

ONTARIO
SUPERIOR COURT OF JUSTICE
(Small Claims Court)

CESALTINA FIUSA, GILBERTO FIUZA, and RICARDINA FIUZA
Plaintiffs

- and -

CREEKSIDE REAL ESTATE GROUP INC., ANDREW DOOLING, JACQUELINE
FERGUSON, THE CORPORATION OF THE CITY OF CAMBRIDGE and WATERLOO
(REGION) POLICE SERVICES BOARD
Defendants

* * * * *

P R O C E E D I N G S A T T R I A L
C O N T I N U A T I O N
(DAY THREE)

BEFORE THE HONOURABLE MADAM DEPUTY JUDGE C. DICKENSON
on May 18, 2018 at KITCHENER, Ontario

APPEARANCES:

Mr. T. Ellis	Counsel for the Plaintiffs
Mr. F. Battiston	Counsel for the Respondent, Creekside Real Estate Group
Mr. A. Dooling	Unrepresented Respondent
Ms. J. Ferguson	Unrepresented Respondent

T A B L E O F C O N T E N T S

ONTARIO
SUPERIOR COURT OF JUSTICE

W I T N E S S E S

<u>WITNESSES</u>	<u>Exam. in-Chief</u>	<u>Cr- Exam.</u>	<u>Re- Exam.</u>
FIUZA, Cesaltina		10	43
FIUZA, Nelson	52	55	
FIUZA, Regan	60	62	
FIUZA, Gilberto	65		

E X H I B I T S

<u>EXHIBIT NUMBER</u>	<u>ENTERED ON PAGE</u>
-----------------------	------------------------

* * * * *

Legend

[sic] - Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) - Indicates preceding word has been spelled phonetically.

Transcript Ordered May 21, 2019
Audio file receivedMay 23, 2019
Transcript Completed June 14, 2019
Ordering Party NotifiedAugust 21, 2019

FRIDAY, MAY 18, 2018

...UPON COURT COMMENCING (9:32:18)

5
THE COURT: All right. So the court reporter and I have realized there's two different docket orders so I'm not sure which one is out in the hall. In any event, the parties in the courtroom, please identify themselves for me. Please come up to the podium, everybody.

10
...PARTIES IDENTIFY THEMSELVES; OTHER MATTERS DEALT WITH, RECORDED BUT NOT TRANSCRIBED

R E C E S S (10:50:31)

15
U P O N R E S U M I N G (11:06:27)

THE COURT: Mr. Ellis, are you ready?

MR. ELLIS: Yes, Your Honour.

20
THE COURT: All right. It looks like when we left off that was in February, February 27th, the recordings were being played. Do you have any more recordings you want to - that's it? Okay. All right. Where're we going to now?

25
MR. BATTISTON: Preliminary matter, Your Honour. Preliminary matter.

THE COURT: Okay.

30
MR. BATTISTON: Dealing with medical records is sometimes a process that can be done with some efficiency between counsel. If you recall, and maybe you don't, so I'll bring it up again...

THE COURT: The doctor was....

MR. BATTISTON: ...the doctor was subpoenaed and you ordered the doctor over to today.

THE COURT: Right.

MR. BATTISTON: Now, in the process I thought, you know what Dr. Camala if you would prepare copies of your records I would be more than pleased to deal with it that way. Dr. Smith's office, who's here, Dr. Smith is here by the way.

THE COURT: Okay.

MR. BATTISTON: Dr. Smith's office quite properly requested - made us aware that she required authorizations.

THE COURT: Yes. Of course.

MR. BATTISTON: I requested from Mr. Ellis his clients' authorization given what Dr. Smith needed to basically respond to my prime objective which was to get the patient files which arise from the few documents that have been presented in the plaintiffs' brief.

Well the authorization was not forthcoming. I was told that the plaintiffs would not authorize the release of the documents. Easy way is not available so Dr. Smith is here today and I really don't want to impose on anyone to have to sit around...

THE COURT: Yes.

MR. BATTISTON: ...listening to matters that probably won't touch on what they could possibly respond to or deal with until later on. Dr. Camala has told me that she has brought her files, patient files. I haven't seen them of course because they're confidential.

THE COURT: Mm-hmm.

5
MR. BATTISTON: Mr. Ellis tells me he hasn't seen them. All I want to do is see what's there to see if they're relevant for what I need to know later depending on what the response is to the evidence that will be presented. I don't believe we were going to get to the point where I could possibly hope to question Dr. Smith on anything today.

THE COURT: And that was going to be my first question. Are you going to finish today or not?

10
MR. BATTISTON: I mean I'm still cross-examining the plaintiff's first witness.

THE COURT: I know.

MR. BATTISTON: And it's eleven o'clock.

THE COURT: You know, you can always be hopeful.

15
MR. BATTISTON: Oh yeah oh me too. I'm going to be as efficient as I can. I don't know what my friend is going to be presenting but I did tell Dr. Smith that I would bring it to your attention and I haven't seen the records and I don't know what my friend is going to do about medical records so I'll leave it to Mr. Ellis.

20
MR. ELLIS: Your Honour, I apologize. I, I don't want to ask this but as you know I've been in a couple of other cases this morning. I have not had a chance to sit down with the doctor to look at the records. If we could ask for a fifteen-minute recess I can review the records, review it with my client. Maybe we just consent to handing them over to my friend and then the doctor doesn't have to stay.

25
30
THE COURT: And that's fine with me if you're all right with that Mr. Battiston. I mean, I appreciate why don't both of you look at them together.

MR. BATTISTON: Well they're not my patients' files. I mean they they're Mr. Ellis' patients[sic].

THE COURT: Well they're not Mr. Ellis' patients either 'cause he's not a doctor...

MR. BATTISTON: All right.

THE COURT: ...you know but Mr. Ellis has to provide evidence of his claim. He's made the claim against you and the other defendants and you know you're all entitled, I think. I'm sorry I don't mean to leave you out of this because you're entitled too because the plaintiffs are making claims against all the defendants of a personal injury nature. So we can't ignore that the doctor's records may be relevant, may be partially relevant, may be wholly relevant. Some parts may be irrelevant but I mean I do personal injury work and I have for years so you know if we were in Superior Court those....

MR. BATTISTON: That would have been done previously.

THE COURT: That would have been done. It would be produced and that would be the end of it. So, I don't, I don't understand what the concern is quite frankly but certainly - I mean I don't want to delay things by ordering that the doctors produce copies of their records. If they're here with their files then if you think fifteen minutes is going to do it.

MR. ELLIS: Maybe a little more, Your Honour.

THE COURT: Maybe half an hour would be better.

MR. ELLIS: Half an hour would be better. That way you can review everything.

THE COURT: And I'm going to suggest to you Mr. Battiston as the only counsel for a defendant you

know that sort of - if you don't mind but assisting the unrepresented defendants...

MR. BATTISTON: Yes, of course.

THE COURT: ...in some way you know as an officer of the court because I think all the parties need to be involved in this. There's meeting rooms, certainly you can use any of the meeting rooms on this floor. They're always available and I'm happy to - if you think a half an hour is sufficient fine, we'll do that. That's going to take us to quarter to twelve and then....

MR. ELLIS: Do you want to take an early lunch?

THE COURT: No well what I'm thinking is if a half an hour isn't going to be sufficient maybe you know you come back once you start looking at the records, come back, talk to the court reporter and say you need additional time at which case I will take an early lunch and then we could resume at say 1:00 o'clock or 1:30 'cause I, I don't want to waste time but at the same time I want to make sure that everybody has the evidence that they need for both parties' respective cases; not just one or the other. So, if that's acceptable we can do that, all right?

MR. BATTISTON: Yes.

THE COURT: Okay. Then we will adjourn and again if you find that you need additional time to review the doctors' records please let the court reporter know ASAP and we'll go accordingly. Okay. All right.

MR. ELLIS: Thank you, Your Honour.

CLERK OF THE COURT: All rise. Court will recess for half an hour. [Off THE RECORD - 11:15:18 - BACK ON

RECORD - 11:36:11] This court will recess for lunch
'til 1:00 p.m.

R E C E S S

(11:15:18)

U P O N R E S U M I N G :

(01:16:47)

CLERK OF THE COURT: Order. All rise. This court will now resume. Please be seated.

MR. ELLIS: Your Honour, I want to apologize for the delay. It took me a long time to print them all.

THE COURT: Well, when I said 1:00 o'clock, I meant 1:00 o'clock. This is ridiculous. It is twenty after one and we've not even started this case again. I mean this is a huge waste of the court's resources. One trial has already been kicked from this list today because of this matter and I'm - I don't understand why you can't be prepared for court before you get here and not during the court itself.

MR. ELLIS: Your Honour, these weren't my documents. These were the documents that the defendant required.

THE COURT: I don't care Mr. Ellis. You heard what I had to say. Everybody had an hour and forty-five minutes to get their act together and get back to this courtroom to start at 1:00 o'clock. End of discussion. Please proceed, Mr. Battiston.

MR. BATTISTON: I would ask that the witness be given Exhibit Number 3. Your Honour, please. I believe it's marked book 3. Exhibit 3, book 3.

THE COURT: Don't we have any exhibit books for the witness? All I have are the exhibits in my file.

MR. BATTISTON: I have what I need just for a couple of questions on this, Your Honour. The witness can look at mine.

MR. ELLIS: I have a copy of all the books, Your Honour.

THE COURT: I have no exhibits in my file. I have no exhibits in my file. I don't know if I even have the entire file. I probably do not. Mr. Battiston, I have your brief, there's no exhibit.

MR. BATTISTON: No, I noticed it hasn't been put on the list.

THE COURT: This hasn't been marked yet?

MR. BATTISTON: No, not yet no.

THE COURT: Okay so that was in this folder and the only other thing I have in here is a motion record, pleadings and the plaintiffs' claim. Let's adjourn. We're gonna adjourn again until the court gets this straightened out downstairs. All right.

CLERK OF THE COURT: All rise. Court is recessed.

R E C E S S

(01:21:12)

U P O N R E S U M I N G :

(01:25:24)

CLERK OF THE COURT: All rise. This court will now resume. Please be seated.

THE COURT: All right. Did you ask for Exhibit 3?

MR. BATTISTON: Yes, Your Honour.

