

IN THE SUPREME COURT OF NOVA SCOTIA

**Citation:** Hartt v. Murphy, 2003 NSSC 235

**Date:** 20031127

**Docket:** S.K. 10501

**Registry:** Kentville

**Between:**

Jeffrey Lee Hartt, carrying on business under  
the firm name and style of Call Me Excavating

Plaintiff

v.

Valerie Lorraine Murphy, carrying on business under the  
firm name and style of Little Village Child Care Centre

Defendant

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DECISION

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**Judge:** The Honourable Justice Gerald R. P. Moir

**Heard:** 6 & 7 October 2003 at Kentville and  
13 & 14 November 2003 at Windsor

**Written Decision:** 27 November 2003

**Counsel:** Harold G. S. Adams QC and Lisa Wight, Articled Clerk  
for the plaintiff  
D. Mark Gardiner for the defendant

**Moir, J.:**

[1] Introduction. The defendant bought a hilly property along highway fourteen at Brooklyn in Hants County. She planned to construct a combination home and day care centre on a plateau atop a hill that rose steeply from the highway. She retained the plaintiff to build a driveway up the hill. He told her the driveway was going to be very steep. About a month after the driveway was built and some days after she had paid for it, the defendant decided the driveway was too steep for a day care centre. Under direction of the defendant's father, the plaintiff deeply excavated the crest of the hill and put in a much wider and much larger driveway that reached a lower elevation and rose much less steeply than the first. The defendant contends she does not have to pay for the second effort. I disagree.

[2] Credibility of Witnesses. The plaintiff, Mr. Hartt, was a co-operative witness who answered questions in an straight forward and, for a party, dispassionate manner. I found him and his workers, James Curry and Gerald Spencer, to have been credible. I also found the defendant's father, Curtis Smith, to have been credible, as were her customers, Annette Barkhouse, Pam Steeves, Pam Northup and Darlene Meehan, and her employee, Denise Wile. Another employee, Lisa

Hennigar, was far too combative during cross-examination and far too wedded to her employer's cause. I did not find the defendant, Ms. Murphy, to have been as credible as others. She believed in the truth of what she said but the favour for her own cause when she so often contradicted testimony of credible witnesses including her father and the favour for her own cause in numerous contradictions of her evidence on discovery lead me to distrust her present recollections. Recollection was distorted by interest.

[3] The First Contract. Mr. Hartt worked with his father for many years hauling gravel, building driveways and installing new foundations under older homes.

There was never enough work for the younger Mr. Hartt to be employed full time by his father, so he took on various jobs after completing high school. The senior Mr. Hartt died in late 1995 and his son decided to continue the business. Most of the work involved building or repairing driveways. Business expanded. In 2001, when the events of this case happened, Mr. Hartt had a dump truck, an excavator and one employee, an experienced excavator operator.

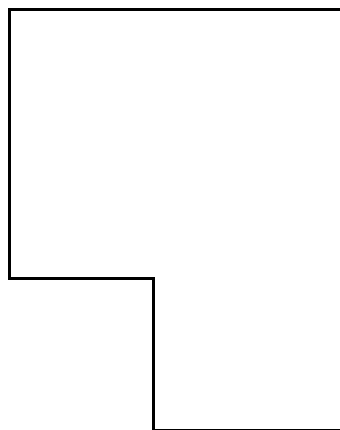
[4] Ms. Murphy studied early childhood education after completing high school. For the past fourteen years she has been employed in day care and, since 1995, she

has operated her own day care centre in Brooklyn. In the last few years she made plans to develop property in the Brooklyn area and open a bigger day care. This lead her to the hilly property on highway fourteen that is of concern in this case.

[5] The property fronts 140 feet along the highway. It measures 190 feet up the hill and widens at the crest of the hill. For our purposes the land could be rendered

as:

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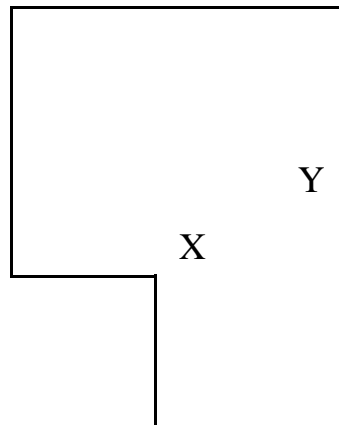


There is another piece, a 66 foot strip at the west, but it does not concern us. Once built, the driveway ran on the diagonal and up the hill from the southeast corner to the first corner, where the lot widens. The crest was in line with that first northern line and the plateau accounted for most of the first half of the wider part of the lot.

