NOVA SCOTIA COURT OF APPEAL
Citation: *Conrad Estate v. Goodick Estate*, 2012 NSCA 42

Date: 20120425
Docket: CA 347092
Registry: Halifax

Between:

Brenton Conrad as representative of
The Estate of Clifton Arnold Conrad

Appellant

- and -

Lori Michelle Briand, as representative of the Estate of Michael Roger Goodick, Lori Michelle Briand to her personal capacity, Dylan Ryan Briand and Lauren Amara Briand, both infants, by their guardian *ad litem* and mother, Lori Michelle Briand and MacLeod's Farm Machinery Limited, a Nova Scotia Company

Respondents

Judges:	MacDonald, C.J.N.S.; Fichaud and Bryson, JJ.A.
Appeal Heard:	April 2, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Fichaud and Bryson, JJ.A. concurring.
Counsel:	Geoffrey Machum, Q.C., Tricia L. Avery and Tipper McEwan, for the appellant Michael E. Dunphy, Q.C. and Andrew J. Sowerby, for the respondent MacLeod's Farm Machinery Limited Robert H. Pineo, for the respondents Briand (watching brief)

Reasons for judgment:

[1] At the end of the appellant's oral argument, we confirmed our unanimous view that this appeal should be dismissed with reasons to follow. Here are those reasons.

BACKGROUND

[2] Tragically, two snowmobile operators were killed when, in January of 2006, their machines collided near Margaree, Cape Breton Island. The issue in this appeal involves the ownership of one of the machines. Specifically, Justice Robert W. Wright of the Supreme Court was asked to decide whether the late Clifton Arnold Conrad had purchased or was simply test driving the new machine he had been operating at the time of the collision. If he had completed the purchase, thereby becoming the owner, then his liability insurer would have to respond to various claims flowing from the accident. On the other hand, had he been simply test driving the machine, then ownership would have remained with the respondent dealer and its liability insurer would have to respond.

THE DECISION UNDER APPEAL

[3] In a thorough and careful analysis, the judge concluded that Mr. Conrad had taken ownership at the time of the collision. He began by succinctly identifying the issue: (**Briand et al. v. The Estate of Conrad et al.**, 2011 NSSC 51)

> ¶ 1 As long time snowmobile enthusiasts, Clifton Conrad, accompanied by his friend Archie Lockhart, set out on January 25, 2006 on a snowmobiling trip to Margaree, Cape Breton where they had a camp. Unfortunately, on January 28th, disaster struck. Mr. Conrad was involved in a head on snowmobile collision with Michael Goodick which took the lives of both drivers. This resulted in the present lawsuit brought by Mr. Goodick's Estate and family members.
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> ¶ 2 At the time of the accident, Mr. Conrad was operating a brand new Polaris 700 Touring model snowmobile (the "700 model"). He had just taken delivery of that unit from the defendant MacLeod's Farm Machinery Limited ("MacLeod's") on January 26th after his new Polaris FST Touring model snowmobile (the "FST model") had broken down on its first day of use. Mr. Conrad had earlier purchased the FST model from MacLeod's on November 15, 2005 but took it back to

> MacLeod's on January 26th after the breakdown, at which time he took delivery of the 700 model to resume his snowmobiling trip in Cape Breton.
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> ¶ 3 These circumstances, which will be detailed later in this decision, raise the issue of the ownership of the 700 model at the time of the accident. The parties have severed that issue by consent order and the court is required to now determine whether it was Mr. Conrad or MacLeod's who owned the 700 model at the time of the accident. That finding, of course, will determine which liability insurer will be required to respond to the plaintiffs' claim for damages in the next stage of the proceeding.

