1966

Joanne Adams Leishman Dba Samak Lodge v. Kamas Valley Lumber Company, A Corporation : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

ANNE ADAMS LEISHMAN,
dba SAMAK Lodge,

Plaintiff and Respondent,

vs.

MAS VALLEY LUMBER
OMPANY, a Corporation

Defendant and Appellant.

Case No.
10711

BRIEF OF RESPONDENT

eal from the Judgment of the
rt, Summit County, State of Utah
A. H. Ellett, Judge.

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STATEMENT OF FACTS

Counsel for appellant is not quite accurate in his statement of the facts, and so we shall briefly set out these facts:

In the spring of 1964, Mrs. Joanne Leishman commenced reconstruction work on the Samak Lodge near Kamas, Utah. This lodge consisted of a restaurant, kitchen, lounge facilities and restrooms (TR 3). The structure had previously collapsed from the snows, and so she and a partner, Mr. Ben Dell, looked around for the type of wood beams that would hold

the roof structure on their proposed building. They had consulted with Hyland Lumber Company and Morrison-Merrill Company in Salt Lake City concerning wood beams. They then contacted Kamas Valley Lumber Company about the problem, told them and showed them a sketch of the type of roof structure they desired to use and that the previous roof in the building had failed and "we did not want that problem again." (TR 14).

Mr. Bannister and Mr. Weaver of Kamas Valley Lumber Company were familiar with the building and of its collapsed condition, and represented that they could supply the same type and quality beam as the Salt Lake supplier and that respondent could save freight and time. A sample laminated beam was shown that appellant manufactured, and appellant further represented that respondent would have no problem with the snow depth they were concerned about of up to four feet of snow with the use of their beams (TR 15). Respondent thereupon ordered the laminated beams for use in the reconstruction of the Samak Lodge.

A short time later, but before the delivery of the beams, Mr. Weaver and Mr. Walt Carroll, who was the man in charge of constructing the beams for appellant company, came out to the job site where they discussed the spacing of the beams as being on eight-foot centers, and Mr. Carroll said if "they would put a one-inch camber in the beams, that that would be sufficient." (TR 16)

The beams were then delivered with the one-inch camber, and at the time of delivery of the beams, respondent was concerned about their ap-

pearance and contacted Mr. Weaver again about it. Mr. Weaver again assured respondent that the small gaps in the beams could be filled in, sanded down and painted, but that the beams were structurally sound. (TR 20, 21, 149). This was done by respondent and the beams were used on the structure.

Subsequently, respondent heard of someone else getting a better price on these type beams than they were paying, so a complaint was made to Mr. Weaver about it, and an adjustment in price was given (TR 39, 41, 152).

The lodge construction was completed by respondent and they operated as a going business for a few months. In the latter part of February, 1965, the beams gave way, the roof collapsed and partially destroyed the building. When respondent discovered this they promptly notified appellant of the failure of their beams, which the expert engineers who examined the beams and testified in this action said were defectively manufactured.

Respondent had purchased the property originally for $7500.00. It cost her over $6500.00 in cash in the reconstruction of its former collapsed condition, and it would have cost about $11,500.00 to restore the building to its condition just prior to the collapse of these defective beams. (TR 97).

ARGUMENT

POINT I

THE COURT CORRECTLY FOUND THERE WAS A WARRANTY FROM APPELLANT TO

RESPONDENT OF THE FITNESS FOR USE OF THE BEAMS FOR THE PARTICULAR USE TO WHICH THEY WERE PUT.

60-1-15 (1) of Utah code annotated, 1953 states as follows:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

60-1-12 of Utah code annotated, 1953, gives the definition of an express warranty:

> "Any affirmation of fact or any promise by the seller relative to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

In the case at bar, we submit that there was a warranty, both express and implied, that the beams manufactured and sold by appellant to respondent were structurally sound and were suitable for the purpose for which they were purchased, and respondent relied thereon. The evidence clearly sustains this position and the Court so found.

Mr. Ben Dell testified that in talking with Mr. Weaver of appellant's company:

> "The question arose as to the type of roof structure we were going to use. I told him that

we wanted to use a laminated beam because the previous roof in the building had failed, and we did not want that problem again. I told him I had talked to Hyland Lumber Company, got price on laminated beams and found that because of a strike from their supplier, they could not supply the beams for at least six weeks. Mr. Bannister or Mr. Weaver then told me that they made laminated beams, they could supply the same type and quality beam, and we would save freight from Salt Lake to Kamas, the price would be approximately the same."