THE COURT: All right. Do we have a book for the witness?

MR. ELLIS: I believe that this is Exhibit 3. It's just not written on there.

THE COURT: All right. Exhibit 3.

CESALTINA FIUZA: PREVIOUSLY SWORN

CONTINUED CROSS-EXAMINATION BY MR. BATTISTON:

MR. BATTISTON: Your Honour, I'm directing Ms. Fiuza to Tab 5, page 8 of Exhibit 3 which presents the e-mail that she sent to Mayor Doug Craig on September 10th but before that at the bottom of the page there's a previous e-mail of Friday, August 22nd, 2014.

Q. Do you see it Ms. Fiuza in your book?

A. Yes. It's page 22.

Q. I've page 8....

A. I have page 22.

Q. Is that the one - are you looking at that e-mail?

A. Yes, I am.

Q. I'm sorry your book says what page?

A. Page 22.

Q. And can I ask you to turn over to the next page.

THE COURT: My book says page 22 as well.

MR. BATTISTON: Q. Twenty-two, page 23 then the next page. It's very condensed print there but if you look right in the middle you see where you wrote, boom, boom, boom, boom, you see that right in the middle?

A. Yes.

Q. All right, now if you go four lines below that you can read with me what you said at that time which is, and my parents are seniors....

MR. BATTISTON: Your Honour, we're good?

THE COURT: Yeah, I've got it. Thanks.

MR. BATTISTON: Q.

[As read] Your parents are seniors who are even more stressed about it and to make matters worse

they do not speak very good English so I need to handle the matter on their behalf.

Your parents don't speak English, Ms. Fiuza?

A. Not very much, no.

Q. Not very much?

A. No.

Q. Okay so do we take this for the truth that you handled the matter on their behalf?

A. Well they've asked me to handle it, yes.

Q. Sorry?

A. Yes.

Q. Yes, you did. So, as we saw from all the correspondence, in the e-mail correspondence that was presented in your evidence that was - those were all your e-mails. Your parents don't do e-mails I suppose?

A. Sorry?

Q. Do they do e-mail correspondence, your parents?

A. My dad no. My mom does - she kind of BS's her way through it with my help. She has to do an e-mail; she'll ask me for help. Type what she has to and I'll help her send.

Q. Oh, but none of these - none of the e-mails presented in evidence were your mother's e-mails?

A. No, 'cause she doesn't write English.

Q. Oh, I see. Does Portuguese?

A. She writes Portuguese, yes.

Q. Oh, I see. All right so all the communications with the By-Law Department were from you on your behalf and on behalf of your parents?

A. Yes.

Q. All the correspondence, communications with the Cambridge Police Department, Police Services was by you on your behalf and on behalf of your parents?

A. Yes.

Q. Okay and all of the communications with Mr. Buonvivere regarding this whole thing was only through you, is that correct?

A. That I remember, yes.

Q. Well, in your previous testimony you said there was, the first time your problems and the allegations you were making against Mr. Dooling and Ms. Ferguson was June 10th....

A. He did have a conversation with my parents one day. Apparently, my mom - I wasn't home but he came and....

Q. You weren't there so it's hearsay.

A. No, I was advised by my parents....

Q. Okay, well that's - then let's - then that's evidence that will come from your dad.

A. Yes.

Q. But, in your evidence you said that you called Mr. Buonvivere on June 10th. Do you remember - it was June 10th was the first time you spoke to him by telephone about noise allegation, is that correct?

A. I don't remember the exact date but I did speak to him, yes.

Q. You don't remember, well I wrote it down...

A. Okay.

Q. ...and it was shortly after that that there was a meeting convened at the Dooling house next door. Do you remember that when Joe said he'd come to see what he can do?

A. It was arranged by by-law, yes.

Q. Right and Sean Ellis was there, right?

A. Yes.

Q. And that's when there were attempts to try and ameliorate the situation by putting - because Mr. Elliott reported back to you, the by-law officer, correct?

A. Yes, and I believe he advised that what I was listening at the time when they had done whatever they did on their side...

Q. Yeah.

A. ...that was, was working for us.

Q. Okay and it did work for a while?

A. It worked for until by-law was there and then when they left the music was turned back up a bit.

Q. Okay, but you did not call Mr. Buonvivere again until July 13th - remember that 2:00 a.m. phone call in the morning?

A. It might have been - I don't remember what time it was or what day it was but yes, I did call him where I could not reach by-law and I thought I'd....

Q. Hold on, hold on, we're going to cut this short. There was a phone call at 2:20 a.m. on July 13th. Remember you left a message you said, my sleep is disturbed and you just wanted to wake him up because your sleep was disturbed. Do you remember your evidence in that regard?

A. I don't remember the exact words, what time a day but yes, I did send him a message.

Q. You left a message?

A. I left a message to try and get some help, yes.

Q. Okay, good. Then, the last time you spoke with him was on July 26th. Do you remember that when he told you to use ear plugs?

A. I don't remember the exact date but yes, I do remember.

Q. All right. And that was the last time you spoke with him?

A. Yes, 'cause I advised by-law if they would let him know the situation....

Q. Yes or no?

A. Yes.

Q. Yes, okay. Thank you. And your parents did not speak with him or contact Mr. Buonvivere about this situation at any time after July 26th, correct?

A. No.

Q. No?

A. No.

Q. No? All right. Thank you. If I can refer you then to the big book, Exhibit 1. The big book. Is there a big book and I'm taking a chance on this one, page 200?

THE COURT: Good luck with that.

MR. BATTISTON: Sorry?

THE COURT: And good luck with that.

MR. BATTISTON: We tried to check and double-check that but the numbers are a little.

THE COURT: Two hundred....

MR. BATTISTON: What's that, I got 200 which is an e-mail of December 13th, 2014.

THE COURT: That's what I have.

THE WITNESS: Yes.

MR. BATTISTON: Q. Yeah, we're good? All right. The e-mail at the bottom was an e-mail of Saturday, December 13th, 2014. The last line you said, this is - and this is an e-mail to?

A. Would have been to by-law.

Q. I'm guessing by-law.

A. Yes.

Q. Ms. Fiuza, yes?

A. Yes.

Q. All right so at 11:45 a.m. you said,

[As read] This is noise abuse, can't even call by-law because no one does anything.

That's a little strong statement, don't you agree?

A. No.

Q. No, it's not, you didn't agree.

A. No, considering what we were - no.

Q. All right let's try another one. Turn to page 212
5 and that's an e-mail of Friday, December 19th, are we in sync,
good?

A. Yes.

Q. Right in the middle is - it seems sort of a
10 disjointed e-mail but you see where it says, heard main floor, on
that line about four lines down on that e-mail right in the middle?

A. Yes.

Q.

[As read] Heard main floor, upper case,
15 basement, hallway to bedrooms, even went in the
bedroom heard the bass.

A. We knew that.

Q. And then I circled this one,

[As read] Don't call by-law as nothing will be
20 done by by-law and we end up suffering more as
they turn it up and make us pay.

Again that's a pretty strong statement, don't you
think Ms. Fiuza?

A. No, it's not.

Q. No, all right. Turn to page 218. This is an e-
25 mail December 23rd, 2014. Again you close off with a statement
that I consider quite strong and if you're following me it says,

[As read] Don't call by-law because you don't do
30 anything and then leave and it is worse and you
still say not bad and we end up suffering more.

Did you say that on December 23rd?

A. Yes.

Q. All right. Turn to page 219. Right in the middle of the page of an e-mail December 24th you said,

[As read] Second biggest mistake was calling for by-law instead of recording how loud it was first.

Did you make that statement?

A. It's written down, yes.

Q. All right. Did you already know at this time you were going to sue the By-Law Department?

A. I don't remember what....

Q. No, when did you formulate that...

A. I'd have to look...

Q. ...opinion?

A. ...at my documents, I don't remember.

Q. No? You don't remember, no idea? All right turn to page 254.

A. Did you say 254?

Q. Two fifty-four, I hope we're in sync.

A. It's part of an e-mail?

Q. It starts at the top, hard base noise still playing. Are we, are we in-line?

A. Yes.

Q. Right at the bottom and this statement is even bold, capitalized.

[As read] By-law is responsible for this nightmare in my parents' home. You have allowed this nightmare into our home and repeated....

This is to the By-Law Department?

A. Yes.

Q.

[As read] And repeatedly experience a loss of enjoyment in our home. It's after eleven p.m. we

can't even turn to by-law or the police for help
as you do nothing and give them permission to
continue such behaviour.

When you made the statement had you already formulated
a decision to sue by-law and police?

A. I don't remember what date. I'd have to look at
my notes to see when.

Q. But you don't have your notes here?

A. Don't have, no.

Q. I see. Page 359. A bottom quarter of a, again
condensed e-mail. You see the line that says, advised we are
suing.

A. Page 259?

Q. Sorry?

A. No.

THE COURT: On 359?

MR. BATTISTON: Three forty-nine. Sorry, sorry, Your
Honour.

THE COURT: Did you say the bottom quarter?

MR. BATTISTON: Q. Bottom quarter there's a dash and
then it says, advised we are suing. All right we're all on the
same page.

A. Sorry, which page?

Q. So, this is an e-mail....

THE COURT: Page 349.

THE WITNESS: And where?

THE COURT: About a quarter of the way...

MR. BATTISTON: Q. Bottom quarter.

THE COURT: ...from the bottom.

THE WITNESS: Okay. Oh, yes.

MR. BATTISTON: Q. Okay, got it? All right so if - the previous page indicates that this e-mail was to Norman, Norman Neilson who is Waterloo Police, correct?

A. Yes. Yes.

Q. And the second page where I've now directed your attention you state, we are,

[As read] Advised we are suing as we feel police and by-law have been negligent in the matter.

Is that pretty clear now that by Feb - March of 2015 you had resolved to sue...

A. Yes.

Q. ...by-law and police?

A. Yes.

Q. All right, because you say here, they were negligent, right?

A. Yes.

Q.

[As read] They have taken no action to resolve the issue and let him know by their actions that he can continue and not to have to do anything.

[Next] He knows by-law and police do nothing.

So, is that because there were no charges laid at that time, Ms. Fiuza?

A. Yes.

Q. In addition to whatever negligence you were pleading, correct?

A. Well they would just come in and they would just listen, go we don't think it's that bad. There was no, no audios taken, there was no nothing to....