[4] The judge then identified the conflicting positions regarding the purported purchase:

> ¶ 4 Both Mr. Conrad and Mr. Lockhart purchased new FST model snowmobiles from MacLeod's in mid-November of 2005 in preparation for an extended trip to Labrador they were planning to make in the winter months of 2006. Since there had been hardly any snow accumulation until about mid-January that year, the trip to Cape Breton over the extended weekend of January 26-28 presented the first real opportunity for them to try out their new FST model snowmobiles as a prelude to the Labrador trip.
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> ¶ 5 As it happened, both these new snowmobiles were in for repair at MacLeod's at its Truro location immediately prior to the trip to Cape Breton. Messrs. Conrad and Lockhart therefore planned to pick them up from MacLeod's en route on January 25th which they did.
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> ¶ 6 The trip began on a sour note when both snowmobiles broke down on their first morning of use in actual snow conditions. Mr. Conrad experienced two broken drive belts on his snowmobile and observed that the engine light was on as well. Since both snowmobiles were virtually inoperable, Messrs. Conrad and Lockhart loaded them on the latter's truck and headed back to MacLeod's in Truro.
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> ¶ 7 While en route Mr. Conrad made a series of four telephone calls to MacLeod's, using Mr. Lockhart's cell phone, between 2:06 p.m. and 4:00 p.m. (there possibly having been one earlier call before their departure from a land line in Cape Breton). Mr. Conrad was not a happy customer, being very dissatisfied with the performance of his new snowmobile.
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> ¶ 8 There are conflicting versions as to what actually transpired during the first of those telephone calls to the dealership which was taken by Mark MacLellan, a salesman and Secretary-Treasurer at MacLeod's. The position advanced on behalf

> of the Conrad Estate is that Mr. Conrad intended only to return his FST model to MacLeod's on that date to have it repaired and that he concurrently took delivery of the 700 model only on loan for the weekend. The position advanced on behalf of MacLeod's, on the other hand, is that during that telephone call between Mr. Conrad and Mr. MacLellan, an agreement was made whereby Mr. Conrad would make an even trade of his FST model for a brand new 700 model, without any money changing hands (which he could then take back with him to Cape Breton that evening). That conflicting evidence will be reviewed in detail later in this decision.
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> ¶ 9 At all events, upon their arrival at MacLeod's at approximately 4:30 p.m., Mr. Conrad was presented with a brand new 700 model which had just been uncrated and undergone the usual dealer preparation that afternoon as promised. The license plate from the FST model was removed and given to Mr. Conrad to take with him. Also, by working overtime, MacLeod's technicians were able to make the necessary repairs to Mr. Lockhart's FST model so that it was ready to go. Nothing occurred by way of efforts to repair Mr. Conrad's FST model that day.
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> ¶ 10 No paperwork was done at the dealership before the departure of Messrs. Conrad and Lockhart at approximately 5:30 p.m. Just before their departure, however, the question of insurance coverage on the new 700 model was raised. As will be detailed later, Mr. Conrad was informed by MacLeod's that its liability policy would not provide coverage, whereupon Mr. Conrad telephoned his son Brent Conrad to ask that he arrange to switch their own policy coverage from the FST model to the 700 model (of which more will be said later). Shortly after making that call, Messrs. Conrad and Lockhart returned to Cape Breton to resume their snowmobiling trip the next day. It was on the day after that, January 28th, that the fatal accident occurred.

[5] Then after carefully examining the competing evidence, the judge accepted the version of events offered by the dealership:

> ¶ 83 With those extenuating circumstances, I have no hesitation in accepting the evidence of Mr. MacLellan that he was told by an agitated Mr. Conrad during their telephone call that he thought the FST model was a piece of junk and that he didn't want it anymore. I also accept Mr. MacLellan's evidence that there was no talk between them about repairing the FST model which was on its way back to the dealership as they spoke.
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> ¶ 84 I further accept Mr. MacLellan's evidence that he made a spontaneous business decision, recognizing the legitimacy of Mr. Conrad's complaints, to offer to take back the FST model in exchange for a brand new 700 model on an even trade basis. Moreover, I accept Mr. MacLellan's evidence that Mr. Conrad's reply to

this offer was "that sounds good to me" or words to that effect. It is to be remembered that Mr. Conrad appears to have been already familiar with the 700 model which had been available on the market for some time. It is also to be remembered that the MSRP for these two models was virtually the same (the 700 model MSRP being only $100 higher).

