SUPREME COURT OF NOVA SCOTIA
Citation: *Fougere v. Blunden Construction Ltd.*, 2014 NSSC 20

Date: 20140121
Docket: Hfx No. 288177
Registry: Halifax

Between:

William Fougere

Plaintiff

v.

Blunden Construction Limited

Defendant

and

Fowler, Bauld & Mitchell Ltd.

Third Party

Judge: The Honourable Justice Patrick J. Duncan

Heard: January 7, 2014, in Halifax, Nova Scotia

Counsel: Dale Dunlop and Sean MacDonald, for the Plaintiff

Gavin Giles, Q.C. and Franco Tarulli, for Blunden Construction Limited, Defendant

James Boudreau and Selina Bath, for Fowler, Bauld & Mitchell Ltd, Third Party

By the Court:

Introduction

[1] The plaintiff, William Fougere, is a school teacher who is currently disabled due to a lung condition which has left him seriously ill. There is evidence suggesting that his condition was environmentally induced and its onset was in the latter part of 2005. During the summer and into the fall of 2005 the defendant, Blunden Construction Ltd., was employed to carry out construction of an elevator hoistway at Mr. Fougere's school and at a location in close proximity to his classroom.

[2] The plaintiff alleges that the defendant failed to adequately contain hazardous dust during the construction and did thereby cause him personal injury compensable in damages. The matter is scheduled for trial commencing on February 10, 2014.

[3] The defendant has brought a motion for summary judgment on evidence pursuant to **Civil Procedure Rule 13.04**. In support of its motion it has filed, among other evidence, the expert opinion report of Bruce Mollins that speaks to the defendant's standard of care and whether the defendant's conduct met that standard.

[4] The defendant's position is summarized in its initial brief as:

> The instant motion for Summary Judgment is based on the applicable standard of care. …
>
> The law of course cast[s] a burden on the plaintiff which….requires evidence: (i) that he was owed a duty of care by the defendant; and (ii) that the defendant breached this duty by failing to observe the relevant standard of care…
>
> One is entitled to assume that the plaintiff has already stated his best case and that as part of his best case, he would have rebutted, if he could the expert observations and opinions of Mssrs. Mollins and Bell which he has received; and which have been filed with the Court. Having not done so, a not unreasonable

> inference to draw is that the plaintiff has been unable to locate any expert, any knowledgeable, experienced or seasoned construction person, who has been critical of the defendant's approach to its execution of the subject project. And if that is in fact the case, then the plaintiff's claim must fail.
>
> …quite simply: there is no genuine issue for trial on a seminal aspect of the plaintiff's claim: 'that the defendant breached its duty by failing to observe the relevant standard of care…' Once again on that seminal point …there can be no dispute.

Law of Summary Judgment

[5] The test for summary judgment has recently been recited in *Symington v. Halifax (Regional Municipality)*, 2013 NSCA 152 where Saunders J.A. states:

> [22] It would be helpful to begin with the test for "summary judgment on the evidence" as set out in our Rule 13.04. This court in *Burton Canada Company v. Coady*, 2013 NSCA 95, recently restated the two-stage approach:
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> > ¶27 In *Guarantee* the Supreme Court enunciated the test for summary judgment. But because the Court's clear statement of the test is not always reiterated with precision, the Court's words bear repeating. The Court said:
> >
> > > 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules*, *supra*, at para. 15).
> >
> > ¶28 That statement was affirmed by the Supreme Court of Canada in *Canada (Attorney General) v. Lameman*, 2008 SCC 14 where the Court *per curiam* reiterated the test for summary judgment:
> >
> > > [11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R.

> 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.
>
> [29] The Rules have not changed these well-established legal principles. Rather, they attempt to codify the legal principles that emerge from the case law into a workable, effective matrix of procedural directives and deadlines.

[23] The Court then offered this guidance on each of the two stages:

> ¶42 At this point a summary of the analytical framework may be helpful. In the first stage the judge's focus is concerned only with the important factual matters that anchor the cause of action or defence. At this stage the relative merits of either party's position are irrelevant. It is only if the judge is satisfied that the moving party has met its evidentiary burden of showing there are no material factual matters in dispute that the judge will then enter into the second stage of the inquiry. The focus of that stage is not – as the judge put it here – to see if the "undisputed facts ... give rise to a genuine issue for trial". That is a misstatement of the test established in *Guarantee*. Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?