[6] Ms. Murphy bought the property without professional advice from engineers or surveyors as to whether a larger day care centre could be located on land such as this, nor as to whether constraints, such as necessary sites for disposal fields, affected possible locations of any foundation, nor as to whether possible locations and consequential grades and widths of a driveway would be suitable. Rather, she paid for the property, she made arrangements with her father for him to act as her builder upon return to Eastern Canada after seasonal work out West and she retained a driveway contractor, Mr. Hartt, to immediately install a driveway leading to the upper plateau.

[7] In late April 2001, Mr. Hartt and his employee, James Curry, met with Ms. Murphy at the site. For the reasons already explained, I prefer the evidence of Mr. Hartt and Mr. Curry as to what happened that day. They parked across the highway from the site. Mr. Hartt was immediately daunted by the shear face of the hill. Its first incline of about twenty feet rose at a wall-like eighty degrees. It rose steadily, though less steeply from the first incline to the crest. The group travelled by another route up to the crest. Mr. Hartt needed to know where the day care centre was to be located, and where any driveway would be constrained by the property bounds. Eventually, he told Ms. Murphy that this was a poor site for a driveway. It was

going to be too steep. She explained that she had to reject another site because the speed limit was eighty kilometres an hour and the lot was so configured that the Department of Transportation would not approve a driveway, but this one could be approved because the limit was only thirty. Mr. Hartt looked at boundary pins. He and Mr. Curry looked at stakes that marked where Ms. Murphy said her building was to go. She pointed to the area where she wanted a parking lot. Mr. Hartt could see that a driveway could be cut into the hill extending, as I said, diagonally from the southeast corner to the boundary at the crest. In Mr. Curry's presence, Mr. Hartt stressed to Ms. Murphy that the driveway was going to be "very steep" if she wanted her day care where she said it was to go. To show Ms. Murphy how steep it was going to be, Mr. Hartt held his arm out at about a thirty degree angle with the ground. Thirty degrees would make for a very steep driveway. Both Mr. Hartt and Mr. Curry stressed that the proposed driveway would be very steep. Ms. Murphy said she wanted a parking lot to handle about ten cars and Mr. Hartt indicated she was looking for a space about fifty feet by fifty feet. This would be located (X) past the boundary corner at the crest with the day care centre beyond, nestled into another rise of hills (Y):



The driveway would approach the neighbour's northeast corner, then rise in a curve to the parking area. The parties also discussed the width of the driveway. Ms. Murphy agreed it should be the normal size for a one car driveway, twelve to fourteen feet. She asked for an estimate. I find that Ms. Murphy was then aware that the subject under discussion was a twelve to fourteen foot wide driveway rising at a "very steep" angle from the highway at the southeast corner to the top of the hill at the northwest corner of the neighbouring lot. Although angles, distances and measurements are not as easily grasped by Ms. Murphy as by most people, I find she had been made fully aware of the intended steepness and narrowness of the driveway for which she was to receive an estimate. This finding is based upon the explanations given by Mr. Hartt to Ms. Murphy that day, Ms. Murphy's knowledge of the lay of the land coupled with her understanding that a line was being drawn diagonally from one corner to the other and Ms. Murphy's subsequent conduct in

witnessing the construction of a very steep driveway, in making no complaint and in promptly paying the bill.