"During that conversation I asked him about the beams. He showed me a sample that he had in his office. At that time I asked him would that sample hold up to four feet of snow, because we don't want this roof to go in again. He left his office, went over to the . . . what I later found out was the sales counter, sales desk, referred to a book, came back and said, 'you would have no problem with that snow depth' ". (TR 14, 15).

These representations were relied upon by Respondent (TR 15).

Now Mr. Ben Dell, previous to the above conversation and representations, had shown appellant the diagram and sketch and dimensions of the building (TR 12, 37), thus they were familiar with it and its previous collapsed condition.

Then after the construction work was started, but before delivery of the beams, representatives of Kamas Valley Lumber Company, Mr. Weaver and Mr. Walt Carroll (who was in charge of construct-

ing the beams), came out to the job site, and Mr. Dell testified on this visit as follows:

> "They looked to see what span we were going on. We discussed the spacing of the beams, that they were to be on eight-foot centers. At that time Mr. Carroll said that he would put a one-inch camber in the beams, that that would be sufficient." (TR 16).

Respondent followed the recommendation of getting the beams with the one-inch camber (TR 18, 19), and nothing was heard from Mr. Weaver or Mr. Carroll as to the spacing of the beams at less than the eight-foot centers (TR 16).

Then again, at the time of the delivery of the beams to the job respondents were concerned about the appearance of the beams and they sought out Mr. Weaver of appellant company for assurances, and once again respondent was told that "the beams were structurally sound, they would do the job that we wanted." Further, it was suggested by Mr. Weaver that bolts could be put through the beams if they were concerned, "but really we didn't need it because the beams were structurally sound" (TR 20). Then Mr. Weaver recommended that the gaps in the laminations and appearance of the beams could be corrected and cleared up by "filling in," sanding down and painting. Again this recommendation of appellant was followed by respondent (TR 20, 21, 148, 149).

Mrs. Leishman also testified as to these conversations and especially as to the representation of appellant as to the structural quality of the beams. (TR 119)

Counsel for appellant makes a point of the fact that the defectiveness and structural weaknesses of the beams were obvious to Mrs. Leishman and Mr. Dell. This is not the case, (TR 21, 118, 119). The evidence shows they were primarily concerned about the appearance of these exposed beams and they were satisfied with the assurances of the manufacturer as to the structural soundness. They were not engineers or experts in this field and they had to rely on the skill and judgment of the manufacturer here. Why would respondent spend several thousand dollars in this building that had already once before collapsed from the snow and then knowingly put in defective beams on the new structure? This argument is ridiculous, and the lower court wisely would not buy it.

Yes, there is ample evidence to support the court's finding of a warranty of fitness for use here. (See also *Nielson v. Hermansen*, 109 U. 180, 166 P 2nd 536 and *Nephi Processing Plant, Inc. v. Talbott*, 247 F 2nd 771.

POINT II

THE COURT DID NOT ERR IN NOT MAKING A FINDING THAT BUYER FAILED TO GIVE NOTICE OF THE BREACH OF WARRANTY.

As was discussed under Point I, appellant continued to represent the structural soundness of their beams and that it would do the job intended and which they personally observed even after delivery of

said beams (TR 20, 21, 148, 149). Thus there was no knowledge of a breach of these representations and warranties until the beams actually failed and collapsed, and then it was that respondent gave due notice to appellant of the breach, and the court so found.

The code provision quoted by Counsel for appellant, 60-3-9 of the Utah code annotated 1953, was only partially quoted. The applicable part of that law, and which holds for respondent's position is as follows:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages, or other legal remedy for breach of any promise or warranty in the contract to sell or the sale."

In our case the warranty of structural soundness was reiterated again by appellant to respondent after delivery, and acceptance was made based upon those assurances.

POINT III

THE COURT WAS CORRECT IN FINDING THAT APPELLANT REPRESENTED THEIR BEAMS SOLD WOULD STAND THE WEIGHT OF UP TO FOUR FEET OF SNOW.

In answer to counsel's or appellant's statement in his brief that "nowhere in the record is there any claim that defendant represented that the beams would stand the weight of up to four feet of snow,"

we merely refer the court to our argument in Point I where the testimony is set out in detail on this question (TR 14, 15. See also (TR 29) where reference is made again to the subject.)