> ¶43 In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.
>
> ¶44 The phrase "real chance" should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
>
> *Is there a reasonable prospect for success on the undisputed facts?*
>
> *the answer would be yes*

Issue 1: *Has the defendant shown that there is no genuine issue of material fact requiring trial?*

[6] The defendant's argument relies upon two key assumptions:

1. That the standard of care to be observed by the defendant is definitively determined by the opinion of Mr. Mollins, (the opinion of Mr. Bell, also referred to by the defendant, reinforces aspects of the defendant's argument on the relevant standard of care, but its focus is on the conduct of the third party);

2. That the opinion of Mr. Mollins that the defendant met the requisite standard of care must be taken as definitive in the absence of a competing expert opinion brought forward by the plaintiff.

[7] On the first of these points, the defendant referred me to the recent decision in *Szubielski v. Price*, 2013 NSCA 151 where Saunders J. A. held:

> [12] Ms. Szubielski seeks damages for alleged dental malpractice. This is obviously the type of case where the trier of fact will need the assistance of an expert. The issues of causation and standard of care in the circumstances presented here are outside the experience of a judge or a jury. Accordingly, as Ms.

> Campbell makes clear in her excellent factum on behalf of the respondents, Ms. Szubielski bore the burden of presenting expert evidence establishing both of her principal allegations. Specifically, she had to adduce expert evidence demonstrating that the respondents had breached the appropriate standard of care, and that she had suffered compensable injuries because of the respondents' breach.
>
> [13] Summary judgment motions in cases alleging medical or dental malpractice are typically brought (or opposed) by respondents (as defendants in the underlying action) who point to a lack of expert evidence in support of the plaintiff's position on the standard of care and/or causation. See for example, *MacNeil v. Bethune*, 2006 NSCA 21, and *Cherney v. GlaxoSmithKline Inc.*, 2009 NSCA 68, leave to appeal ref'd [2010] S.C.C.A. No. 17. Although there is no burden on a defendant to do so, a defendant may – in order to provide greater comfort to the Court – offer expert evidence establishing that the standard of care was not breached, and/or that the plaintiff's injuries were not caused by the defendant's acts or omissions. In such circumstances, if the plaintiff is able to present supportive expert evidence in answer to the defendants' motion, then she will have established a genuine issue of material fact requiring a trial, and the defendants' motion for summary judgment will be denied; whereas if she fails to offer such evidence, the defendants' motion will often succeed: *Johansson v. General Motors of Canada Ltd.*, 2012 NSCA 120, paras. 112-115 and the authorities cited therein.

[8] The plaintiff has an obligation to prove that he was owed a duty of care by the defendant and that the defendant breached that duty by failing to observe the relevant standard of care. For the purposes of this motion, the defendant and the third party do not challenge the possibility of a finding that a duty of care was owed to the plaintiff.

[9] How does a court formulate the standard of care? Looking at the decision in *Szubielski* and the cases cited therein, it is apparent that there are cases where an expert opinion as to the standard of care is necessary for the support of the plaintiff's claim, without which the claim may fail. I do not agree, however, that expert opinion evidence is the sole source of evidence upon which the court can determine the appropriate standard; and in some cases, such as where the issue is within the experience of the judge or jury it may not be necessary to have any expert opinion evidence to correctly establish the appropriate standard of care.

[10] In *Cheevers v. Halifax (Regional Municipality)* 2005 NSSC 153 Moir J. addressed the factors that are relevant to establishing the standard of care in the context of an injury suffered by the plaintiff in an industrial workplace:

42 Standard of Care. The Court was presented with much evidence concerning industry practices, both from the expert witnesses and from fact witnesses who were able to describe what they had particularly observed at other times and places or what they generally could say based upon numerous experiences, sometimes called lay opinion. Mr. Dunphy referred me to the following synopsis from the decision of Côtè, J.A. on behalf of the Alberta Court of Appeal in *Warren v. Camrose* (1989), 92 A.R. 388 (CA) at para. 18:

