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# Murkute v. Owners Condominium Plan 8210034, 2006 ABCA 315 (CanLII)

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Date: 2006-10-30

Docket: 0501-0231-AC

## In the Court of Appeal of Alberta

**Citation: Murkute v. Owners Condominium Plan 8210034, 2006 ABCA 315**

**Date:** 20061030

**Docket:** 0501-0231-AC

**Registry:** Calgary

**Between:**

**Dipika Murkute**

Appellant  
(Plaintiff)

- and -

**The Owners of Condominium Plan 8210034, Stanley Bastain, Jean Bastain,  
Craig Bastain, Abbott and Abbott Building Maintenance & Repairs Ltd.**

Respondents  
(Defendants)

- and -

**Abbott and Abbott Building Maintenance & Repairs Ltd.**

Respondent

(Third Party)

**The Court:**

**The Honourable Madam Justice Constance Hunt  
The Honourable Mr. Justice Clifton O'Brien  
The Honourable Madam Justice Karen Horner**

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**Memorandum of Judgment**

Appeal from the Judgment by  
The Honourable Mr. Justice W.P. Sullivan  
Dated the 13<sup>th</sup> day of May, 2005  
(Docket: 0301-01177)

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**Memorandum of Judgment**

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**The Court:**

**I. INTRODUCTION**

[1] This is an appeal from the trial judge's finding that the appellant plaintiff ("Ms. Murkute") failed to prove that the respondents had breached the standard of care owed to her in a slip and fall action. Ms. Murkute slipped and fell on the common property of the respondent Condominium Corporation ("Condo Corp."), just outside of the condominium owned by the respondents Stanley Bastain and Jean Bastain but occupied by their son, the respondent, Craig Bastain. The respondent Abbott and Abbott Building Maintenance & Repairs Ltd. ("Abbott & Abbott") was contracted by the Condo Corp. to, *inter alia*, keep the common areas free from ice and snow. At the outset of the trial Ms. Murkute discontinued the action as against Stanley and Jean Bastain. Pursuant to an order of another judge, the trial proceeded on the issue of liability only whereby Ms. Murkute claimed under the *Occupiers' Liability Act*, R.S.A. 2000, c. O-4 and the common law tort of negligence. Ms. Murkute seeks to have fresh evidence admitted before this Court.

**II. FACTS**

[2] Ms. Murkute owns and resides at Unit 31 of a condominium complex located in Calgary. Abbott & Abbott was retained for snow removal and other maintenance of that complex. Ms. Murkute alleges that she fell and injured herself on the evening of January 30, 2001 at approximately 9:00 p.m.

[3] Craig Bastain is a tenant in Unit 35 of the complex. Unit 35 and Unit 31 are separated by Unit 33. The front entrances of each of Units 31 and 35 face north towards a public street owned and maintained by the City of Calgary. Ms. Murkute's parking stall is in a parking lot immediately to the west of these units. A concrete sidewalk extends from the front entrance of Unit 35 north to the public street. There is a paved walking area to the front of the parking lot which leads north to a concrete platform four to six inches in height above the parking lot and serves as a landing as well as for entry into Unit 35, then leads to a common area sidewalk which leads north to the street. This is the route that Ms. Murkute used to proceed from her car to her condominium unit on foot on the night of January 30, 2001.

[4] January, 2001 had mild weather. Prior to January 30, 2001 there had been only five days in that month where traces of snow had fallen. On January 30, 2001 late in the day at or about 8:00 p.m., 0.8 centimetres of snow began to fall which resulted in what a witness described as a "dusting" of snow: A.B. 78/41.

[5] Sometime around 9:00 p.m. on the 30<sup>th</sup> of January, 2001 Ms. Murkute returned to her home after having dinner at a local restaurant with an acquaintance. Ms. Murkute pulled into her parking space, got out of her vehicle and proceeded as previously described. Ms. Murkute proceeded directly north to the platform outside Unit 35, stepped off Unit 35's platform, walked a short

distance down the common area sidewalk, turned to her right or to the east to proceed across Unit 35's lawn on the way to her unit. She alleged that she slipped and fell on the sidewalk immediately after turning and starting to walk east toward or across the lawn located in front of Unit 35. As a result of her fall, Ms. Murkute alleges personal injury.

### III. THE DECISION BELOW

[6] The trial judge found that the Condo Corp. and Abbott & Abbott owed Ms. Murkute a duty of care to reasonably ensure that she would be safe in using the common areas of the condominium premises for permitted uses.

[7] The trial judge found that the Condo Corp. discharged its duty to Ms. Murkute in hiring the property management firm of Montgomery Ross who supervised Abbott & Abbott, and in hiring Abbott & Abbott. The trial judge further found that Abbott & Abbott discharged its duty to Ms. Murkute in performing daily checks of the condominium common areas, including the area where Ms. Murkute fell, and applying ice melt when necessary. The trial judge found no negligence by any of the defendants and dismissed the action.

[8] The trial judge further found that Ms. Murkute had not slipped on the sidewalk as she alleged but had slipped on the lawn in front of Unit 35 as witnessed by Craig Bastain. This finding was acknowledged by him to be unnecessary to his final decision. We agree.

[9] At the conclusion of the trial the parties agreed to work out costs among themselves. A bill of costs was circulated and consented to by counsel for Ms. Murkute.