[8] In cross-examination, Mr. Hartt agreed he had known that Ms. Murphy knew little of driveway construction. That was his expertise. Yet he did not put his mind to the problem of two cars passing or children on foot passing traffic on a twelve foot width other than to note one would have a clear view of the driveway from beginning to end and Ms. Murphy had a single lane at her present day care centre. As regards steepness, Mr. Hartt did not discuss with Ms. Murphy the possibility of excavating the hill and extending the driveway some 150 feet to a lower point of ground. He said he proposed to take the driveway to where Ms. Murphy had instructed while staying within bounds. "I did all I could to get her to where she wanted to go", he said in cross. He was aware of cost and wanted to present something she could afford. On behalf of Ms. Murphy, it is suggested that Mr. Hartt "bid low" expecting to bill more as a need for a more elaborate driveway became apparent. I reject that suggestion. He honestly bid according to the owner's instructions. Whether he was obligated to point out other possibilities is a subject I shall take up later.



[9] Mr. Hartt called Ms. Murphy the next day with his estimate. He offered to put in the driveway they discussed for \$4,000. This would be done in two stages. Immediately, the major part of the work would be completed including excavation to undisturbed soil, levelling and compacting and a layer of compacted pit run. Later, after construction of the day care was finished and risk of damage by heavy equipment was gone, Mr. Hartt and Mr. Curry would repair any damage and then install a layer of class A gravel. Ms. Murphy accepted. Thus, the terms were \$4,000 to be paid by Ms. Murphy in exchange for:

- 1) Constructing a twelve foot wide, very steep driveway diagonally from the highway at the southeast to the crest of a hill near the neighbour's northeast corner.
- 2) Putting in a curve at the crest near the neighbour's corner and extending the driveway back northeasterly to the area for a parking lot.
- 3) After the day care centre was constructed, repairing wear and tare and installing a layer of class A gravel over compacted pit run.
- 4) Sundries such as standard ditching, culvert at the highway and so on.

Work started a few days after the estimate and its acceptance.

[10] The First Driveway. The Department of Transportation and Public Works approved the lot for a driveway on 30 April 2001. Work was done over a couple of

days in early May and Ms. Murphy visited the site regularly. Mr. Hartt rendered an account for \$3,082 on 9 May 2001. Ms. Murphy paid \$2,000 on 22 May 2001 and the balance of \$1,082 on 29 May 2001. The completed driveway traversed the hilly parts to the crest a length of about 125 feet then it made a twenty foot curve towards the proposed parking area. It was twelve to fourteen feet wide. It was properly ditched. A culvert had been installed at the highway and there was just enough room to pull over before the driveway rose steeply.

[11] A Second Contract or Repairs. Mr. Curtis Smith, Ms. Murphy's father, arrived at the beginning of June 2001. He is sixty-one and has worked in general construction much of his life. In his opinion, the driveway was too steep. So steep, one could not safely drive up it. Just as bad, it approached the highway steeply in what Mr. Curtis described as a "nose dive". How bad was it?

[12] Firstly, there is some dispute as to whether one could see the top of the driveway at the curve from the bottom and *vias versa*. I am satisfied that there was a clear line of sight. Secondly, some said one could not drive up such a steep incline and others said one could. It is obvious that the driveway could be used. Even without a surface of gravel or asphalt, cars and trucks travelled up and down the

driveway. The value in the evidence about whether one could use the driveway is as lay opinion. Having driven many times up inclines, some acceptable and other frightening, was this a driveway like the former or the later. Mr. Hartt, Mr. Curry and a co-worker, Mr. Spencer, found the driveway did not cross the line. I am satisfied that Ms. Murphy had no concerns about steepness or width until she heard from others. Mr. Curtis thought it too steep to use. Day care customers Annette Barkhouse, Pam Steeves, Pam Northup and Darlene Meehan found it too steep and too narrow, at least as it appeared in the unfinished state. Employees of the day care Denise Wile and Lisa Hennigar found the driveway to be impossibly steep and narrow.

[13] Unfortunately, the driveway disappeared in June 2001 without anyone having taken pictures or having plotted elevations. It has not been established that the driveway was dangerous or would have been dangerous when it was finished. No doubt less cautious sorts of drivers would have gone up undaunted. No doubt many parents of young children are very cautious and some of these would not have gone up. I find the driveway would not have been dangerous if it had been properly finished and diligently maintained in winter conditions. However, I also find it was

very steep and would have deterred some day care centre customers from using the contemplated facility.