> The consensus of the recognized experts in a field on what is safe does not absolutely bind the courts. Neither does the uniform practice of a profession or industry. But they are very strong evidence: cf. *Teno et al. v. Arnold et. al.*, [1978] 2 S.C.R. 287; 19 N.R. 1; 83 D.L.R. (3d) 609; 3 C.C.L.T. 372, 339. Indeed leading authorities go much beyond the questions of evidence, and make such a consensus or uniform practice a substantive defence to a charge of want of care (subject to one exception). See *Ruch v. Col. Bus Lines*, [1966] 1 O.R. 621, at pp. 625-627 (C.A.), and cases cited, expressly approved and adopted on appeal in [1969] S.C.R. 106. It is not enough for a plaintiff to show that other precautions were possible, if they were not commonly used by the profession or trade in question, unless their omission was clearly very unreasonable: *Ruch* case, at p. 626; *McLeod v. Roe*, [1947] S.C.R. 420, esp. at pp. 425, 430; *London & Lancs, etc. v. Cie. F.X. Drolet*, [1944] S.C.R. 82, 86, 91. Nor need a defendant warn that an unusual precaution is omitted, or recommend its use: *McLeod v. Roe*, *supra*. The test is what was the generally accepted practice at the time of the accident; precautions which had been followed at an earlier age but have since been discarded by most of the people in the field are irrelevant: *McDaniel v. Vancouver Gen. Hosp.*, [1934] 3 W.W.R. 619, 622-623 (P.C. (B.C.)). (Nor is the test a precaution introduced since: *London v. Drolet*, *supra*.) Nor does a plaintiff rebut the generally accepted practice by producing one respected expert or textbook which advocates a precaution not generally followed: *McDaniel v. Vancouver*, *supra*, at pp. 624-625; *Maynard v. W. Midlands R.H.A.*, [1984] 1. W.L.R. 634 (H.L.); *Quintal v. Datta and Skochylas*, [1988] 6 W.W.R. 481; 68 Sask. R. 104, 511 (Sask. C.A.); cf. *Bolam v. Friern Hosp.*, [1957] 1 W.L.R. 582, 587. The court can override expert evidence and brand a universal practice as negligent only in a strong case: the experts' thinking or the profession or trade's practice, properly understood, must offend logic or common sense, or flow from a gross error in weight, these cases say. In my view that is the proposition applied error in weight, these cases say in my view that is the proposition applied and approved in *Edmison v. Boyd* (1985), 62 A.R. 118, 120, affd. (1987), 77 A.R. 321; 51 Alta. L.R. (2d) 43, 47 (C.A.).

> I have two slight reservations about this synopsis. Firstly, the phrases "uniform practice" and "universal practice" are too strong. A general practice qualifies to inform the standard of care: *Lewis N. Klar, QC Tort Law* 3 ed. (Carswell, Toronto, 2003), p. 321. Secondly, evidence of practice is informative but not determinative of standard of care. The over-arching principle establishes the standard of care by reference to an objective assessment of what the reasonable person would do in like circumstances. Bearing these thoughts in mind, let us turn to the evidence of precautions actually taken at the Eastern Passage plant and the evidence of general practice.

[11] In *Cherubini Metal Works Ltd. v Nova Scotia (Attorney General)* 2011 NSCA 43 Farrar J.A. addressed the formulation of the standard of care expected in a case where negligence was alleged in the administration of workplace safety inspections:

> 53 As noted earlier, the formulation of the standard of care is a question of law and will be reviewed on the standard of correctness.
>
> 54 Once a duty of care exists the standard of care must be formulated correctly. In *Ryan v. Victoria (City)*, [1999] S.C.J. No. 7 (Q.L.) at para. 21, the Court refers to the seminal decision of this Court in *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241 in defining the relationship between the duty and the standard of care:
>
> > The relationship between the duty and the standard of care was explained by MacDonald J.A. of the Nova Scotia Court of Appeal in *Nova Mink Ltd. v. Trans-Canada Airlines,* [1951] 2 D.L.R. 241, at p. 254:
> >
> > > It is the function of the Judge to determine whether there is any duty of care imposed by the law upon the defendant and if so, to define the measure of its proper performance; it is for the [trier of fact] to determine, by reference to the criterion so declared, whether the defendant has failed in his legal duty.
> > >
> > > ...
> > >
> > > The common law yields the conclusion that there is such a duty only where the circumstances of time, place, and person would create in the mind of a reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to take care to avert that probable result. This element of reasonable prevision of expectable harm soon came to be associated with a fictional Reasonable Man whose apprehensions of harm

> became the touchstone of the existence of duty, in the same way as his conduct in the face of such apprehended harm became the standard of conformity to that duty...
>
> Thus, a discussion of duty centres around its existence, while the standard of care clarifies what the content of the duty is. Where there is no duty there is no negligence.
>
> …
>
> 57 Each case is different and some factors are more informative than others on what the requisite standard of care is and whether it was met in the circumstances.
>
> (emphasis added)