Q. Got it. Well you then prepared or had your legal representative, Mr. Ellis, prepared a claim, correct? So, you sued Mr. Dooling, Ms. Ferguson, correct?

A. Yes, yes.

Q. My client, Creekside?

A. Yes.

Q. The By-Law Department...

A. Yes.

5 Q. ...of the City of Cambridge and Waterloo Police Services?

A. Yes.

10 Q. All right. Do you have the claim before you or that I can put it before you, Ms. Fiuza?

A. I don't have a claim before me.

Q. No, all right. You can look on through mine.

MR. BATTISTON: Might need to be an exhibit, does it, Your Honour?

THE COURT: No, we won't make the claim an exhibit, no. Let me just find it first.

15 **MR. BATTISTON:** Q. So, paragraph one says,
[As read] The plaintiffs claim [and let's focus on] (a) general damages and special damages for private nuisance, failure to protect and negligence.

20 You see that?

A. Mm-hmm.

25 Q. All right. Now I've gone through this many times and I want you to pick up again at paragraph 14. Now here you start laying out your case against the By-Law Department and the police 'cause you say at the end of the first line,

[As read] The plaintiffs were instructed by by-law officer Shaun Elliott that they could proceed to appear before a Justice of the Peace to file charges.

30 And you did that didn't you?

A. Yes.

Q. Yes, you did. And, you did that because according to what is stated here, they believed their hands are tied. Who's that, the By-Law Department, Ms. Fiuza?

A. Yeah, I guess by-law or the police.

Q. Or police? So, you were told that their hands were tied?

A. That could have been the words they used. If that's what I put down, yes.

Q. All right and why were their hands tied?

A. I believe it's 'cause the by-law was vague and there was nothing they could do to enforce it.

Q. Or, the noise wasn't disturbing? Was that one of them too? Was that one of the options?

A. Based on what their perception of listening to five minutes, they would say that they didn't find it to be disturbing.

Q. There was no charge - there were no charges laid even when you started the action, correct?

A. No. No.

Q. No, all right. Thank you. Paragraph 15. The last two lines there say, defendant four and five and those - by referring to defendants four and five you're referring to by-law and police, correct? You can check the front page if you want.

A. Four and five was Andrew and Jacqueline. That's paragraph four and five is that what we're looking at?

Q. No, the defendants, how they were....

A. Oh, sorry it is the Corporation of Cambridge and Waterloo Regional Police.

Q. Right. All right. So, you were referring to police and by-law in the statement that says,

[As read] They were unwilling to intervene on your behalf to resolve and make the situation stop.

Is that the position that was taken against the police and by-law?

A. Yes.

Q. All right. Then at paragraph 17, a little further down. It was stated on your behalf and on behalf of your parents, [As read] By-Law and police failed to properly assess, investigate, interview witnesses, review evidence or lay a charge even after the constant complaints by the plaintiffs. Lack of training and assessment on by-law's personal perception and not the homeowners. No form of measuring noise nor do they understand decibel meter readings.

Those were all - that was part of the entire position you took against by-law and police, is that correct?

A. Yes.

Q. All right. Then you continue. On your behalf, it's continued to paragraph 18.

[As read] By-law and police lack of initiative to enforce the by-law and protect one's right to enjoyment. Left the plaintiffs with no one to turn to as enforcement would not take action.

Pretty strong, pretty strong. So, this arises from some of the communications that you'd already sent to by-law and police previously in some of those e-mails I pointed out to you?

A. Yes.

Q. Right?

A. Mm-hmm.

Q. There's a connection there right? So, you were passing this on to Mr. Ellis to put into the claim, correct?

A. I - we did discuss the points, yes.

Q. All right. And, at paragraph 19 indeed you were advised as it says here by Nicole Papke.

[As read] They will no longer have by-law officers respond to noise complaints due to the situation.

Correct?

A. They stopped temporarily, then returned.

Q. But they stopped?

A. They stopped temporarily and then they came back. They started returning.

Q. They stopped responding to your communications and to your complaints.

A. Temporarily.

Q. Yes, or no?

A. Yes, temporarily.

Q. Yes. Thank you. And at paragraph 21,

[As read] The continuance occurrence of incidents and resulting undue stress and medical health issues which have been caused solely by the defendants, one, four and five.

So, there's the tie-in to my client. Creekside is defendant number one, correct? Look at that.

A. Yes, he is.

Q. All right. So Creekside is defendant number one and I went to paragraph 21 to see what the problem was with Creekside in relation to this whole problem because do you agree that all the allegations in the statement of claim that I've pointed out to you were all directed to by-law and police?

A. At the beginning, yes.

Q. The one's I referred to, correct?

A. Yes.

Q. All right. And you're claiming \$25,000. Of course, you're claiming against Mr. Dooling and Ms. Ferguson. You know what, I didn't even look to see what you claimed against them. I suppose as causing the noise, is that - I'm sure that's in here, somewhere right?

A. I'm sorry.

Q. I'm sure that's in here somewhere. Your problem with the Doolings was that they were causing the noise, correct?

A. Yeah, the constant bass noise, yes.

Q. All right. So if they allegedly were causing the noise and police and by-law were failing to do anything about it and lay charges and, and/or intervene with other legal measures, what was Creekside to do?

A. As the landlord, he could investigate and also you know try and work to resolve the issue.

Q. As the landlord they investigated on June 14th, you know that.

A. Yeah, he took steps that rectified the problem.

Q. Right.

A. But then the problem still continued.

Q. Right and through the notes we realize that Sean Elliott spoke with Mr. Buonvivere, correct? You know that?

A. Yes.

Q. You were in constant touch with Sean Elliott and the other by-law officers, correct?

A. Yes.

Q. All right. And, are you aware that Sean Elliott told Mr. Buonvivere that no charges were laid because there were not grounds to lay the charges?

A. Yes.

Q. You know that. So Mr. Buonvivere was charged with that knowledge in June of 2014. Is that correct?

A. I don't know the date but, yes.

Q. And, that would have taken until July because there were still no charges laid in July of 2014, correct?

A. Yes.

Q. And that would have been the case as of the last day you spoke to him on July 26th and that's all he knew at the time, correct? That there were no charges laid?

A. Yes.

Q. All right. You know Mr. Buonvivere lives in Toronto?

A. Yes.

Q. You knew that at the time?

A. Yes.

Q. So was it reasonable for Mr. Buonvivere to conclude that there was nothing more he could do if the By-Law Department and the police did not find proper grounds to lay charges against Mr. Dooling and Ms. Ferguson. Is that reasonable?

A. I think he could have tried to work with his tenants to try and help resolve the issue.

Q. What more could he have done? Tell me.

A. I don't know. I'm not a landlord so....

Q. No? I tried to find this out even before we got here on day one. I said what, what was Creekside, Mr. Buonvivere to do and I was told he should have evicted the tenants. Do you remember that?

A. If that was what needed to resolve the issue that was a suggestion that could have come up, yes.

Q. Right. He was - so is that part of the case Ms. Fiuza? I really need to know.

A. We wanted to have it resolved and if what it took was for him to evict, if that was necessary that was not the only option. If that's would it would took to do it then that's what's....

5 Q. Okay, now again Mr. Buonvivere's knowledge at the time - he was charged with the knowledge because he had no other available knowledge but to realize and be told that there were no charges to be laid and no charges were laid against Dooling - Mr. Dooling and Ms. Ferguson, correct?

A. No.

10 Q. No what?

A. No charges were laid.

Q. They weren't - there were no charges. All right, so was terminating the lease an option, is that what you're saying?

A. I'm not a landlord.

15 Q. Right.

A. So, it was up to Mr. Buonvivere to look at what his options are?

20 Q. Exactly. Your evidence included evidence about a phone call you had with the Landlord and Tenant Board, do you remember that?

A. I remember....

Q. You called in.

A. Yes, I called the Landlord....

25 Q. You called in and before you called in, I mean seemed to me you read up, on the law, that you have a better than a superficial knowledge of some legal principles that perhaps other people would not be sophisticated enough to understand. Let me refer you to Tab 5, that would be Exhibit 3 again Ms. Fiuza and I'll have my claim back by the way if you don't mind.

30

THE COURT: Just for the purpose of the record, Mr. Battiston, the claim has two paragraph 19's, two paragraph 20's and two paragraph 21's.

MR. BATTISTON: No?

THE COURT: I would not lie to you sir.

MR. BATTISTON: You wouldn't be mistaken on that, would you?

THE COURT: After the bold points, it resumes.

MR. BATTISTON: Oh, my God. Is that confusing enough for the record?

THE COURT: No, I understood it but I just want to make it clear on the record. I knew you....

MR. BATTISTON: Of all the times I've looked at this you know what I never noticed that.

THE COURT: You were referring to the first paragraph 19, 20 and 21. How's that? I understood that because that's what you were reading.

MR. BATTISTON: Yes, the first one, yes 'cause I didn't get....

THE COURT: And then when you turn over the page that's when you discover there's duplicate paragraphs.

MR. BATTISTON: Wow, I didn't Your Honour. I stand by what's here, Your Honour.

THE COURT: No, that's fine. It's not your document. I just want it clear for the record.

MR. BATTISTON: Right. Right. Right. Duly noted. Never noticed it before.

THE COURT: Okay, so we're back to Exhibit 3.

MR. BATTISTON: Hold that thought for a sec.

Q. So after - sorry Ms. Fiuza before we move on.

After all this elaborate set-up with the By-Law Department, the

police, the e-mails, the very sophisticated pleading against them, isn't it true that the case was dropped against them like within two months of the institution of the case?

A. Which case?

Q. The claim against Cambridge By-Law Department and the Waterloo Police Services.

A. I don't remember when it's dropped but it was dropped against them, yes.

Q. And I tried to find out why but no one tells me why. Why was the case dropped against them?

A. That was a decision that was made with my paralegal.

Q. Okay, well then that's communications between you and your legal advisor but they never paid anything?

A. No.

Q. To you?

A. No.

Q. So, after having focused so much on police and by-law they were let out of the action leaving the Doolings and the Buonvivere's to respond. All right, all right. I referred you to Exhibit 3. Please turn to Tab 5, page 8. It's already the one I had previously referred you to only this time it's page 8 which is the e-mail you sent to Mayor Doug Craig and I will refer to the top one, the one dated September 10th.