¶ 85 The foregoing evidence forms a strong indicator, from the perspective of a reasonable and objective onlooker, that the parties shared a mutual intention to carry out an even trade of the FST model (which was virtually new) for a new 700 model. Mr. Conrad would thereby be rid of a machine that he had found unreliable and didn't want anymore. In its place, he would have a new 700 model with a proven track record at no additional cost.

¶ 86 MacLeod's, on the other hand, were trying to do something to satisfy an irate customer with legitimate complaints and they took pride in their service reputation. Granted, MacLeod's would thereby be left with a slightly used FST model which they would have to sell at a discounted price but they would have been left in much the same situation had the 700 model been provided to Mr. Conrad on a loaner basis and thereby returned as a slightly used unit.

THE ISSUES ON APPEAL

[6] In its notice of appeal, the Estate lists the following grounds:

The grounds of appeal are:

1. the Learned Trial Judge erred in finding that the Defendant/Respondent MacLeod's Farm Machinery Limited ("MacLeod's") proved by a preponderance of credible evidence that the deceased, Clifton Arnold Conrad ("Cliff Conrad") was the legal owner of the Polaris 700 model snowmobile in question as of January 28, 2006;

2. the Learned Trial Judge failed to apply proper principles of law and evidence and/or made a palpable and overriding error by failing to give sufficient and proper weight to character evidence, and evidence as to the habits, tendencies, and past conduct of the deceased, Cliff Conrad when determining whether on January 26, 2006 a binding agreement was reached between Cliff Conrad and MacLeod's for the trade of Mr. Clifton's Polaris FST snowmobile for McLeod's Polaris 700 model snowmobile;

3. the Learned Trial Judge erred by failing to give sufficient and proper weight to documentary evidence prepared and sent on Cliff Conrad's behalf to his

insurance broker after the alleged trade had occurred on which it was indicated that Mr. Conrad would be "demonstrating" the Polaris 700 snowmobile while his Polaris FST snowmobile was in the dealership for warranty work;

4. the Learned Trial Judge erred by failing to give sufficient and proper weight to the evidence of Brent Conrad, who testified that at all times following the alleged trade of the snowmobiles, his father's conduct and behaviour gave no indication or impression that a trade had occurred;

5. the Learned Trial Judge erred by failing to critically assess the reasonableness of concluding that a binding trade agreement was reached in the circumstances in question, during a brief telephone conversation, and without any discussion of price or any information being provided to Mr. Conrad by MacLeod's as to the retail or sale price of the Polaris 700 model;

6. the Learned Trial Judge erred by failing to critically assess the reasonableness of concluding that a binding trade agreement was reached in the circumstances, without any paperwork being executed to confirm the alleged trade;

7. the Learned Trial Judge erred in that several of the inferences which he drew in reaching his decision are contrary to and not in conformity with the weight and preponderance of the evidence, including:

(a) that Brent Conrad misunderstood the information he received by phone from his father, Cliff Conrad on January 26, 2006, when he testified that his father advised him that he was returning his FST snowmobile to MacLeod's for repairs, and would be provided use of MacLeod's 700 model for the weekend;

(b) that Cliff Conrad would have known that insurance coverage on a snowmobile loaned to him by MacLeod's on a temporary basis would have been covered by MacLeod's insurance policy; and

(c) that Brent Conrad would have known that insurance coverage on a snowmobile loaned to his father, Cliff Conrad by MacLeod's on a temporary basis would have been covered by MacLeod's insurance policy, and that he therefore should have questioned his father about this if his father requested that he obtain insurance on a snowmobile in these circumstances;

> (d) that the removal of the license plate from Cliff Conrad's Polaris FST snowmobile was suggestive that a trade had occurred; and
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> 8. such further and other grounds as may appear.