[12] In the present case, the plaintiff says that the standard of care is established by the Instructions to Bidders which specifies in section 2.0(a) that:

> School/Work site access control: The work site shall be demarked and surrounded completely at all times by a plywood and wood frame hoarding that shall prevent access by unauthorized personnel. The contractor will also be required to erect an interior barrier using 2 x 4 wood framing and plywood with a steel access door with gaskets to ensure a seal between the work area and the school interior and to isolate the work area from the remainder of the school. The barriers shall in no way impede the normal egress from the affected stairwell so that normal and emergency evacuation of the building is maintained.
>
> (emphasis added)

[13] The third party, Fowler Bauld & Mitchell, architects, prepared these instructions on behalf of the Halifax Regional School Board, which operated the school and sought out the work. Cory Bell has provided an expert opinion report that speaks to the standard of care expected of the third party. He concluded that the third party complied with its standard of care, and in particular that instruction 2.0(a) specifying the erection of hoarding was consistent with industry standards and the existing Codes. Counsel for the plaintiff does not allege any failure by the architects to meet its requisite standard of care.

[14] Bruce Mollins provided an expert opinion report at the request of the defendant. The report outlines industry practices, and describes three levels of dust

containment that may be used on a job site. He concludes that the one provided for by the Instructions to Bidders was the appropriate method for this contract. The plaintiff takes no issue with this aspect of his report.

[15] In summary, all three parties to the action agree that the Instructions to Bidders are relevant to the formulation of the standard of care. There is no apparent disagreement as to the industry practices. The absence of a significant dispute as to the relevant standard of care does not, however, mean that there is nothing for the trial court to determine. As Moir J. noted in *Cheevers*:

> …evidence of practice is informative but not determinative of standard of care. The over-arching principle establishes the standard of care by reference to an objective assessment of what the reasonable person would do in like circumstances.

[16] In my view summary judgment should not be granted in this case simply because the plaintiff did not retain an expert. The plaintiff elects to rely upon the Instructions to Bidders as establishing the standard of care. It is also open to the plaintiff to agree that the defendant's expert has correctly stated the standard of care; or that it is to be determined by reference to various factors arising from the totality of the evidence.

[17] The trial judge must, as a question of law, formulate the standard of care; and there is evidence available for him to consider in doing so. He is not restricted to the evidence of the defendant's expert, although he may choose to accept his evidence as conclusive of the standard of care. The trial judge may accept the plaintiff's position that the standard of care is established by the Instructions to Bidders. The trial judge may treat the Instructions to Bidders, the defendant's expert report, the third party's expert report and any other evidence that is presented to inform him as to the correct standard of care. That decision is to be left to the trial judge.

[18] The more salient question is whether the expert's conclusion that there has been no breach of the standard of care is based upon material facts which do not require a trial.

[19] Some key factual determinations to be made in the trial are whether the hoarding was erected when it was required to be in place; and whether it was

erected in such a way as to accomplish its purpose of containing or limiting the amount of construction generated dust from transferring to the public side of the hoarding. e.g., the area of Mr. Fougere's classroom on the second floor.

[20] Mr. Mollins reviewed what he understands Blunden to have done and concluded that:

1. As to work associated with concrete block removal:

   The dust level would have been quite minor and far enough away from the existing interior to prevent any significant accumulations within it. The dust level would also be in keeping with that which would be expected on any construction site at which the same types of works were being executed.

2. As to the dry floor grinding:

   …can create a fair level of dust… the related level of dust at the worst case scenario would still have been very minor. It was also taking place in an area of the school which had been hoarded off from the main occupational areas of the building.

3. As to installation of gypsum board:

   [it] was not sufficient in either installation, filling or sanding and finishing to create any discernable level of dust.

4. As to the "lengthy run of cable from the electrical room on the basement level to the elevator machine on the 2nd floor":

   [it] would have created various, indeterminate levels of dust. …I have been informed by Blunden's personnel that the coring of the deck(s) was done using a wet drilling process, so that no dust would be created.

5. As to removal of ceiling tiles:

> …maintaining the existing drop ceiling would likely have meant a very careful removal of the individual ceiling tile and various cross-T's. The amount removed would probably be limited to the amount that could be replaced in a shift, including the time to run the electrical feed. As was evidenced, considerable thicknesses of dust were found lying atop the ceiling tiles, which may not have been anticipated, but should not have been a surprise to anyone. In my experience, areas undisturbed for several years will collect dust and more.… Blunden's described process of removing relatively short runs of ceiling and vacuuming/cleaning what was exposed or dropped as it went would be completely satisfactory and in my opinion and experience, totally consistent with industry standards applicable.