A. It may be a different page.

THE COURT: No. It's not page 8.

MR. BATTISTON: Oh, again?

THE COURT: Again. You've got different numbers.

THE WITNESS: I think it's 22.

MR. BATTISTON: Q. Twenty-two, sorry. I did all this in advance so the reference will be consistent. Thank you for keeping me in line. So, it's page 22 of Exhibit 3, Tab 5, page 22.

THE COURT: But which e-mail are you referring to?

MR. BATTISTON: This one, the September 10th one on page 22.

Q. And, I'm talking about you know your understanding of some legal principles and this letter was a very well worded letter, Ms. Fiuza, I'll grant you that compliment because the second paragraph that I've highlighted says,

[As read] We keep being told that we do not have a right to the enjoyment of our home and that these people have a right to play their music.

[Two paragraphs down you said] It seems in Cambridge no one is familiar with the common law nuisances and neighbour disturbances that states another person does not have a right to substantial and unreasonable interference with the occupation and enjoyment of land by its owner.

Wow, did you look that up?

A. Yes.

Q. I thought so. Good 'cause you continue in the next paragraph,

[As read] There is even the common law of nuisance, an environmental regulation that states in theory, that a land owner's right to use and enjoy their property doesn't give them the right to engage in activities that interfere with the rights of neighbours to use and enjoy their own property.

Did you look that up too?

A. Yes.

Q. Wow. Very well done. Good letter. Good letter and the Cambridge Police Services responded by not pursuing it and certainly not laying any charges, correct?

A. Yes.

Q. All right. And then you went to the Justice of the Peace, you yourself laid the charge with a Justice of the Peace 'cause no one else would do it for you, correct?

A. Yes, because I was advised by by-law and the Police Department to proceed.

Q. Right, right. So, it's pretty easy to understand and I'll ask you if you checked the provisions of the *Residential Tenancies Act* at any time while you were seeking advice about what rights you had *visa vie* the noise that your neighbours were making. Did you ever look it up?

A. I did see it but there's not very much online, yes.

Q. All right. Let me read it to you. So, s.23 of the *Residential Tenancies Act* - in fact I've got copies. It's easier to just refer everyone to it. Mr. Ellis. It says, *responsibility of the landlords*.

A. Thank you.

Q. See where it says that? It's at the top, the subheading. I have taken the excerpts from the *Act*.

A. Okay.

Q. Easier to read instead of flipping through all kinds of pages but this is the section that deals with responsibilities of landlords and look at number 23 at the bottom of that section. That's says,

[As read] A landlord shall not harass, obstruct, coerce, threaten or interfere with a tenant.

Do you read that?

A. Yes.

Q. All right. So, if a landlord is given information that By-Law Department and police won't charge his or her tenant with any noise violations, do you think it would be a little bit of an interference for that landlord to try and terminate the lease of that tenant in those circumstances?

5 A. I feel that he should have tried to - if that wasn't the option then try other options but his option was, he didn't want to try anything.

10 Q. Let's try the one underneath. And just look a little bit further down where it says, *termination for cause*. Do you read that? Read that with me.

A. Yes.

Q. It says,

[As read] A landlord may give a tenant notice of termination of the tenancy if the conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant is such that it interferes substantially [Not only interferes in a mild sort of way but substantially] interferes with the reasonable enjoyment of the residential complex for all usual purposes by the landlord.

20 Do you read that with me so far?

A. Mm-hmm.

Q.

25 [As read] By the landlord so if the landlord is being interfered with okay, and it continues, or another tenant.

You read that?

A. Mm-hmm.

30 Q.

[As read] Or substantially interferes with another right, lawful right, privilege or interest of the landlord or another tenant.

Do you read all that with me?

A. Yes.

Q. What's missing then, Ms. Fiuza?

A. Just saying because we weren't tenants it didn't apply to us.

Q. Right. So, you can read it like I read it. So, Mr. Buonvivere had no grounds to terminate the Dooling lease, did he, according to the *Residential Tenancies Act*? Right?

A. I don't know.

Q. Well, you just stated it yourself a moment ago. He couldn't serve notice of termination for cause, do you agree?

A. I don't....

Q. You're not a lawyer, that's fine. That's a fair answer if you want to answer it that way. So, the police are out - let out of the action. There are no charges laid by by-law or police. The *Residential Tenancies Act* doesn't appear to be even a possibility of any application in the circumstances. Mr. Buonvivere has no idea what's happening at the house after July 26th, 2014. Does that pretty much summarize the situation as of July 2014, Ms. Fiuza?

A. I don't know 'cause I did advise by-law that they should be advising Mr. Buonvivere of the situation.

Q. And, nothing happens after that according to any of the records, correct?

A. I don't know whether by-law contacted him or not, I wasn't given that information.

Q. No, you don't, no, you don't and really Mr. Buonvivere doesn't find out how grievous the situation has become

until he is served with a claim in this matter in March of 2015,
correct?

A. I'm not aware of what he was aware of or not, no.

Q. Remember in your evidence where you said in book
one - can we have book one, Exhibit 1 page 432 put in front of the
witness.

A. Yes.

Q. Still have book one there Ms. Fiuza?

A. Yes I do.

Q. I hope it's page 432.

A. Okay, July 18th?

Q. Yeah.

A. Okay.

Q. Good. One, two, three, fourth paragraph down.

When I read that I was quite surprised because according to this on
that date - oh no, you wrote it on July 18th. On July 16th it says
you called Constable Spalling(ph) which is I suppose one of the
police officers of...

A. Yes.

Q. ...Waterloo Police and reported that Andrew was
playing ball with his daughter on your front lawn. Is that true?

A. Yes.

Q. Because you said, we do not want him playing ball
on our property. Is that seriously, you reported that to the
police?

A. We don't want people trespassing on our property.

Q. Wow, wow, interesting. Is it true that you've
also called Fire Department on your neighbours because they use
those steel pits to do fires in their backyard?

A. They had an illegal open fire, yes.

Q. Called Fire Department?

A. On an illegal open fire, yes.

Q. Illegal?

A. You require a permit in Cambridge to have a bond -
to have an open fire.

Q. What's that?

A. It requires a permit in Cambridge....

Q. Yeah.

A. ...in Ontario to have an open fire...

Q. Sure.

A. ...meeting certain restrictions.

Q. Sure, it does. I'm sure it was an egregious,
egregious breach of those policies and in your evidence, you said
you presently get along with the present occupants Jaimee and
Christopher Ford, is that correct? Is that your evidence?

A. We were. Yeah, until the open fire and then
things turned around.

Q. Oh, because you reported them to the Fire
Department?

A. Things had started to....

Q. One would think that that would be the effect.
Book one, page 24. Book one, page 24, I hope.

THE COURT: Did you say 44 or 1....

MR. BATTISTON: Twenty-four.

THE COURT: One twenty-four?

MR. BATTISTON: Twenty-four, book one which I hope....

THE COURT: I'm hoping too.

MR. BATTISTON: It's an e-mail of June 16, 2014.

THE WITNESS: Yes.

THE COURT: Okay.

MR. BATTISTON: Q. Great. Now, this was again one of
those complaining e-mails about music and this is on a Monday and
it's in June and it's at 5:38. Like really Ms. Fiuza, you're
complaining about noise at 5:38 in the afternoon?

A. When you're listening to constant bass noise it becomes a nuisance....

Q. What are you doing at June - at 5:30 on an afternoon like that? Nothing, in the house, doing nothing?

A. I probably came home from work and was unwinding. I don't know, I don't remember that.

Q. So, you don't turn on some music, unwind a little bit, go outside, go back in the garden, nothing? Really?

A. Could be having dinner.

Q. Didn't say that did it?

A. No, it didn't say what I was doing so....

Q. In fact, I don't know, doesn't say anything about what you're doing.

A. No. The whole point is it was through the house and it's just a nuisance.

Q. I would image it's so egregious at 5:30 that you had reason or you thought you had reason to complain. How about - how about - let's try, let's try page 30. So, this was a Saturday, July 5th.

A. Okay.

Q. Saturday, July 5th, 11:55. You're monitoring the music. Eleven-thirty, you're monitoring music. You said, if it's not one shit it's another. I mean it's Saturday July 5th. Are you doing nothing early in the morning, you're not getting' out walking around the block or anything?

A. I was talking about the Walking Dead where the Walking Dead is on another....

Q. I see what you're talking about but it's 8:30 in the morning.

A. I sent that e-mail at 8:30.

Q. People cutting their grass with lawnmowers are going to cause a lot more noise than that.

A. Walking Dead's not on at 8:30 in the morning.

Q. No, it's not, I know.

A. It's not on at that time. it's on at 11:00 o'clock....

Q. Go to page 44. Saturday, July 26th. It's gotta be warm, beautiful day outside. Certainly, better than it is on January and you're sending an e-mails at 12:45 p.m., like noon. Song playing, seems to have more bass, like really? What are you doin' on July 26th at 12:00 noon but listening to the bass of this music next door, is that it?

A. Could have been having - getting ready for lunchtime.

Q. Wow, don't you have friends to go out with or shopping on a Saturday in July like that?

A. I'm not a big shopper, no.

Q. No, I guess not. I guess not. Turn to page 77. Turn to page 77. We started focusing on Saturdays. I mean Saturdays people got a million things to do, they're not workin', they're home and still early fall September 27th. We looked it up, the temperature was 22 degrees, 26 degrees on September 27th, 2014. Would you happen to have had a recollection of that day, the weather that day Ms. Fiuza?

A. No, I don't.

Q. Well, it couldn't've been snowing and ice and you're writing an e-mail at 10:57 a.m. on a Saturday to by-law saying, bass noise once again. Like really? There's no activity goin' around that neighbourhood to, to, to come close to what you're complaining about?

A. No.

Q. No, didn't think so. All right. Monday, October 13th. Turn to page 100. Turn to page 100; are we all looking at e-mails of October 13th?

A. Yes.

Q. At the bottom. What time is it? It's 7:30 on October 13th. It's 7:30, you're complaining about music and writing e-mails about the bass music started at, at the bottom it's 5:52 p.m. It's not even dinner time. Aren't you doing anything that - aren't you watching tv yourself?

