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PHILADELPHIA CONSTRUCTION Non-Suit Granted



Daniel J. Rucket

In February 2008, masonry restoration contractor Kevin Waggle began underpinning the basement party wall of a home in historic Old City Philadelphia as part of a basement renovation project. Underpinning is a process of digging and filling pockets underneath the brick wall of the home and filling them with concrete after lowering the floor to provide structural support for the wall. This party wall was constructed of one brick wall next to another brick wall of the adjoining home (owned by “KK”). The walls were connected by soldier bricks: bricks set sideways every ninth course, tying the two walls together from the basement to the fourth floor, making it one homogeneous party wall. The underpinning pockets were twelve inches high and extended eight inches under the party wall to support both sides of the party wall. After excavating part of the basement floor, Waggle began digging the first three underpinning pockets, with six feet of undisturbed wall between them.

The same day, while knowing that Waggle was doing work next door, KK had his own contractor remove sidewalk bricks and concrete in front of his home using a jackhammer and sledgehammer, causing the walls to vibrate. That evening, KK complained that there suddenly were cracks in the party wall of his home and that the front door would not close, beginning at lunchtime that afternoon. Waggle inspected his work the next morning and found that no damage had occurred to his side of the wall and no underpinning pockets were disturbed.

KK then alleged that additional cracks on the party wall and concrete basement floor developed and that his side of the party wall continued to settle over the next five months. KK also made a claim to his homeowner's insurance company, claiming not only damage to the party wall, but also cracking and damage to the front wall, rear wall, and roof of his home, with an estimated cost of \$341,000 to repair.

Waggle insisted from learning about KK's claims that it was not possible for there to be damage to KK's wall because of the way the wall was constructed. Only three pockets were dug the day KK alleges that damage occurred, and there was no damage to the wall or pockets on which Waggle was working. Because the wall was constructed with the soldier bricks, it was not possible for KK's wall to drop without the other side dropping or exhibiting any damage. Although KK claimed that his party wall continued to settle and the cracks got worse, there was never any damage to any of the pockets that Waggle dug or to the wall on which Waggle was working through the remainder of the project.

An adjuster for KK's insurance company inspected KK's home upon receiving the claim and determined that there was no damage to the front wall, rear wall, or roof of the home as a result of the underpinning. He estimated the damage to the party wall to be approximately \$50,000.

In September 2008, seven months after KK made his claim, an engineer was retained on behalf of KK's insurance company to inspect KK's home to determine the extent and cause of the damage. The engineer (who as a measure of professional courtesy we will call "Johnny Structure") went to KK's home. He did not go into the home in which Waggle had performed his work, did not speak with anyone involved in the construction (including two structural engineers), did not speak with KK, did not review any plans, did not review any documents, and did not review any photographs of the construction or claimed damages. Johnny Structure was told only that a contractor had lowered the basement floor next door to perform underpinning work. Johnny Structure did not know what work had been done, how it had been done, or where it had been done. Johnny Structure saw cracks in the plaster and parging covering KK's party wall and a crack in the concrete basement floor. He did not inspect the entire wall because personal items were stacked against the wall. He was not allowed to remove any plaster, parging, or concrete to inspect the actual bricks or under the floor. Johnny Structure was not aware that another contractor was doing work on the sidewalk that vibrated the walls of KK's home or that water had begun infiltrating through the party wall from KK's basement a week after the first underpinning pockets were dug. Armed with only his visual observation of cracks and being told that someone had done work next door,

Johnny Structure prepared a report in which he concluded that the “construction activities” next door caused the damage to the party wall. KK’s insurance company ultimately paid a total of \$235,000 in property damage and additional living expenses to KK.

KK’s insurance company filed a subrogation suit in the Court of Common Pleas of Philadelphia County, Pennsylvania against Waggle, KK’s neighbors, and the structural engineer for the neighbors. KK also filed his own lawsuit, which was consolidated for discovery, but which he eventually withdrew after his deposition was completed. During discovery, thousands of pages of documents and photographs were produced. Over a dozen depositions were conducted. At the conclusion of discovery, Johnny Structure prepared a written expert report for this litigation. After identifying items he reviewed (which did not include any depositions except Waggle’s deposition), Johnny Structure concluded that his review of these documents did not change his original opinion that the party wall experienced movement from construction activities next door. Johnny Structure failed to discuss in his report any details about the work that Waggle conducted, the manner in which it allegedly was not conducted properly, or how any specific construction activities (especially any acts or omissions by Waggle) caused KK’s side of the

party wall to move. He did not discuss any other potential causes of the movement of the wall.

The case was assigned to the Honorable Marlene Lachman for trial on January 28, 2013. We filed a motion in limine to preclude Johnny Structure from testifying at trial. In Pennsylvania, expert witnesses are required to set forth their opinions with specificity in their report, and their testimony is limited to the fair scope of their report at trial. *Pa.R.Civ.P. 4003.5*.

Expert testimony is required in cases involving construction, as such cases deal with issues beyond the knowledge of the average person. In a construction case, an expert must specifically state the facts on which his/her opinion is based and must establish the standard of care, breach of the standard of care, and a causal relation between the breach and the claimed damages. Judge Lachman partially granted the motion, allowing Johnny Structure to testify that the “construction activities” caused movement of the other side of the wall, but precluding him from testifying to any acts or omissions of Waggle that caused the wall movement because he failed to address any standard of care that applied to the work, breach of any standard of care, or how the breach caused the alleged damages in his reports.

The case proceeded to trial for four days. Waggle maintained that his work was done properly and

did not cause KK's party wall to move. Waggle contended that the damage was caused by the sidewalk contractor causing the basement floor to settle because of water conditions under the floor and that the damage to the wall was caused by a ceiling joist being raised inside KK's house. Johnny Structure was cross-examined extensively about the extremely limited investigation he conducted which led to his initial conclusion, and about the lack of damage to the party wall on which Waggle worked.

At the end of the plaintiff's case, we made a motion for non-suit, which Judge Lachman took under advisement while we presented our first three witnesses. On the fifth and final day of trial, Judge Lachman granted the motion for non-suit, ruling that the plaintiff had failed to present any evidence that Waggle's work caused KK's wall to move, particularly because Johnny Structure had failed to set forth anything in his report about Waggle's work, how it was allegedly done

improperly, and how it caused the movement of the party wall.

An important lesson to be learned from this case is *all available information must be obtained before reaching preliminary conclusions*. Johnny Structure chose to obtain no information about the project and other activities at the time the alleged damage occurred before concluding that the damage was caused by Waggle's work, resulting in KK's insurance company paying hundreds of thousands of dollars to KK. If he had obtained all of the facts, including discussing the work with Waggle and finding out about the sidewalk work and water problems, the true cause of the damage could have been discovered and these payments could have been avoided.

Philadelphia Contribution Insurance Co. vs. Waggle, et al., PCCP, January Term, 2010, No. 02367

Daniel J. Rucket concentrates his practice in general casualty litigation, including premises, motor vehicle, construction, product liability, catastrophic injury, uninsured/underinsured motorist, bad faith, insurance coverage, and civil rights litigation.

Dan graduated from the William and Mary Law School in 1993 and subsequently clerked for the Honorable Albert R. Subers in the Montgomery County Court of Common Pleas. Mr. Rucket is admitted to practice in Pennsylvania and the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania. He has been selected as a Pennsylvania Super Lawyer every year since 2010. He was selected as a Pennsylvania Rising Star in 2005, 2006 and 2007.

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