

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CORY MARSHALL and LYNNE MARSHALL

PLAINTIFF

AND:

**REGIONAL DISTRICT OF NORTH OKANAGAN,
EDWARD SMITH, ASTRID ELSIE DAVIS
and LEONARD JAMES DAVIS**

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE BLAIR**

Counsel for the Plaintiff:

Gary P. Weatherill

Counsel for the Defendant:

Edward Smith appearing on his own behalf

Place and Date of Hearing:

September 12 & 13, 1996, B.C.
Vernon, B.C.

[1] The plaintiffs, Cory and Lynne Marshall, commenced this action to recover the costs of roof repairs and rectification of structural faults they discovered following the purchase of a home located near Enderby.

[2] Mr. and Mrs. Marshall completed the purchase of the home from the defendants, Astrid Davis and Leonard Davis, in March 1994. The defendant Edward Smith constructed the home between 1978 and 1979 and resided in it for approximately eight years. The defendant Regional District of North Okanagan issued the building permit for the home to Mr. Smith and then followed up with some, but not all of the required inspections. The Regional District's inspectors noted infractions of the National Building Code in the home's construction, but these infractions were not rectified.

[3] Mr. and Mrs. Marshall settled their claims against Mr. and Mrs. Davis and the Regional District and sought in this trial a determination of Mr. Smith's share of liability, if any, and an assessment of the damages for which he is responsible if found liable. Counsel advise that the settlement reached with the other defendants provides that Mr. and Mrs. Marshall would not seek to recover from Mr. Smith such portion of their losses attributable to the fault of the Regional District or Mr. and Mrs. Davis.

[4] The evidence included reports from engineers Victor von Maydell and Ed Thiessen which outlined the deficiencies of the home including a slipping roofing membrane on the tar and gravel roof which allowed water to enter the home, as well as the improper installation of support posts which allowed settlement of the home. The evidence further confirms that the Regional District, after issuing the building permit to Mr. Smith, conducted inspections during which deficiencies were noted.

[5] Mr. Smith testified and acknowledged that he had constructed the home and that during his residency he had not experienced any of the problems encountered by Mr. and Mrs. Marshall. It was his opinion that the problems with the home followed from poor maintenance by the occupants before Mr. and Mrs. Marshall bought the home, not poor construction.

[6] I am satisfied from the engineering reports that the structural difficulties and poor construction of the roof led to the problems found by Mr. and Mrs. Marshall and are defects for which Mr. Smith, as owner and builder, and the Regional District in its inspection role must share responsibility for the costs of rectifying. The liability of both Mr. Smith and the Regional District in the circumstances arises from the decisions of the Supreme Court of Canada in the cases of ***Kamloops v. Nielsen***, [1984] 5 W.W.R. 1, ***Rothfield v. Manolakos*** (1990), 41 B.C.L.R. (2d) 374, and ***Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*** (1995), 121 D.L.R. (4th) 193, which dealt with the issue of the liability by municipal corporations and contractors. In the ***Kamloops*** decision (supra) Wilson J. at p. 29 referred to the responsibility of the builder and the municipal authorities in the following terms:

The builder's negligence, it is true, was primary. He laid the defective foundations. But the City, whose duty it was to see that they were remedied, permitted the building to be constructed on top of them. The City's negligence in this case was its breach of duty in failing to protect the plaintiff against the builder's negligence.

And in the ***Winnipeg*** decision (supra) Mr. Justice La Forest at p. 203 stated:

In my view, where a contractor (or any other person) is negligent in planning or constructing a building, and where that building is found to contain defects resulting from that negligence which pose a real and substantial danger to the occupants of the building, the reasonable cost of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort by the occupants.

[7] In the **Winnipeg** decision, the court apportioned liability 70 percent to the city and 30 percent to the owners, with liability between the city and contractors apportioned 60 percent to the city and 40 percent to the contractors. Counsel in the instant case suggests liability be apportioned 70 percent to the Regional District and 30 percent to Mr. Smith. On the facts, I find such an apportionment reasonable.

[8] The roof cost \$5,200 to repair, however there is a life span to such tar and gravel roofs and to award Mr. and Mrs. Marshall the full repair cost would disregard the original roof's 15 years of use. Unfortunately, there is little evidence as to the life span of such a tar and gravel roof. I will estimate the full life of a tar and gravel roof at 30 years and assess the damages payable for rectification of the roof at \$2,600.

[9] Mr. and Mrs. Marshall obtained three estimates to rectify the structural defects, those being \$15,500, \$19,700 and \$23,300. I will pick the middle estimate and set the structural repair cost at \$19,700.

[10] In conclusion, I find Mr. Smith 30 percent liable for the \$2,600 cost of repairing the roof and the \$19,700 cost of repairing the structural defects.

[11] The plaintiffs will have their costs against Mr. Smith proportionate to his liability pursuant to s. 3 of the **Negligence Act**, R.S.B.C., c. 298.

J."

"R. M. BLAIR,