A. I could be but it would overpower the tv. It was a nuisance with the tv competing with the tv.

Q. Oh, we heard that right. 'Cause it was coming right through the walls.

A. Yes.

Q. And causing thumping on your chest?

A. Yes.

Q. Right, which you couldn't record 'cause it doesn't come through on the recording?

A. No.

Q. Right? No. Christmas Eve, page 219, Christmas Eve. Christmas Eve. Are you Jehovah?

A. No.

Q. No, so you're celebrating Christmas on Christmas Eve, I assume December 24th, 2014?

A. Trying to.

Q. Trying to but you're writing e-mails at 7:15. What time are you writing? Eleven forty-three. Just before Christmas midnight bells ring, you're writing to by-law, no worse police.

A. Both.

Q. Police and by-law, complaining. Weren't you in company like this is - isn't there are party going on in your house or something?

A. No.

Q. No, there isn't.

A. We have it on the twenty-fifth.

Q. Were you home alone?

A. No, with my parents.

Q. Just you and your parents. Don't you have relatives?

A. We don't celebrate the 24th, no.

Q. Really? Wow, other people do, do you agree?

A. Yes.

Q. Rest of the Christian world does. Don't you go to midnight mass?

A. No.

Q. Obviously, you're home monitoring music.

A. And so are my parents.

Q. Christmas Day, page 222, Christmas Day. Good God, Christmas Day. Christmas Day. Again, the Doolings have at this point three children, my God. They have a baby, two babies, twins and a daughter that's six, seven years old. They're celebrating on Christmas Day and on page 222 we have e-mails, my gosh at 10:56 - sorry no, further down on December 25th 8:32 - no bass, went away, it's quieter today. We all went to nap between 2:00 p.m. and 4:00 p.m. Like that's what you do on Christmas Day, that's what you did?

A. No, but we were exhausted.

Q. Right, partying?

A. No.

Q. No, of course not. You were home by yourself. What happened on New Year's Eve, December 31st, 2014?

A. Which page?

Q. Turn to page 230. Oh, okay this could be a mix-up. Two thirty-five. Two thirty-five.

A. Two thirty-four.

Q. Are we in line for an e-mail December 31st...

A. Yes.

Q. ...at 1:50 p.m.?

A. Yes.

Q. Dad, and you say at 10:00 a.m. said, that bass noise started. Goodness gracious it's December 31st at 10:00 a.m. There's a busy - there're busy households all around you. What were you doing at 10:00 a.m. on December 31st?

A. I don't know. I don't have it written down.

Q. Aren't you getting ready to go out?

A. No.

Q. Did you go out that night?

A. No, I did not.

Q. Wow, why not?

A. I don't go out a lot to the Christmas Eve - to the New Year's parties.

Q. Don't you have friends calling you to go out?

A. Sometimes but sometimes I just prefer to stay....

Q. You didn't get called to go out on December 31st?

A. I didn't say I didn't get called out. I said I chose not to go out.

Q. And then you wrote an e-mail that's noting disturbing times. Well one thing I don't understand, the email is dated December 31st at 1:50 p.m., do you see that?

A. Yes.

Q. And then further down you have a notation for 1:53 p.m. That doesn't make sense. Oh, this is one of those weird e-mails that....

A. It might have been 12:50 and it's a misprint.

Q. Well, I don't know, how 'bout the first line why is that in a different font? Did we go through this before?

A. I don't know.

Q. We'll go through it again.

A. They're written at different times as the times are coming up, I'm putting in the time so if the font changes and I don't know why.

Q. Yeah, you were confused, I know. I know and at 1:53 p.m. you write, dad can't even get peaceful rest at 1:00 o'clock in the afternoon on December 31st.

A. My parents do enjoy taking afternoon naps.

Q. Really?

A. They are seniors.

Q. Like every day?

A. Most of the time. Not every day but....

Q. They nap all day, okay. They were only what 72, 73 at the time?

A. Around that yes.

Q. Do they have hobbies? Don't they go shopping, does your dad drive?

A. He does but he had stopped for a while because at this time he was not driving because of his health.

Q. At this time?

A. He stopped driving.

Q. Wow, interesting I didn't see that. That comes up for the first time.

A. Well that wasn't - I don't know if that was put down but he chose....

Q. Did he tell his doctor that?

A. I don't know.

Q. No, maybe not, interesting. How about in nicer weather, did your dad like gardening?

A. He does a little bit when he can 'cause I told him to try and stay active so he would do stuff slowly.

Q. He's only 72, 73 of course - he stopped gardening because of the noise?

A. Well he was not able to. I had to do - I had to take on some of the gardening responsibilities, yes.

Q. Wow, I didn't hear that, is that new?

A. We didn't report it; we're not discussing like....

Q. Did you put it in any e-mails?

A. I don't think so, no.

Q. No, I don't think so, interesting, interesting, interesting, interesting. Exhibit 1, page 11. I mean a little girl playing ball in front of your house, you called police. This is just another one I had to - I had to have you look at because on page 11 you see - it's in the middle of an e-mail - at the top it says May 31st, do you see that?

A. Yes.

Q. Two seventeen p.m. so Saturday afternoon hopefully on a beautiful day. You're writing an e-mail that says, FYI....

A. I don't have 217, sorry.

Q. You with me?

THE COURT: Two seventeen is the page before. It's at the bottom of a header line and on page 11 is the body of the e-mail.

THE WITNESS: Okay.

MR. BATTISTON: Q. You with me, FYI you see where it says that?

[As read] Looks like Joe may have spoken with his tenants as the music has been lowered. We can still hear it but it is much better. [This is the statement that I want to know if you wrote it.] Also wish that we did not hear it at all but that is requesting a lot from such people.

Do you remember making that statement Ms. Fiuza?

A. I wrote it.

Q. You wrote it so isn't that really at the heart of all this?

A. Was the constant bass noise, yes.

Q. No, really at the heart of it is you don't want to hear anything at all. You want silence in your life.

A. No.

Q. Well that's what you said.

A. We're discussing the bass.

Q. I wish that we did not hear, we can still hear it but it is much better. Right, it says, as the music has been lowered. So, you're changing your answer right now but I'm asking you to confirm what you wrote at the time.

A. I'm discussing the bass.

Q. The music - do you agree this is what it says, [As read] The music has been lowered. We can still hear it but it is much better. Also wish that we did not hear it at all but that is requesting a lot.

Is that what you said at the time?

A. Yes.

Q. All right and that's really what's at the heart of this, isn't it?

A. Regarding the music....

Q. You don't want to hear anything?

A. No.

Q. You don't want a little girl playing ball in front of your house 'cause it's your property?

A. It's trespassing. Should something happen we're held responsible.

Q. Sure, it is. Thank you, Ms. Fiuza.

MR. BATTISTON: That's all I have, Your Honour.

THE COURT: Yes, Mr. Ellis?

MR. ELLIS: No, Your Honour.

THE COURT: All right. Mr. Dooling and Ms. Ferguson, either one of you or both of you may question the witness. You can choose not to, it's your decision to make. I'm not going to give you any direction in that regard but I do want to say one thing if you do wish to ask her any questions.

For example let's say there is a discussion that you may have had with Ms. Fiuza when these issues were going on. It's for you to raise that issue with her now if you're going to give evidence about it later when you give your own evidence in the witness box okay.

So let's say - and I'm just throwing this out there - she came over and complained to you, you had a discussion with her about the music and her complaints about it and what was said. So if you want to bring that issue forward in your own evidence then you can question her, remind her about that particular incident and again I'm just giving this as an example but it's a particular rule of evidence and I don't want to bore you with the details of that particular rule but that's basically how it works.

So, I'm just giving you a heads-up about that. You may choose not to ask any questions but you certainly can ask her any questions in cross-examination of anything that she has said or anything that is contained in the records that have been filed as exhibits.

MS. FERGUSON: No questions for me.

MR. DOOLING: No questions.

43.

Fiuza v. Creekside et al.

C. Fiuza - Re-ex.

THE COURT: You have no questions no? All right, fine. Mr. Ellis, do you have anything on re-direct?

MR. ELLIS: I just have a few quick ones, Your Honour.

5 **RE-EXAMINATION BY MR. ELLIS:**

Q. If we could go to book two.

THE COURT: Just a second. The witness needs a book two.

MR. BATTISTON: This is not in evidence.

10 **MR. ELLIS:** Oh.

THE COURT: Book two? I've got it marked as Exhibit 2 already.

MR. ELLIS: Yeah, we consented that the entire thing was in evidence.

15 **MR. BATTISTON:** None, none of these documents were referred to in anyone's evidence.

THE COURT: The *Freedom of Information* stuff?

MR. BATTISTON: Yeah, no they're handwritten notes.

MR. ELLIS: No, no....

20 **THE COURT:** No, no, no, no.

MR. BATTISTON: Which one am I looking at?

THE COURT: The trial brief of the plaintiffs.

MR. BATTISTON: Oh, sorry wrong one.

THE COURT: And, Mr. Battiston, there was your book which never got marked.

25 **MR. BATTISTON:** Yeah, oh well we'll get to it.

THE COURT: Pardon?

MR. BATTISTON: I said we'll get to it if we can, I suppose.

30 **THE COURT:** Oh, we'll get to it, okay.

MR. BATTISTON: Or mark it now.

THE COURT: Okay you didn't refer the witness to it so...

MR. BATTISTON: It was filed. I would like to but I will.

THE COURT: All right. Let's go to Exhibit 2, which is book 2.

MR. ELLIS: Tab 4, page 12.

Q. The very top, June 27, 2014 could you read that excerpt from Sean Elliott.

A.

[As read] At 11:45 a.m. spoke with solicitor, relayed details of noise complaints and mediation results agreed. Based on description no reasonable prospect of conviction. Complainant can attempt to lay information on own governed by s.223 of the *Provincial Offences Act*. File also to be forwarded to WRPS for further mediation.

Q. Is this what you were told when you decided to file the private charges?

A. Yes.

Q. And, is that why you filed the private charges?

A. Yes.

Q. You had - there was discussions during your testimony regarding the audio recordings that you had done?

A. Yes.

MR. ELLIS: And, Your Honour. We went and got an expert report regarding the audio. The machine that was done I've served it on my friend.