The court therefore had very adequate testimony and evidence as to this representation to support its finding.

POINT IV

THE COURT WAS CORRECT IN FINDING THAT PLAINTIFF RELIED UPON DEFENDANT'S REPRESENTATION THAT THE BEAMS WERE FIT FOR THE USE FOR WHICH PLAINTIFF PURCHASED THEM.

It is true that both Mrs. Leishman and Mr. Dell were concerned about the snow problem in the Kamas area. This is one of the reasons they were relying on the skill and judgment of the manufacturer of the beams and that said beams would be suitable for their purpose in holding the roof on that particular building which had previously collapsed and which appellant and their salesmen were entirely familiar with (TR 12, 15, 20, 37, 153).

Mr. Weaver of appellant company himself testified that he was very familiar with Samak Lodge before the sale of said beams, and he knew the purpose and use to be made of the beams by respondent, and he actually recommended their beam for this job. He further showed the sample of how it was manufactured, all for the purpose, of course, to sell respondent on its fitness for use in the job (TR 153, 154, 155).

Respondent thereupon bought the beams, relying upon appellant's recommendations.

Mr. Dell testified further in the conversation with appellant as to the fitness of the beams for the snow problem in the area as follows:

> Q. "Based upon — or did you thereupon order the beams?"
>
> A. "A week later"
>
> Q. "I ask you, Mr. Dell, if you relied upon the conversations that had taken place."
>
> A. "Yes, sir, I did."
>
> Q. "Did you communicate these conversations to Mrs. Leishman?"
>
> A. "Yes".
>
> Q. "Did she authorize you to order these beams?"
>
> A. "Yes, Sir."

It should be mentioned here that an adjustment in price on the beams was given because someone else had bought beams for less money in the area and no rebate was given because of defects in the beams. Mr. Weaver himself, of appellant company stated (TR 152):

A. "He (Dell) came in and complained because someone else had bought the beams for less money."

Q. "Was an adjustment made for that?"

A. "I understood that that was made."

Mr. Ben Dell's testimony was also clear on this point when he said (TR 29):

> "One of the people living in the area came down, looked at the beams, told me that he had paid a dollar thirty four for the same type beam; and that is when I questioned Mr. Weaver as to why we were being charged one dollar eighty four when they had sold it for one dollar thirty four to somebody else."

As to the question of Mr. Weaver suggesting bolts in the beams, the fact that respondent didn't do it, (TR 39) shows even further their reliance on Mr. Weaver's statement "but really we didn't need it because the beams were structurally sound." (TR 20)

The other arguments in counsel for appellant's point IV of his brief are either not factual or have no bearing on the question of reliance of fitness for use, and we submit that the trial court held correctly on this point.

POINT V

THE COURT WAS CORRECT IN ITS FINDING THAT THE BEAMS WERE NOT AS

STRUCTURALLY SOUND AND STRONG AS THEY APPEARED AND SHOULD HAVE BEEN, IF PROPERLY MANUFACTURED, AND THAT THE BUILDING COLLAPSED BY REASON OF THE STRUCTURAL DEFECTS IN THEIR MANUFACTURE.

Mr. Joseph F. Patrick, Sr., a structural engineer and an expert witness testifying in this case, and being specifically familiar with the processes for the manufacture of and use of laminated wood products (TR 52), testified as follows; (TR 54, 55):

> Q. "Assuming wood beams containing eight laminations were installed over a span of twenty-four feet with four-foot over-hangs on either end, and assuming further that these beams were properly constructed and were positioned on eight-foot centers in Kamas, Utah, do you have an opinion as to whether or not those beams would be structurally sound to contain the roof?"
>
> A. "Yes, I have an opinion, it would require some qualification."
>
> A. "The process of laminating beams is both simple and complicated. There are many factors that influence the strength of any given beam, and of course *on just the visual inspection it is very difficult to ascertain whether all of these particular elements have been met,* and these are the qualifications."
>
> "Now, as to the specific beams and some of the specific reasons why I feel that the beams themselves will not or would not accomplish what they were purported to me to do" . . .

The court: "Well, I don't know what they were reported to you to do, but he's asked you whether or not they are sound, and I suppose he means sufficiently strong to withhold the normal snows that would fall at the place where this house was."