6. Overall Conclusion:

> The dust generated, though relatively insignificant, was consistent with that which would be expected of any such project in my experience.

[21] Mr. Mollins conditions his opinion in this way:

> The facts stated by me in this Report are believed to be true. I further believe that the opinions I have expressed in the Report are correct and supportable given the information available to me for review and my review and analysis of that information at the time that the Report was prepared….My Report contains all of the information which I regard as relevant to the opinions I have expressed.

[22] As such, the validity of Mr. Mollins' opinion rests on his interpretation of the information he was provided. His sources of information for his conclusions include a variety of relevant documents and "excerpts from Discovery Transcripts" of Frank Covey, Keith Slaunwhite, Harvey Freeman, Amanda Patterson, Jessica Goora, William Fougere and Gary McCormick. He also interviewed site officials of Blunden. Suffice to say that his conclusions rest substantially on hearsay. He

made no personal observations of the construction site at times relevant and material to the defendant's conduct that the plaintiff complains of.

[23] An immediate problem may be found with the basis of Mr. Mollins' conclusion as to the manner in which the defendant removed ceiling tiles as set out in #5 above. He expresses the supposition that "…maintaining the existing drop ceiling would likely have meant a very careful removal of the individual ceiling tile and various cross-T's. The amount removed would probably be limited to the amount that could be replaced in a shift." How the defendant's employees carried out this task is a material fact since there was an admittedly significant accumulation of dust above the ceiling tiles. Mr. Mollins is relying upon the probability that Blunden did this as Mr. Mollins would see necessary. Ultimately, how Blunden executed this task is not a matter for supposition but is a matter for the trial judge to resolve.

[24] Mr. Mollins also concludes that the hoarding specified in the Instructions to Bidders was in place as directed. There is evidence that this was not always the case.

[25] Keith Slaunwhite is Regional Manager of Operations for the Halifax Regional School Board. He was in a position of oversight on the project. In his discovery evidence he says that on one visit to the Blunden work site:

> …they had to knock down a wall, and I can't remember which part of the summer this was, or it might've been even later, but anyway, when I walked in at that time, I noticed dust – or footprints down the hall. So when I walked over to where they were working on the elevator shaft, they were knocking down the wall and no hoarding was in place. So I stopped them immediately.

[26] He confirmed that it was a concrete block wall clad in brick that was located on the first level of the school between the exterior building envelope and the elevator hoistway. It contained some insulation and it was painted. He also testified that the dust "….was down the hallway a ways" and that he retained an outside company to clean the ventilation system because the dust would have gone through "anywhere". Work was stopped immediately in response to his order. The evidence may support a conclusion that until that time, no hoarding was in place.

[27] Harvey Freeman is an architect with the third party. His affidavit and discovery testimony are in evidence on this motion. He attended at the construction site at relevant times. Overall, he makes factual observations that are supportive of the defendant's position. He says, however, that on July 29, 2005 he was contacted by Mr. Slaunwhite who complained that "barriers installed were no longer adequate because the construction workers had taken out most of the ceiling tiles between the inner wall of the entrance lobby and the temporary wall on the main level."

[28] Mr. Freeman's own observations when he went to the site were that the barriers erected by Blunden were installed to be level with the underside of the first floor ceiling. His view was that "…dust could go over the top of the ceiling tiles, through that air space, and spread to adjacent areas." To prevent that he directed the defendant to extend the hoarding to the underside of the floor above.

[29] When Mr. Slaunwhite was asked whether what Mr. Freeman described was the same incident he described, Mr. Slaunwhite testified that it "could've been something else…but I know where they knocked down this wall, that's where there was no hoarding."

[30] I note that these two witnesses have also given evidence that could support the conclusion that the defendant complied with the hoarding requirements.

[31] However, Mr. Mollins' report does not address Blunden's apparent breach, or breaches, of the Instructions to Bidders and of the standards he says were to be observed with respect to the placement of the hoarding. It appears that the defendant's workers may have engaged in dust creating work without adequate hoarding in place. Whether the apparent breach ultimately leads a court to the conclusion that it was causative of the plaintiff's loss is for the trial judge to determine.