MR. BATTISTON: It's not proper re-examination, Your Honour.

THE COURT: No, it wasn't even brought up in cross.

MR. BATTISTON: Not at all.

THE COURT: You can't just bring something up in re-direct.

MR. ELLIS: The audio recordings weren't brought up in cross?

THE COURT: The audio recordings themselves were brought up in cross.

MR. ELLIS: Okay.

THE COURT: We listened to them.

MR. ELLIS: Yeah.

THE COURT: If you wanted to file a report from an expert you should have done that in your chief.

MR. ELLIS: Yes.

THE WITNESS: We didn't know they were being brought in at the last minute.

MR. ELLIS: Q. So, in the issues that were brought up in cross about the - you complaining on Christmas Day.

A. Yes.

Q. Why were you filing a noise complaint on Christmas Day?

A. Because we were getting bass noise through the wall and it was interfering with our Christmas.

Q. And at that point in time how many months had you went through that?

A. With the first Christmas they had moved in in February so we'd gone through it for ten months - or sorry, yeah ten months.

Q. And the first time you had contacted Joe was in June 2014?

A. I don't remember the exact date but....

Q. Had you requested that by-law contact Joe before that date?

46.

Fiuza v. Creekside et al.

C. Fiuza - Re-ex.

A. I had asked them to notify the landlord of the situation so that he was aware of what was going on.

Q. Could we please turn to page 4 of Exhibit 2, Tab 4?

A. Page 4. Okay.

Q. The second one down, March 29th, 2014.

A. Okay.

Q. Can you read that one?

A. It's by Sean Elliott at 8:03 p.m.,
[As read] Spoke with property owner, relayed multiple noise complaints. Furthermore, relayed site observations at time of inspection and advised. Would assist with ongoing civil complaints and attempt to address music bass concerns.

Q. Okay. Could you flip to the next page, page 5? To the very top one.

A. At 6:04 p.m. by Sean Elliott?

Q. On what day?

A. On March 31st, 2014 at 6:04 p.m.

[As read] Received phone call from property owner, advised spoke with tenant. Expressed his frustration regarding ongoing civil dispute with attached neighbour. Advised they will attempt to address bass concerns to resolve matter. To contact complainant and forward above for joint resolution.

Q. Okay. Could you flip to page 9? One, two, three, fourth one down.

A. I don't have what date. I don't have....

Q. April 13th.

A. No, I don't have that. Hang on.

Q. Okay.

THE COURT: It's a document called *permit process activity*.

A. April - that's page 8.

Q. Oh, sorry.

5 A. It's got April 13th and April 20th and April 13th.

Q. Okay. It's one, two, three, fourth one down.

A. By Ryan Ashlie?

Q. Yes.

10 A.

[As read] Spoke with complainant. Advised music is down but wants property owner to contact.

Q. Okay. If you could flip over to what I believe to be page 11.

15 A. June 1st?

Q. Yes.

A. Okay.

Q. The second one down.

A. June 1st, Sean Elliott advised,

20 [As read] Property owner complainant and I arranged to complete site inspection and noise mediation for June 10th, 2014 at 5:00 p.m.

Q. So, were you aware that several times by-law had contacted the landlord?

25 A. I had asked him to contact, whether they were following through or not I was not aware of but....

Q. Okay, so you had - did you ever advise him to contact after July 2014?

30 A. I advised numerous times so that they could keep the landlord up to date on what was going on.

Q. And were you aware of whether they had or not?

A. No, they did not follow-up with me.

Q. Oh. There was a comment about the fact that you had called the police regarding the fact that the daughter had - was playing ball on your front lawn?

A. Yes.

Q. Do you have any idea when abouts that was?

A. No, I don't have the exact date. I know it was during the summer and Mr. Dooling was playing ball with his daughter and throwing the ball towards our property.

Q. Was that in the first summer or the second summer that they lived there?

A. It would be the second summer where the issues had already escalated.

Q. Okay.

MR. ELLIS: Your Honour, I think those are going to be all my re-direct.

THE COURT: All right and I guess that is it for you, Ms. Fiuza. You may step down. I want to point out to all of the parties that the book that was marked as Exhibit 2 and if you remember back to February there was a great deal of difficulty with the briefs because they were (a) numbered incorrectly so that everybody was operating off of different pages but the brief that got marked as Exhibit 2 must be your brief Mr. Ellis because there was one day and that might have been the first day when you didn't have all your briefs with you and you had to leave...

MR. ELLIS: It was the second day.

THE COURT: ...okay second day, whatever, you didn't have your briefs so you had to use your own briefs, They got marked as exhibits but only Exhibit 2 has all these yellow stickies on them and they're

5
10
highlighted, just so you're aware. I don't mark exhibits. My concern is when I'm looking at these exhibits when I'm writing my judgment, my page numbers are going to be all off because the page numbers don't always marry up. So what do you propose I do with Exhibit 2? I think the - at the very least the sticky notes should come off. What's highlighted is highlighted, doesn't matter. I would read through this in any event but I'll leave it to either of you to have any comments about that. Do you care?

MR. BATTISTON: A sticky, no I'm sure you'll use your discretion.

THE COURT: I just want you to be aware I mean honestly if it's highlighted or sticky noted it is not going to make any difference to me...

MR. BATTISTON: I'm satisfied.

THE COURT: ...because I'm going to read the exhibits as I need to so I just wanted to bring that to your attention. All right Mr. Ellis who's your next witness.

MR. BATTISTON: Can I just - sorry Your Honour.

THE COURT: Oh, sorry.

MR. BATTISTON: On May 2nd I served witnesses' statements, two additional witnesses' statements on Mr. Ellis.

THE COURT: Okay.

MR. BATTISTON: By the existing tenants.

THE COURT: Oh, okay, yes.

MR. BATTISTON: On May 2nd. Told him I was relying on these statements. Mr. Ellis subpoenaed those people, Chris and Jaimee Ford to attend. They've been

sitting well during the events of today. They're outside. Mr. Ellis I would implore upon him to call them or they should be let go at least they can salvage the rest of their day at 2:30 so I'll leave it to Mr. Ellis.

MR. ELLIS: I'm fine with letting them go, Your Honour. I only summonsed them because I received these last-minute written statements so unless he's going to put them in during his defence I'm not going to be calling them unless he puts them in.

THE COURT: Are you going to put them in?

MR. BATTISTON: Of course. Well not today but when I get there of course, yes.

THE COURT: No, no, no, but when you get to your case?

MR. BATTISTON: Absolutely, yes.

THE COURT: Are you going to just follow the affidavits or are you going to have them give the evidence.

MR. BATTISTON: Well, Mr. Ellis has subpoenaed them.

THE COURT: I know.

MR. BATTISTON: Let's bring them back next time, I suppose.

THE COURT: Okay.

MR. BATTISTON: I'll call it.

MR. ELLIS: They're not...

MR. BATTISTON: I'll call it. Fine. I'll call it.

THE COURT: Okay. I don't care.

MR. BATTISTON: Just as long as they're bound over that's all.

THE COURT: I just, I hate to waste their time. They've been here....

MR. BATTISTON: Yes, I know that's exactly why I'm bringing it up.

THE COURT: Yeah, I mean Mr. Ellis if you wanted them to give evidence do you want them to give evidence today or are you just gonna to leave it to Mr. Battiston to do that?

MR. ELLIS: I only summonsed them to make sure they showed up and the written statements didn't end up as evidence with no cross-examination of what's said in the written statement.

THE COURT: I see. Okay, well then let's let them go and then Mr. Battiston you can do what you want to do when it comes to your case, yeah.

MR. ELLIS: I will be calling them Your Honour if he produces those statements.

THE COURT: Well....

MR. ELLIS: I summonsed them, Your Honour because I received these statements ten days ago.

THE COURT: We'll wait for Mr. Battiston to get back in the courtroom please. Mr. Battiston while you were out of the courtroom letting the current tenants go, Mr. Ellis has informed me that he will be summoning them if you intend to file those affidavits, which I expect you intend to do.

MR. BATTISTON: Yes, yes, yes.

THE COURT: So, well I guess we'll just leave that 'til next time. It's unfortunate but there we have it. All right then who's gonna be next?

MR. ELLIS: Nelson Fiuza. I'm a little confused, Your Honour. I don't understand what the issue is. I summonsed them solely because there was a

statement. I'm not going to call them if he's not gonna put the statement in.

THE COURT: He just said he was gonna put the statements in.

MR. BATTISTON: Of course.

MR. ELLIS: Well, then.

THE COURT: He just said that. He said he was gonna put the statements in. I was hoping not to waste these people's time. It's 2:30, 2:40 on a Friday afternoon and guess they've been here all day and nothing's happened so in any event let's get going.

MR. ELLIS: Okay. Nelson Fiuza.

...NELSON FIUZA PAGED TO COURTROOM 5043

NELSON FIUZA: SWORN

EXAMINATION IN-CHIEF BY MR. ELLIS:

MR. ELLIS: If I could have book 3 for the witness.

THE COURT: Not from my exhibits you can't.

MR. ELLIS: No, I believe it should be up there.

THE WITNESS: I see Exhibit 1 and Exhibit 2, is that the one?

MR. ELLIS: Q. Yes. Tab 6. Thank you for coming today Mr. Fiuza. Could you tell us what you do for a living?

A. I'm a police officer with the Hamilton Police Service.

Q. And, what is your relation to the plaintiffs in this matter?

A. The female with you is my sister and my parents are behind you.

Q. Okay and do you remember doing the statement at Tab 6, Exhibit 3, Tab 6, page 1?

A. Yes, I do.

Q. Do you need a second to review that statement before you discuss it?

A. If I can have just a couple seconds that'd be great. I scanned it over. It helped me out.

Q. Can you tell us what the statement - can you tell us the story about what's in the statement?

A. On January 15, 2015 when I was at my parents' place at approximately 4:30 p.m. I went to visit my parents. I was made aware prior to all this of an issue with ongoing music coming from the neighbours' house. When I entered my house, I could hear the music playing and it was a lot louder than I was expecting. The comments that were coming from my family saying that the music was always bothering them. Took me awhile to understand what it was like until I walked in the house that day and at that day you basically - you could hear the bass coming through the door, through the wall of the shared houses. So basically you got two semis, concrete wall in the middle, the bass echoing right off that wall. I understand that the - approximately ten minutes after I was there my wife called police, City By-Law, they attended at the residence. An officer and a by-law attended; they went to speak to the neighbour. The music - they said that the neighbour was going to be lowering the music, even when they came back the music still wasn't lowered. It actually sounded like it got louder. The officer and the by-law officer observed all this and from my recollection to this they went back to speak with the neighbours in regards to this. They were told that there was no grounds to lay on this charge which I stated that that shouldn't be right; that there should be a charge to be able to lay and then I was also advised that Cambridge does not have the same by-laws as Hamilton

does or even Kitchener or Waterloo. So they felt that their hands were tied as well.