A. "And on the basis of that particular statement, your honor, I would say that there are several areas where these beams fail to meet the standards of construction of the industry."

Q. "Mr. Patrick, before we get into that, let me restate my question to you. If you were to assume that these beams met the standards of industry, would they have been adequate to do the job?

A. "Provided the proper stress grades of lumber had been used, yes, Sir."

Then again after cross examination and after the testimony of the engineer, Mr. Wadsworth, Mr. Patrick testified again as follows (TR 142):

Q. "All right, now, in view of the definition which he's given and the testimony of Mr. Wadsworth concerning failure, may I ask whether or not this beam if properly constructed would have contained the load without collapse?"

A. "In my opinion, if a beam of these dimensions properly laminated, installed at eight feet, had been subjected to a load in the neighborhood of forty, forty to forty-five

> pounds, it very likely would not have collapsed. It would not have had the normal factor of safety." (See also TR 75 on this point).

Now both engineers testified that the beams were defectively manufactured, there is no question about that, and the roof actually collapsed. So whether the roof would have collapsed anyway if properly manufactured, Mr. Patrick, the expert, thinks not, but for counsel for appellant to categorically state so, is ridiculous, and it is purely a matter of conjecture.

The judge felt there was ample evidence to support this finding as stated in his ruling in the lower court (TR 208):

> "Now, it may be that there should have been four-foot centers instead of eight-foot centers, but it wasn't an eight-foot center that caused this beam, this roof to give way. The thing that caused this roof to give way is the defect in the beam itself."

POINT VI

THE COURT DID NOT ERR IN FINDING THAT PLAINTIFF DID NOT KNOW OR HAVE REASON TO KNOW THAT THE BEAMS PURCHASED FROM DEFENDANT WERE OF INFERIOR QUALITY OR THAT THEY WERE STRUCTURALLY DEFECTIVE, AND THE COURT DID NOT ERR AS TO THE QUESTION OF WAIVER OF PLAINTIFFS' RIGHT TO CLAIM BREACH OF WARRANTY, CONTRIBUTORY NEGLIGENCE, AND ASSUMPTION OF RISK.

We have set out a partial argument on the question of *knowledge* on the part of plaintiff as to the defectiveness and structural soundness of the beams in our Point IV, which we refer the court to. Counsel for appellant states in his Point IV (7), "Weaver told them to put the beams on four-foot centers (TR 151)". Mr. Weaver testified actually that a month or so after respondent opened for business, a casual observation was made on the subject (TR 150, 151).

Again in his Point IV (8) counsel states, "Bannister told them the beams would not hold as placed ..." (TR 171). Here again, it was after the beams were placed that the purported conversation took place and his statement was a passing comment only, but nowhere did he say that the beams would not hold as placed. He actually testified to the contrary – that he made no such statement. These statements and others made by Mr. Thacker were denied by respondent, and anyway they have nothing to do with knowledge of defective beams on the part of respondent.

At the time of delivery of the beams, there was no knowledge of structural defects or unsoundness of the beams, (TR 20, 21, 119), but respondent did complain about their appearance. The testimony of Mrs. Leishman and Mr. Dell was corroborated by Mr. Weaver of appellant's company on this point (TR 148, 149):

> A. "Shortly after the beams were delivered, Mr. Dell had come down and complained about appearance ..."
>
> A. "The objection he raised to the beams were some voids, there was . . ."

Q. "Some voids?"

A. "By voids I mean slight openings such as this in the finger joints."

Q. "You mean the openings . . . you have pointed to the areas where we have heard testimony that there is improper lamination. Is that what you mean by the voids?"

A. "Yes."

Q. "He had some objection to that?"

A. "From appearance standpoint."

Q. "And what else was said?"

A. "There was some mud on the beams because there was snow and mud on the ground, and they were dumped there, unloaded. I suggested that he possibly could fill those voids with some kind of plastic or wood because we were speaking merely from the standpoint of appearance now."

Again, merely because Mr. Weaver or Mr. Carroll suggested putting in bolts in the beams if there was any concern about them, but assured respondent, "but really we didn't need it because the beams were structurally sound (TR 20), did not impart knowledge to respondent of structural unsoundness and defects. (See also TR 57). It would take an expert in the field to determine such structural unsoundness,

as was evidenced by the testimony of both the expert engineer witnesses.