[14] Mr. Smith, Mr. Hartt and Mr. Curry met at the site of the proposed day care early in June 2001 for the first time. Ms. Murphy, denies she was present. She says she went to the site with her father who advised that the driveway was too steep and that it should be lowered by excavating the crest and extending the driveway to a lower point. Ms. Murphy says she then telephoned Mr. Hartt to tell him that the driveway was too steep and he would have to fix it. A meeting was arranged. Ms. Murphy says she was not available for the meeting and had authorized her father to speak to Mr. Hartt about repairing the slope. She instructed her father to find out why Mr. Hartt had not extended the driveway beyond the crest, had not excavated the crest and had not, thereby, obtained a better grade. Her father says Ms. Murphy expressed no concerns about the slope either when they explored the site in the fall of 2000 or when she spoke with him by telephone about construction after the first driveway had been built. He and she visited the site together and it was he who suggested the grade was too steep. Mr. Smith says he suggested to Mr. Hartt extending and lowering the driveway. Mr. Smith did not indicate that this work was to be done at Mr. Hartt's expense. He seems to have believed it would be at his

daughter's expense. In direct examination, he said he did not discuss price as he, Mr. Smith, was not paying for it. In cross-examination, Mr. Smith said he expected there would be a charge for the work. In direct, he also said that Ms. Murphy had asked Mr. Hartt to meet with her concerning price.

[15] Mr. Hartt says that he arrived at the site and met Ms. Murphy, who introduced her father. Mr. Smith said that the driveway is too steep. Mr. Hartt said that he and his worker had achieved the best slope possible to get to where Ms. Murphy had instructed. Mr. Smith said he would get a better slope by going further on to a lower elevation. Mr. Smith wanted to start construction right away. Mr. Hartt and his crew were able to report for work the next day with the excavator and two trucks.

[16] Mr. Hartt says Ms. Murphy brought up the question of cost twice. Once at the meeting on site and again later. Mr. Hartt understood he was to be working under Mr. Smith's direction, that Mr. Smith would decide how deep, how long, how wide and so forth as the work was carried out. Mr. Hartt did not know what work Mr. Smith would direct. So, he could not estimate the work. He would have to keep hours and charge standard rates. Ms. Murphy vigorously denies she was told this. She says Mr. Hartt evaded her questions about price.

[17] Mr. Smith's testimony tended to portray his involvement in the construction of the second driveway as minimal beyond his initial instructions for location. His presence on site afterwards was more out of interest or to pass time. Mr. Hartt and Mr. Curry gave evidence that portrayed Mr. Smith as directing the project in detail over the two weeks it took to build the new driveway. I accept the evidence of Mr. Hartt and Mr. Curry.

[18] I find that the parties met in early June 2000 and no suggestion whatsoever was made that Mr. Hartt had made any mistake in the construction of the first driveway. I find that, through Mr. Smith, Ms. Murphy informed Mr. Hartt that she wanted a different driveway than she had agreed to in May. She wanted a driveway of lower slope, of longer extent, of greater width and going to a different place. I find that it was obvious to Ms. Murphy, Mr. Smith, Mr. Hartt and Mr. Curry that what was now being requested would involve an effort many times greater than what was contracted in May. I find that, through Mr. Smith, Ms. Murphy requested a crew report as soon as possible so construction of the building could begin soon. I find that Mr. Hartt said cost would be established by time and standard rates for time

or loads. I find he said that no estimate was possible because the work would be done however Mr. Smith directed.

[19] Driveway. Much of the first driveway was useful to and incorporated into construction of the second. Nevertheless, the second project took three times as long as the first. Under Mr. Smith's direction the Hartt crew removed three hundred loads of fill compared with about forty the first time. The driveway extended two hundred and fifty feet, compared with one hundred the first time. It is twenty feet wide, compared with twelve to fourteen. Throughout, Mr. Smith directed the course, the grade and the width. Mr. Hartt carried out all instructions and Mr. Smith seemed pleased with their performance.

[20] On 19 June 2001, Mr. Hartt met with Mr. Smith and Ms. Murphy to present the bill. It totalled \$10,879 for excavator hours at standard rates, truck hours at standard rates, hauling at standard rates per load and tax. Ms. Murphy seem shocked. Mr. Smith was calm. He said to his daughter "Well, you needed a driveway". Ms. Murphy said she had to wait for a draw on her financing and Mr. Hartt asked her to see what she could do and to make contact with him when she

could pay some if not all. On 31 July 2001, Ms. Murphy paid \$1,300 by cheque.

