties, as well as experience in attending the offices of lawyers and notaries for the purpose of completing the property sales. In the Court of Appeal's words, "she was not a neophyte in the purchase and sale of land or the legal consequences of transferring property".

Further, there was evidence that the plaintiff's son-in-law, who had brokered the transaction, had suggested that the plaintiff speak with a real estate lawyer about the transfer of the property. This occurred after the Form A had been signed but before it was registered with the Land Title Office. The plaintiff's daughter subsequently looked up the name of a lawyer for her, obtained a contact number, and provided this information to her. However, the plaintiff never took steps to speak to a lawyer about the transaction.

In light of this evidence, there were simply too many "unknowns" to conclude that but for the notary's failure to make specific inquiries of the plaintiff, she *would have* done something other than transfer the property thereby avoiding her loss when the buyer failed to meet its payment obligations. This is the test the plaintiff had to meet.

Where factual causation is sought to be established by inference, any such inferences "must be based on proven facts and cannot be simply guesswork or conjecture": *Borgfjord v. Boizard*, 2016 BCCA 317, at paragraphs 55 and, 67. It is only in "rare circumstances" that a court is entitled to draw an inference of causation "from no relevant evidence at all", and that is when a defendant's negligence prevents the plaintiff from positively proving the cause

of their injuries: *B.S.A. Investors Ltd. v. D.S.B.*, 2007 BCCA 94, paragraph 43.

In the Court of Appeal's view, the plaintiff's claim was defeated by the sizeable body of evidence showing that she had the capacity to contract in 2012, was content with the sale of the property at the time, was not interested in seeking legal advice about the inherent risks, and that she did not complain about the transaction to a third party until well after the fact. What was missing in the evidence at trial was a factual nexus between the notary's negligent conduct and the plaintiff's loss. The lack of evidence from the plaintiff on the issue of what she would have done differently if the notary had made certain inquiries of her or declined to witness the form was fatal to the factual causation analysis.

As a result, the appeal was allowed and the negligence action against the notary was dismissed. The decision shows that the evidentiary record must be capable of proving factual causation resulting from the alleged error by the professional, failing which there can be no finding of liability.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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