Mr. Wadsworth had to look twice, closely before he could say the joint was not a good one (TR 136, 137). Then, after viewing carefully one of the delaminated beams, and in response to the question "Does that delamination indicate improper or weak bonding of glue?", Mr. Wadsworth answered, "not necessarily, in my opinion." (TR 137).

Again Mr. Wadsworth was asked (TR 139):

> Q. "But the mere fact that there is spacing at the butt end of the finger joint, is that an indication of weakness within the joint itself?"
>
> A. "No. It is the width of it that would indicate it."

Mr. Patrick testified, as we have already argued in our Point V: "There are many factors that influence the strength of any given beam, and of course, on just the visual inspection it is very difficult to ascertain whether all of these particular elements have been met . . ."

Thus, the court properly found that plaintiff had no knowledge that the beams purchased were structurally defective. The judge, in his ruling on this, pointed out as follows (TR 208):

> "I believe these plaintiffs would no more have put a defective beam up there than they would have flown because they knew that the thing they had bought for some $7500.00 had been knocked down by snow, and they wanted good beams."

Now in regard to appellant's argument as to waiver, contributory negligence, and assumption of risk set out in his Point IX, we submit that where there is no showing by appellant of *knowledge of structural defectiveness* of the beams on the part of respondent, such theory and argument must immediately fail, even if the theory were sound, which it is not.

The cases and authorities cited by appellant are either not in point or involve only those situations where the buyer must have actual knowledge of the defect, continue to use the goods and additional damages result from such use. And it is further noted that even in those cases that may involve these elements, where the continued use has been at the suggestion or instigation of the seller, the courts still allow recovery to the buyer for his damages (See 33 ALR 2nd 513, 517).

Therefore we feel the trial court was fully justified in not finding for appellant on these points.

POINT VII

THE COURT DID NOT ERR IN FINDING THAT PLAINTIFF MADE NO COMPROMISE WITH DEFENDANT ON PRICE REDUCTION BY REASON OF STRUCTURAL DEFECTS IN THE BEAMS, AND THE COURT DID NOT ERR IN NOT GRANTING A NEW TRIAL OR TO SET ASIDE THE JUDGMENT AFTER HEARING ADDITIONAL TESTIMONY ON THE EVIDENCE GIVEN BY W. WARD BLAZZARD ON THE QUESTION OF PRICE REDUCTION.

Counsel for appellant states in his brief at point VIII that Mrs. Leishman admitted the rebate was given because of structural defects. This simply is not the fact. Mrs. Leishman's testimony was to the effect that the structural defects of the beams *did not* have anything to do with the discount. She testified as follows (TR 119):

A. "The discount was given later, yes."

Q. "And that was because of all the factors, one including the structural aspects of the beams. Isn't that true?"

A. "No, Sir."

Again, we refer the court to our argument in Point IV of this brief on this question, where it is clear, both from Mr. Dell's testimony and Mr. Weaver's testimony that the reduction in price was by reason of someone else having bought the beams for less money (TR 39, 152). It was Mr. Weaver of appellant company who respondent was dealing with, not Mr. Blazzard, and so appellant is bound by Mr. Weaver's own testimony on this point, which is very clear.

Just how the credit memorandum in the hands of Mr. Blazzard received the notation "adjustment of price due to dissatisfaction in laminating" got there, when it was not entered on the copy given to respondent, and whether or not the judge believed Mr. Blazzard's explanation of putting the notation there himself (it was not entered there by Mr. Weav-

er, who had the conversation as to price adjustment with respondent), makes no difference in this case.

Further, we do not believe nor recollect the judge stating that he would be obligated to dismiss plaintiff's action, if what Mr. Blazzard said was in fact true. It appears nowhere in the record, and even if the statement were made, it would have no bearing on this case.

The trial judge, by his further order, merely found that he believed Mr. Blazard had not tried deliberately to pull a fast one on the court. This does not mean that the trial judge had to throw out the testimony of Mrs. Leishman, Mr. Dell, and Mr. Weaver, as to the reason for the price reduction.

Again, there was ample evidence to support the court's finding on the reason for the reduction in price on the beams, and that it was not by reason of any structural defects.

POINT VIII

THE COURT WAS CORRECT IN FINDING RESPONDENT SUFFERED DAMAGES IN THE AMOUNT OF $7,500.00.