For “memo”, she wrote “Partial Driveway Payment”.

[21] Mechanics’ Lien. Mr. Hartt filed a claim for lien on 2 August 2001, near the end of the period for doing so. Action was commenced within time and a *lis pendens* was recorded. The lien is a valid charge upon the property and the property may be sold under the *Mechanics’ Lien Act* if the issues are determined in favour of the lien claimant.

[22] Issues. The first issue concerns the express terms of the first contract and whether the single-lane, steep driveway was performance. Two further issues are raised in defence but they are closely related. The first concerns the implied warranty of the reasonable fitness for purpose in contracts for work and materials and the second concerns an implicitly contracted duty of care to advise the customer that the product of a contract for work and material will be useless.

[23] Contract. The argument for Ms. Murphy is determined by my findings of fact. It might have been otherwise if I had accepted her evidence concerning formation of the first contract, but I accepted the testimony of Mr. Hartt and Mr.



Curry. Base upon my findings, Ms. Murphy got precisely what she expressly contracted for: a twelve foot wide driveway leading very steeply up the hill from her southeast corner at the highway to her first neighbour's northeast corner, curving there eastward towards a spot she designated with proper ditching, culvert and sub-layers. Thus, the contract was preformed, the work was accepted and paid for and an independent contract was entered into with Ms. Murphy through her father, who had ostensible authority. That contract was for a much better and much more expensive driveway. The cost of it is impeached insofar as the plaintiff is responsible for breach, under the first contract, of an implied warranty of fitness for purpose or of a duty of care to advise on the design of the driveway.

[24] Fitness for Purpose. I think this was a contract for supply of work and materials rather than a sale of goods and that the more appropriate issue is breach of a contracted duty of care. In any case, I have found that the first driveway could have been used, although some customers would have found it daunting. The requirements of day care and of day care customers were far more within Ms. Murphy's knowledge than her contractor's. He brought home to her precisely what she was contracting for.

[25] Breach of Duty of Care. Counsel are agreed that *Duncan v. Blundell* (1820), 171 E.R. 749 remains good law where it states as cited in *Sanson Floor Co. v. Forst's Limited*, [1942] 1 W.W.R. 553 (B.C.C.A.) at p. 558:

Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not; of course it is otherwise if the party employing him choose to supersede the workman's judgment by using his own.

This is not a situation where it was impossible to preform the contract for work and materials. A driveway was built according to agreed specifications. This is not even a case where the contract leads to a useless result. The driveway was useable for the most part. The argument for the defendant was premised on different findings of fact.

[26] However, Mr. Gardiner did take the matter a step further when he argued that Mr. Hartt had been under an obligation to point out to Ms. Murphy the option later identified by Mr. Smith. Mr. Hartt failed to direct his mind to the possibility that moving the driveway to a different part of the land (and either moving the building or accepting a longer walk) and excavating away the crest would produce a gentler slope (at much greater cost). This failure was a breach of duty of care.

[27] I do not think this argument leads to any proven damages. More importantly, it puts too much on driveway contractors as opposed to engineers or surveyors. If one wants advice on the best configuration of buildings, septic disposal fields and driveways on a difficult and complicated piece of land, one pays for a professional. One does not rely on contractors for advice of that kind. As a matter of fact, Ms. Murphy did not ask Mr. Hartt for that kind of advice, and she was not relying upon him to give it. In my opinion, any duty of care in reference to the design of the driveway was fully discharged when Mr. Hartt precisely described what he would do to get where Ms. Murphy instructed and warned her it was going to be very steep.

[28] Conclusion. Mr. Hartt is entitled to \$9,579 plus costs of trial as limited by the *Mechanics' Lien Act* to \$2,394.75, plus costs of registration in the amount of \$117, plus pre-judgment interest of \$1,005.80. I am prepared to grant an order to enforce payment of \$13,096.55 according to the remedies under the *Act*.

J.

Halifax, Nova Scotia