Q. Okay. Was this the only incident you had ever witnessed at your parents' house?

A. No, this is the only one I actually put to pen to paper or typed it in that aspect. There was a I would say a good five times that I attended the house after it that you could still hear it and it was disappointing that it was continuing over and over again and that the person that was living there as I never met anybody from the house that continued to do this.

Q. Yeah. Did you, did you speak to anybody other than the Waterloo Regional Police or Cambridge By-Law about this situation?

A. Yes, I spoke to actually my detectives in Hamilton in regards to this and they were actually shocked that a charge had not been laid yet.

Q. In Hamilton would - if you were on duty would there have been a charge laid?

A. Yes, I've actually been part of a charge being laid.

MR. BATTISTON: Is he being called as an expert in police procedure or...

THE COURT: Yeah, I mean...

MR. BATTISTON: ...what 'cause I should of had a report for any of this?

THE COURT: ...really Mr. Ellis he is a Hamilton police officer.

MR. BATTISTON: Exactly.

THE COURT: This has nothing to do with the City of Cambridge.

MR. ELLIS: Okay.

THE COURT: So, the questions you're asking him about whether or not detectives in Hamilton thought this was inappropriate or whether charges should be laid are certainly not relevant to this situation at hand.

MR. ELLIS: Okay.

THE COURT: Proceed.

MR. ELLIS: Q. How often did you visit your parent's home?

A. I usually try to visit them once every two weeks. It's just because of my shift work it makes it hard to attend Cambridge on a regular basis so once every two weeks I usually try to get up especially on the weekends.

Q. And there was only - there's only been five occurrences that you can remember where there's been a noise problem?

A. Yeah that I can recall, yes.

Q. Okay.

MR. ELLIS: Those are all my questions.

THE COURT: Mr. Battiston?

CROSS-EXAMINATION BY MR. BATTISTON:

Q. Mr. Fiuza?

A. Yes, sir.

Q. Were you in uniform when you went to visit your parents on that one day?

A. No, sir.

Q. You weren't?

A. No, sir.

Q. This was the only one you said you put to pen, what does that mean? Did you make notes on this occurrence before you prepared this letter?

A. No, this....

Q. 'Cause that's what police officers usually - I mean what's in your book, what are your notes, do you have notes to back this up?

A. No, that's my duty book, it's kept at the station. I did not have it with me so....

Q. You weren't on duty?

A. No, I was not.

Q. Okay. I wondered what's going on. Did you go speak to the neighbour yourself?

A. No, I did not.

Q. Okay and you know as a police officer giving evidence you always - there should be a hallmark of impartiality. Now are you here as a police officer giving an opinion as to whether charges should be laid or are you here to tell us what you heard and saw?

A. I think since I'm a police officer that's what I'm told twenty-four hours a day I should be base it both on both sides.

Q. Right and you're impartial?

A. I feel I am because I've had enough experience to deal with both aspects of it, yes.

Q. Giving evidence on behalf of your parents and your sister that have dragged this thing on like this and they're relying on you to straighten this out 'cause man the by-law officers couldn't figure it out. Waterloo police couldn't figure it out but my brother's a police officer. We've got to believe you, is that what I'm led to believe here?

A. No.

Q. No, all right. Slight exaggeration on your part perhaps just because you might be a little partial to your parents' case?

A. No.

Q. No, all right. You sure you go visit your parents every week or every second week?

A. I usually try to get there every second week.

Q. And, was that the case even at the time?

A. Yeah, especially since I was there before at Christmas time and everything, yes.

Q. Everything okay in the family at that time, Mr. Fiuza?

A. Yeah.

Q. Really?

A. Yes.

Q. Why weren't you with your parents on Christmas Day?

A. Because I worked the Christmas holidays and I was going over for dinner.

Q. Oh, got it. How about New Year's Eve?

A. New Year's Eve I was off, yes, I actually asked it for holiday time.

Q. You were with your parents?

A. I would have - I can't recall if I was there that day or not.

Q. Nothing in the evidence so far. If I can refer you - have you got Exhibit 3 in front of you there?

A. I think it's the one I'm opening up.

THE COURT: You have tell him it's book 3 cause....

MR. BATTISTON: Book 3, right it's referred to book 3. Is it there?

THE WITNESS: Okay, yeah.

MR. BATTISTON: Q. All right book 3, Tab 7, page 15. This is a document that hasn't been referred to in the evidence on behalf of your parents' case but this appears to be a hospital record from Cambridge Memorial Hospital and this - you see it's got

your father's name on the right hand side, sorry Ricardina; that's your mom, right?

A. Yes.

Q. All right. So, it looks like this is a report you know that deals with a visit by your mom, the date is - it's dictated April 3rd, 2015, you see that? And, date transcribed is like a month later which is - you know what I think it's March 4th and March 5th, it's transcribed, you agree with me?

A. Yeah

THE COURT: Yeah, it would be...

MR. BATTISTON: It's probably the case.

THE COURT: ...day month year is how the medical people....

MR. BATTISTON: Q. So, at the bottom it says, [As read] In the past the patient and the patient's husband, [so that's referring to your mom and your dad] would go to visit her son and grandchildren or invite their son and family over for dinner. This no longer occurs. This son bought a new home in October and the patient and the patient's husband have not yet seen the house.

This is March, what is going on here Mr. Fiuza?

A. My parents have not seen my house in March.

Q. Yeah.

A. Yeah, that's incorrect.

Q. That's incorrect? Oh.

A. They have been to my house.

Q. At that time?

A. Before that time.

Q. So, they said from October that you bought the house, they hadn't been over to see you, your grandchildren or your

children or you haven't been invited to their house either for dinner and this was March, so is this incorrect?

A. It is 'cause my dad actually helped me move.

Q. Wow, so who was wrong with this?

A. Depending if it was understood by the doctor that wrote this. I wasn't there so I can't state who wrote it.

Q. Or depending if somebody wanted to exaggerate what the heck was going on at the house maybe?

A. If that's your view yes, probably.

Q. Okay, it's possible though isn't it?

A. Possible.

Q. Because this person was only writing down what they were being told.

A. I do understand that my mom and dad don't speak very good English so if the person doesn't translate....

Q. Oh, so it's a transcription error?

A. It could be.

Q. Could be. All right. Otherwise, everything was hunky dory with the house and your parents and your sister.

A. Understandable yeah besides the issue that was at hand, yes.

MR. BATTISTON: No other questions. Thank you.

THE COURT: All right. Mr. Ellis, Mr. Dooling or Ms. Ferguson if you have any questions, no? All right.

Mr. Ellis, you don't have any questions, sorry?

MR. ELLIS: No.

THE COURT: Thank you. Mr. Fiuza you may be excused. Thank you. All right Mr. Ellis your next witness please?

MR. BATTISTON: Could I, if I may Your Honour?

THE COURT: Yes.

60.

Fiuza v. Creekside et al.

R. Fiuza - in-Ch.

MR. BATTISTON: Could you please give an indication when's the first available opportunity that I can make a motion for a dismissal of the claims against Creekside. Whenever you'd be prepared to entertain that motion.

THE COURT: Certainly not today.

MR. BATTISTON: Then I'll sit down.

THE COURT: Thank you.

MR. ELLIS: I call Regan Fiuza.

CLERK OF THE COURT: Regan?

MR. ELLIS: R-E-G-A-N.

...REGAN FIUZA PAGED TO COURTROOM 504

REGAN FIUZA: SWORN

EXAMINATION IN-CHIEF BY MR. ELLIS:

Q. Thank you for coming. Can you tell us what your relationship is with the plaintiffs?

A. Cesaltina?

Q. Yes.

A. I am her new sister-in-law.

Q. Okay. Can you tell us - Can you go to book 3, Tab 6, page 3.

A. Book 3, Tab 6, page 3?

Q. Yes, a willsay statement.

A. It's not mine.

Q. Oh, whose is it?

A. Page 10, mine, sir.

Q. Page 10, sorry. Do you recognize this statement?

A. Yes.

Q. Would you require a minute to - a second to read that just to review it?

MR. BATTISTON: Is it hers?

MR. ELLIS: Q. Yes. Is this your statement?

MR. BATTISTON: I got it at page 3.

THE COURT: Yeah, mine's at page 3 as well. Don't forget all the pages are incorrectly numbered.

MR. ELLIS: Q. Is this statement written in your maiden name?

A. Yes, the first married name.

Q. Can you tell us what this statement is in regards to?

A. On this date when we were visiting at the Fiuzas' residence the noise that we had heard about was witnessed by me when I was sitting in the living room and I felt it was excessive.

Q. Okay and had you visited the home very often?

A. I would say once every couple of weeks.

Q. Okay and how long have you been in the family unit?

A. Since 2012.

Q. Since 2012. And, had you experienced any other situations like this when you visited your family?

A. Not to the extent it happened that day. We had heard Cesaltina talk about the noise but when we had visited, we didn't hear it. Nelson and I only attend for short periods of time every couple of weeks. This is what I do. I'm a 911 operator so I take this information from people and I create these calls for service every day at work and when I was sitting at her house, I felt that the noise was extremely excessive and I called the police. Yeah, I called the police myself.

Q. Okay and but this is the only real bad episode that you witnessed?

A. We heard it at Christmas too but this one specifically is the one that stood out the most.

Q. Okay.

MR. ELLIS: Those are all my questions, Your Honour.

THE COURT: Mr. Battiston, do you have any questions?