[7] Then, for the first time in its factum and again in oral submissions, the Estate introduced a purported error of law. Specifically, it asserts that the judge made a reversible error by ignoring a section of Nova Scotia's *Evidence Act*, RSNS 1989, c. 154. This provision, in the context of this appeal, would prevent the dealership from obtaining a verdict against the Estate based solely on the deceased Mr. Conrad's purported admissions. Instead, such testimony would have to have been "corroborated by other material evidence":

> 45 On the trial of any action, matter or proceeding in any court, the parties thereto, and the persons in whose behalf any such action, matter or proceeding is brought or instituted, or opposed, or defended, and the husbands and wives of such parties and persons, shall, except as hereinafter provided, be competent and compellable to give evidence, according to the practice of the court, on behalf of either or any of the parties to the action, matter or proceeding, *provided that in any action... against the heirs, executors, administrators or assigns of a deceased person, an opposite... party to the action shall not obtain a verdict... on his own testimony...with respect to any...admission of the deceased, unless such testimony is corroborated by other material evidence.*
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> [Emphasis added.]

ANALYSIS

[8] For the reasons that follow, I see no merit to this appeal.

[9] I will begin with the grounds set out in the Estate's notice of appeal. Respectfully, each of them represents an attack on the judge's factual findings and collectively they essentially represent an invitation for us to retry the case, which, of course, is not our role. Instead, we must defer to the trial judge's factual conclusions short of palpable and overriding error. See **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235; **McPhee v. Gwynne-Timothy**, 2005 NSCA 80; and **Re: MacRae Estate**, 2011 NSCA 57. As noted, here the judge rendered a careful analysis with every factual finding emerging squarely from the evidence. As such, there is no merit to any of these assertions

[10] Turning to the new ground of appeal, it is acknowledged that the judge made no reference to *s. 45* in his decision; it not being raised by any of the counsel at trial. However, this omission is of no assistance to the Estate. I say this because, despite not adverting to this provision, the judge nonetheless looked for, found and then relied upon ample material evidence of corroboration. While there are several examples, the two most obvious involve Mr. Conrad's decision to (a) secure insurance for the machine in question, and (b) to then arrange to have his registration plates removed from the FST model so they could be placed in the replacement 700 model. Specifically, on these two points, the judge said:

> ¶ 88 Added to that, even more significantly, is the evidence that when the subject of liability insurance coverage for the 700 model was raised at the dealership, and having been advised by Mr. Langille that MacLeod's policy would not provide coverage, Mr. Conrad telephoned his son Brent with instructions to switch his own policy coverage from the FST model to the 700 model. In my view, that is very telling evidence because Mr. Conrad, with over 30 years experience in sales and service in the automotive/truck industry, must be taken to have known that when a loaner unit is provided to a customer, it remains covered by the dealership's liability insurance policy. Only if he had acquired ownership of the 700 model would it be necessary for him to have placed that coverage under his own insurance policy.
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> ¶ 89 Similarly, the evidence is unequivocal that when Mr. Conrad left his FST model at the dealership that day, someone at MacLeod's removed the license plate from the FST model and it was thereupon taken by Mr. Conrad. Again, with his long experience in the industry, he must be taken to have known that when a vehicle of any sort is left at a dealership for repair, the license plate remains affixed to it. The fact that the license plate here was so removed and taken by Mr. Conrad is yet another indicator of intent that the FST model was no longer his.
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> ¶ 90 Everything that was communicated by Mr. Conrad to both Mr. MacLellan and Mr. Langille on that day, and Mr. Conrad's own actions in taking his license plate from the FST model with him and arranging for an immediate switch of snowmobiles under his own insurance coverage, is consistent with a trade having occurred. And so it was in the immediate aftermath that Mr. Langille prepared a handwritten invoice, for eventual entry onto the computer system, recording the sale of the 700 model to Mr. Conrad against the trade-in of the FST model. His professed intention, which I accept, was to complete all of the standard paperwork associated with such a transaction at the beginning of the following week.

[11] In short, the judge was asked to resolve a factual dispute, which he did. In the process, he found and relied upon material evidence to corroborate the dealership's assertions. In so doing, he met the statutory obligation set out in *s. 45* (as well as any supplementary or corresponding common law duty, should one exist).

[12] I would therefore dismiss the appeal with costs to the respondent dealership of $12,000, together with reasonable disbursements to be taxed. In the circumstances, it is therefore unnecessary to address the dealership's preliminary submission that it was too late for the appellant to introduce this issue for the first time on appeal.

MacDonald, C.J.N.S.

Concurred in:

Fichaud, J.A.

Bryson, J.A.