[32] It is for the trial judge, not a summary judgment motion court, to determine what specifically happened, when it happened and to consider what weight to place on this evidence. It may engage an assessment of credibility. These factual findings and the impact they have on the legal consequences are not determinations that the court can delegate to Mr. Mollins. This is especially true where his conclusions are based on hearsay that has not been tested in a trial. The defendant's motion should fail on this basis alone. i.e., the failure by Mr. Mollins

to consider evidence of Blunden's failure to have hoarding in place while dust generating work was being carried out.

[33] There are other factual issues which are material and which require trial. Once the trial judge establishes the appropriate standard of care, the question of whether it has been observed engages, among other things, an assessment of the amount of dust that escaped the hoarding, when it escaped the containment area, and where the dust ultimately travelled to. Even if the hoarding was in place, evidence that it did not fulfill its function properly could lead to the conclusion that it was not installed properly.

[34] Mr. Mollin's description of dust levels as being "quite minor", "very minor", "indiscernible" and "relatively insignificant" all involve a subjective assessment, the accuracy of which must be measured against the totality of the evidence provided by witnesses who were present and who made observations of that dust.

[35] Mr. Fougere's discovery evidence included the following statement:

> Some staff were concerned about the amount of dust at times in the building. Sometimes there was so much that it looked like it was actually foggy. There were a couple of instances when there was that much dust in our corridor that it was… it actually looked like you were in a fogbank.

[36] He noted dust on the public side of the hoarding during August at a time when he was setting up computers for the upcoming school year. The dust was on desks and in the computers. Mr. Fougere added that:

> The real dust didn't start… the quantitative amounts of dust, it probably wasn't until September when I first started noticing it.

[37] Frank Covey, the school principal, testified that in September 2005:

> The building was still dirty… There was a lot of construction dust as a consequence of the work that was going on through the summer… certainly the dust was spread quite widely throughout the building in a particular wing where they were working on the bottom floor and the second floor.

> …I was behind the library area. So, I was quite far removed from where the work was actually being done. But in that section there, certainly there was a significant amount of dust and debris, and things like that from the work that was being done.

[38] Mr. Covey also testified about an absence of hoarding at the beginning of the construction, though he says it was erected later.

[39] Finally Mr. Covey noted that in March of 2006 he called in a company to remove the "abnormal amount of dust in the ceilings".

[40] Amanda Patterson, another teacher at the school whose classroom was in close proximity to that of Mr. Fougere, also describes the presence of dust "concentrated on the floor we were on, which was the second floor." She also described "a bit of haze in the air" that occurred under particular conditions, though she did not agree that it was "fog like".

[41] Mr. Mollins' report does not specifically explain how this evidence is consistent with his use of diminutives in describing the levels of dust in the publicly occupied areas of the school. This evidence, in my view, creates issues of material fact that require a trial judge to consider and weigh in the overall assessment of the defendant's observation of its duty of care. Mr. Mollins cannot displace the role of the trial judge as the finder of facts.

[42] Wood J., writing in *Drummond v. Grafton-Connor Property Inc.* 2013 NSSC 370 reviewed the current state of the law of summary judgment, in particular at paragraphs 29-38. Of relevance to the motion before me is the following:

> [33] It is clear that there are two distinct analytic steps which a trial judge must take in considering a motion for summary judgment. The first is whether the applicant has established no genuine issues of material fact requiring trial. Sometimes this is expressed as a requirement that there be "no material disputed facts". Alternatively, courts have said that a summary judgment motion can only be decided based upon "undisputed facts".
>
> [34] In my view, the use of language such as "facts in dispute" or "undisputed facts" may be confusing. It suggests that the initial inquiry is limited to a consideration of whether the parties have presented competing evidence. Such an evidentiary contest may well lead a judge to conclude that an applicant for summary judgment has not met the burden imposed in the first stage of the

> analysis; however, that is not the only situation which might lead to that outcome. It was clearly reinforced by Justice Saunders in *Burton Canada* that the responding party has no burden to do anything, including filing evidence, and so the initial assessment of whether there is a genuine issue of material fact requiring trial must still take place, even if the respondent offers no evidence.
>
> [35] Courts have never said that the failure of the responding party to call evidence is always fatal to their position on a summary judgment motion and so even without an evidentiary dispute a court might conclude that a trial is required on a particular issue.

[43] I conclude that there are genuine issues of material fact that require a trial. The motion fails at the first stage of the summary judgment analysis.

[44] The parties made submissions as to costs at the time of hearing which I will rely upon if the parties advise that is their current position. I will defer that decision to provide the parties an opportunity to resolve costs on their own, but if they are unable to agree then I will receive their written submissions.

Duncan, J.