### IV. ISSUES

[10] The following summarizes the issues raised by Ms. Murkute:

- a) Should this Court admit fresh evidence not before the trial judge;
- b) Did the trial judge err in law in:
  - i) determining the standard of care;
- c) Did the trial judge err in his factual findings in:
  - i) finding that Abbott & Abbott inspected the property daily;
- d) Did the trial judge err in his application of the facts to the law by:
  - i) finding that the defendants had discharged their duty of care to Ms. Murkute.

### V. STANDARD OF REVIEW

[11] The applicable standards of review have been set out by Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), 2002 SCC 33, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235 and applied by this Court in *Zaifdeen v.*

*Chua*, 2005 ABCA 290 (CanLII), 2005 ABCA 290, 142 A.C.W.S. (3d) 878. Questions of law including the determination of the standard of care are reviewed on a standard of correctness. The standard of review for the determination of facts or inferences from those facts is one of palpable and overriding error. A question of mixed fact and law includes the application of a legal standard to a set of facts. In negligence actions the standard of review for questions of mixed fact and law is one of palpable and overriding error, unless the trial judge made some error in principle, in which case the error may amount to an error of law which is subject to correctness: *Viridian Inc. v. Dresser Canada Inc.*, 2002 ABCA 173 (CanLII), 2002 ABCA 173, 312 A.R. 93.

### VI. APPLICABLE LEGISLATION

[12] The *Occupiers' Liability Act*, R.S.A. 2000, c. O-4 reads:

#### **Duty of care to visitors**

5 An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.

#### **Liability of Independent Contractor**

11(1) An occupier is not liable under this Act when the damage is due to the negligence of an

independent contractor engaged by the occupier if

- (a) the occupier exercised reasonable care in the selection and supervision of the independent contractor, and
- (b) it was reasonable in all the circumstances that the work that the independent contractor was engaged to do should have been undertaken.

## VII. DISCUSSION

[13] Ms. Murkute seeks to have this Court admit several pieces of fresh evidence described in her motion from (a) to (g). Generally, fresh evidence is admissible only if the appellant could not have obtained the evidence by reasonable diligence before the trial, the evidence is relevant and credible, and, when taken with the other evidence, could reasonably be expected to affect the result: *Palmer v. The Queen*, 1979 CanLII 8 (S.C.C.), [1980] 1 S.C.R. 759, (1979), 106 D.L.R. (3d) 212. None of the evidence sought to be introduced by Ms. Murkute meets these criteria and therefore her fresh evidence application is dismissed.

[14] Section 5 of the *Occupiers' Liability Act* sets out the duty of care that an occupier owes to a visitor. The trial judge correctly found that the Condo Corp. was an occupier and as such its duty of care to Ms. Murkute was to take reasonable care to see that Ms. Murkute was reasonably safe in using the premises in the manner that she did. Although the trial judge found that Craig Bastain was also an occupier, he further found that Mr. Bastain had no legal responsibility to maintain the common areas of the Condo Corp. such as the sidewalk adjacent to his unit. Since Abbott & Abbott were not occupiers as defined by the Act, by inference the trial judge accorded the same duty of care to Abbott & Abbott as that of the Condo Corp. based on the common law tort of negligence.

[15] The evidence of two employees and two owners of Abbott & Abbott was tendered. Ms. Murkute criticizes the fact that the trial judge permitted the evidence of Robert Abbott to be introduced by way of examination for discovery transcript when he could not attend the trial for medical reasons. It does not appear that her counsel objected to these read-ins or applied to adjourn the trial. To the contrary, Ms. Murkute's counsel also read in portions of the discovery transcript as part of her case. There is nothing to suggest that he was limited in any way in doing this. There is no error in how this matter was handled by the trial judge.

[16] The evidence of Ashley Bala and Robert Abbott (that one of them attended at the complex every day for the purpose of snow removal, applying ice melt and picking up garbage) was unrefuted. Ashley Bala testified that he walked the whole property every day in January, 2001 looking for ice. When he found ice, he put ice melt down on it. Although he had no specific recollection of January 30, 2001 he had a daily routine and no reason to deviate from it on that day. With this evidence it was reasonable for the trial judge to find that Abbott & Abbott took reasonable care to see that Ms. Murkute was reasonably safe in using the premises.

[17] Once the trial judge determined that Abbott & Abbott had discharged its duty to Ms. Murkute and was therefore not negligent, he had no need to resort to s.11(1) of the *Occupiers' Liability Act* in order to find Condo Corp. not liable. Section 11(1) only applies in the event that the trial judge had found Abbott & Abbott negligent. As he did not, the Condo Corp. did not require the protection of s.11(1). In finding that Abbott & Abbott discharged its duty of care to Ms. Murkute, he therefore implicitly found that Condo Corp. had likewise discharged its duty of care to Ms. Murkute by retaining Abbott & Abbott's services.

## VIII. CONCLUSION

[18] In the result, the appeal is dismissed.

Appeal heard on October 11, 2006.

Memorandum filed at Calgary, Alberta  
this 30th day of October, 2006

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Hunt J.A.

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O'Brien J.A.

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Authorized to sign for:

Horner J.

**Appearances:**



D. Murkute  
on Own Behalf

S.K. McGurk  
for the Respondents The Owners Condominium Plan 8210034, Stanley Bastain,  
Jean Bastain and Craig Bastain

M.L. McMahon  
for the Respondent Abbott and Abbott Building Maintenance & Repairs Ltd.

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