As stated in 22 Am. Jur. 2nd, 190, Sec. 132:

> "The goal of the damage remedy in cases involving injury to a person's interest in real property is that of compensation. One whose interest in realty has been injured by the tortious act or omission of another is entitled to those damages which will compensate him for the injury sustained. Generally this principle is translated into the following two rules of damages: (1) the injured party is entitled to recover the difference between the value of the real property immediately before and immediately after the injury (often referred to as the 'diminution in value' rule); (2) the injured party is entitled to recover the cost of repairing the realty by restoring it to its condition immediately prior to the injury (generally referred to as the 'restoration' or 'cost or repair' rule)."

Appellant's counsel cites in his brief the diminution in value rule, as the applicable rule. In the footnotes of the cases referred to under appellants citation in 22 Am. Jur. 2nd, 194, Sec. 134, the case of *Curtis v. Fruin-Colnon Contracting Company*, 363 Mo. 676; 253 SW 2nd 158 is cited to the effect that the "Restoration or cost of repair" rule may be applicable in these type cases where the cost of restoration is less than the diminution in value and the realty can be repaired. The trial court considered this in hearing testimony on the damages (TR 97).

Consequently there was not only evidence in the record under the "diminution of value" rule, which amounted to $17,500.00 damages, but also expert testimony on the "restoration or cost of repair" rule.

Mr. Robert Gray testified as a general contractor that he had made a study of the collapsed Samak Lodge and had carefully calculated his figures in the cost of reconstructing and restoring the premises. His estimate of cost for the various items to do the job was testified to in detail with a cost of restoring the premises as it was just prior to the collapse of the roof structure of $11,506.35 (TR 98, 99, 100).

Now Mrs. Leishman who was the owner, builder, and operator of the Samak Lodge property and who had developed a going business there, as well as had offers of purchase on the property after the business was a going concern (TR 104, 105) was a qualified witness to testify of the property value just prior to the collapse of the building as well as its value after the collapse and thus the testimony of these values of $25,000.00 before the collapse and $7,500.00 after the destruction is in the record as competent evidence (See 20 Am. Jur. 751, Sec. 892).

Furthermore Mrs. Leishman's testimony was uncontradicted. Appellant's attorney offered no evidence whatsoever on the question of value of the property nor on the cost of restoring the same, and the trial judge was fully justified to weigh both Mr. Gray's testimony and Mrs. Leishman's testimony as to these damages. (See 20 Am. Jur., 1030-1032, Sec. 1180)

Thus the court was in a position in this case to adopt the lesser of the two amounts, the dimin-

ished value or the cost of restoring, as the measure of damages.

In 22 Am. Jur. 2nd, 204-205, Sec. 140 it states:

> "It has also been held that the owner is entitled to recover the entire cost of restoring a damaged building to its former condition, unless such cost exceeds its diminution in value as the result of the injury, in which event the recovery must be limited to the amount of such diminution. Under this rule the court should receive evidence both as to the cost of restoring the building and as to the amount of its diminished value, and then adopt as the measure of damages the lesser of the two amounts."

Counsel for appellant cites the case of *Gilmore v. Cohen*, 386 P. 2nd 81 (Ariz.) for the proposition that only nominal damages should be allowed. The facts in that case showed no apparent actual damage, while in the case at bar, there was actual damage apparent from the fact that the roof collapsed, and it was only a question of how much damage. Mrs. Leishman had spent in cash over $6500.00 and with some donated labor to restore the building and roof structure before (TR 104, 110), and Mr. Gray testified that it would cost $11,506.35 to restore the Lodge, so there was no question about the *fact* of damage being proven. The court in the Gilmore case stated:

> "It is firmly established, of course, in this state as elsewhere, that *certainty in amount of damages* is not essential to recovery when the *fact* of damage is proven . . . This is simply a recognition that doubts as to

> the extent of the injury should be resolved in favor of the innocent plaintiff and against the wrongdoer."

We submit that the court in the Gilmore case supports respondents position on damages.

It should also be pointed out that the trial judge made a special, personal trip to view for himself the damaged Samak Lodge to consider the extent of damage and salvage material (TR 192, 208). Consequently, from the evidence received and from the personal inspection by the judge, the court made a proper finding as to damages in this case.

CONCLUSION

It is apparent from an examination of the facts and evidence in this case that the trial court properly found in favor of Respondent, and the judgment of the lower court should be affirmed and the Respondents awarded their costs herein.

Respectfully submitted,

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