CROSS-EXAMINATION BY MR. BATTISTON:

Q. So, do I refer to you as Mrs. Regan, no Mrs....

A. Regan.

Q. Regan. That's your first name.

A. My first name.

Q. What's your last name?

A. Fiuza as of two weeks ago.

Q. Okay, all right. Record's gotta catch up. Are you lookin at the book, Mrs. Fiuza that has your statement in it?

A. Yes.

Q. Okay, look at the form of your statement.

A. Yes.

Q. And, you didn't sign it though?

A. No, it was done on a computer.

Q. Who typed it?

A. I did.

Q. Okay, so flip back two pages and there's Nelson Fiuza's willsay, do you see that? Certainly, in my book it starts at page 12...

A. Yeah, I've got it.

Q. Right, did you type this?

A. No.

Q. Why's it in the same form? It's exactly the same.

A. Probably 'cause we use the same computer. We live in the same house.

Q. Oh, so he typed this.

A. I totally clearly recall the date we did it. Yes, he typed his own. He's a police officer he knows how to type a willsay. I'm a 911 operator, I know how to type a willsay.

Q. That's great but you used the same form. Did you see - who saw their statement first?

A. I'm sorry?

Q. Did you see his statement before you typed yours?

A. No.

Q. But you used the same form. Just - is that a coincidence?

A. It was e-mail.

Q. What's that?

A. It was....

Q. That's not an e-mail.

A. Well, it's a word document and it was sent by e-mail.

Q. Well, I'm looking at the document itself.

A. Yeah, it's a word document.

Q. It looks really - they look really similar. You wouldn't choose a different font, different size. Like look at the date in the willsay statement.

A. So, are you suggesting that I wrote his or he wrote mine?

Q. I'm just sayin', did you see his before you wrote yours.

A. No.

Q. Did he see yours before he wrote his?

A. Not that I recall.

Q. And by two separate episodes the same format is used to type the documents and the same font, some courier or whatever this is. I'm just sayin. You know I'm - just looks

really coincidental to me because you know it's so important for witnesses to be impartial but you're in the family.

A. Well, I'm twenty-six years of the Hamilton Police Service employee.

Q. Well, I guess we gotta believe what you say then I guess eh? Is that what's - we're supposed to believe?

A. That would be your choice but for me to say that I attended their residence on one occasion...

Q. Yeah.

A. ...to hear noise of this level which was going on for a few years that I'm aware of....

Q. About how many years?

A. Two, if not more.

Q. Started....

A. It started - well in 2012.

Q. Hold on, this was January 2015.

A. Right and that's exactly when we heard it in....

Q. You say two years before that?

A. That's when we were hearing about it, that it was a problem.

Q. Two years before that.

A. So....

Q. Did you write that down?

A. No.

Q. That's fine. All right no problem.

MR. BATTISTON: No other questions.

THE COURT: All right. Mr. Dooling or Ms. Ferguson, do you have any questions. No? All right. You may be excused Ms. Fiuza. Mr. Ellis?

MR. ELLIS: No further questions, Your Honour.

THE COURT: Who's your next witness?

MR. ELLIS: I call Gilberto to the stand. I will need the interpreter up there as well, Your Honour.

THE COURT: I'd like the interpreter qualified please.

MS. INTERPRETER: I'm - would you like to see my badge?

THE COURT: That would be helpful. You could give that evidence from the box.

CLERK OF THE COURT: And which language is it?

MS. INTERPRETER: Portuguese.

INGRID REHKOTH: INTERPRETER SWORN - Portuguese/English

CLERK OF THE COURT: Please state your name.

MS. INTERPRETER: Ingrid Rehkoth.

CLERK OF THE COURT: Could you spell it for the record please.

MS. INTERPRETER: First name I-N-G-R-I-D, last name R-E-H-K-O-T-H.

MR. BATTISTON: She's gonna have to - I ask that Madam Interpreter raise her voice a little bit 'cause I could barely hear you.

MS. INTERPRETER: Okay, I will.

MR. BATTISTON: Please.

CLERK OF THE COURT: Please stand up sir. Would you like to swear on the holy book or would you like to affirm to tell the truth?

GILBERTO FIUZA: SWORN

Testifies through Interpreter - Portuguese/English)

CLERK OF THE COURT: Please state your name.

THE WITNESS: Gilberto Fiuza.

CLERK OF THE COURT: And, could you spell it for the record please.

THE WITNESS: G-I-L-B-E-R-T-O.

CLERK OF THE COURT: Thank you. You may have a seat. If you wish you can come to this side of the room, be closer to the microphone. Thank you.

THE COURT: I'm wondering if - is there a spare chair in here that perhaps.

THE INTERPRETER: No, it's okay - I'm okay.

THE COURT: Are you sure?

THE INTERPRETER: I'll be fine.

EXAMINATION IN-CHIEF BY MR. ELLIS:

Q. Thank you for coming. Can you - could you tell us how long you've lived in the home?

MR. BATTISTON: We can't have a conversation going on between the interpreter and the witness. I was afraid that was gonna happen 'cause they're so close together and I can't hear.

THE COURT: She will have to interpret every single word he says to her.

THE INTERPRETER: Would you like me to stay closer 'cause he's just saying Portuguese? Just waiting for him to finish to....

MR. BATTISTON: ...hear what his answer is...

THE COURT: Oh, I don't want everybody speaking at once. It's very simple. The question gets interpreted in Portuguese, he gives the answer in Portuguese, she interprets it in English.

MR. BATTISTON: Right.

THE COURT: Everything that he says. Not a synopsis but everything, Okay?

THE INTERPRETER: Yes, I know my role.

THE COURT: Yes, she's a Ministry translator.

MR. BATTISTON: Let's do it.

THE WITNESS: I've been living in the house for about forty-three years since ninety-seventy something.

MR. ELLIS: Q. And is that at 540 Elgin Street?

A. Since 1975.

THE COURT: 1975?

MR. ELLIS: Q. And that's 540 Elgin Street in Cambridge?

A. Yes.

Q. And who do you live at that address with?

A. With my wife and my daughter and my kids.

MR. BATTISTON: And my what?

THE INTERPRETER: Kids.

MR. BATTISTON: Kids?

THE INTERPRETER: Yes.

MR. BATTISTON: How many other kids are there?

THE WITNESS: Two.

MR. ELLIS: Q. And who were the kids?

A. I have two children.

Q. Who are the two children?

A. My son and his wife.

Q. Do they live at your house?

A. No.

Q. So, when you said that you have your two kids living at your house, you don't have two kids living there now?

A. When I said I have my two kids I meant my daughter and my son. They were living in my house.

Q. And, who lives in your house now?

A. Me and my wife and my daughter.

Q. So, if we could go to the dates of February 2014, do you remember what happened then?

A. I don't know what happened.

Q. Do you understand why we're here today?

A. This is because of the problem of me going to the hospital.

Q. Okay and what caused you to have to go to the hospital?

A. It was the stress because of the music and then I started to get sick and that's what happened. I went to the hospital.

Q. Can you tell us when the music started?

A. I believe it started when the new couple moved to the house and I think it was around February.

Q. February of what year?

A. I don't know maybe 2014.

Q. Okay, do you recognize the young couple you're speaking about in the courtroom?

A. Yes, I can.

Q. Could you point to them please?

A. Both those two.

THE COURT: For the record Mr. Ellis.

MR. ELLIS: Yes, the witness is pointing to the defendants, Andrew Dooling and Jacqueline Ferguson.

THE INTERPRETER: He's just repeating that he pointed to the man in black and to the woman in pink.

MR. ELLIS: Q. Can you tell us in your words about the experience of the music playing?

MR. BATTISTON: Your Honour, this whispering is causing me some concern. You've got to be audible enough so I can understand that he's explaining the

answer to the interpreter so I can hear what the answer is but he's barely whispering.

THE COURT: I can hear him.

MR. BATTISTON: Well, I'm having difficulty.

THE COURT: I can hear him but I mean I don't understand Portuguese so it doesn't matter. The interpreter hears him.

MR. BATTISTON: Well, I just find it really odd that this conversation has to be carried on at a whisper level, I mean he's got to be able to speak up in just a little bit more, I submit.

MS. INTERPRETER: I will ask him to repeat in Portuguese again closer to the microphone.

A. It was because of the noise of the music was always bothering my head, making noises.

MR. ELLIS: Q. How often was the noises happen?

A. Every time they were playing music so every, every day there was music playing.

Q. Okay. Did you have any issues with your neighbours before these neighbours moved in?

A. I never had any problems with music. The problem was the new neighbours.

Q. And, you mentioned that you had a medical situation happen because of the music?

A. Yes.

Q. Whenabouts did you start to have medical problems?

A. So, I started to feel the impact I would say around July or August. Before that date the music was already being played and I was having trouble sleeping through the night or sleeping.

Q. So, would that be July or August of 2014?

70.

Fiuza v. Creekside et al.

G. Fiuza - in-Ch.

A. Yes, 2014.

Q. Do you know when you first went to see a doctor regarding the medical issue?

A. Right in the beginning I can't really point a date.

Q. Could we go to book 3, Tab 7?

THE INTERPRETER: Tab 7?

MR. ELLIS: Q. Yes. Would this be a medical report for you?

A. I don't know if it was in a hospital or if it was the family doctor but I know it was the doctor - at the doctors.

THE INTERPRETER: I can see the date 15, 2014 and November 22nd, 2014, February 9, 2014 - he's pointing to those dates for me.

A. And, I believe there's one more time but it's not in here.

Q. Okay, do you remember having to go to the hospital around those dates that are listed on there?

A. Yes, I remember November 15 was the first date and the 22nd was right after.

Q. And do you remember what the doctors had said to you when you went to go see them?

A. At the hospital you mean?

Q. Yes.

A. I don't remember 'cause I was really dizzy and confused and I know they talked to me but I can't recall. I wasn't feeling well.

Q. Okay and....

MR. ELLIS: If I could just have one quick second?

Q. Do you know, are you better now?

A. Yes, I am.

Q. And, do you know what - do you know when you started feeling better?

A. I started to go to therapy. I also was always going - checking myself in the hospital and I will say maybe like after a year I started seeing an improvement after I was following up with that.

Q. Do you still have a problem with a noisy neighbour?

A. No because they are not there anymore. They moved.

Q. Were you - sorry.

MR. ELLIS: Those are all my questions, Your Honour.

THE COURT: Mr. Battiston?

MR. BATTISTON: I apologize, Your Honour, but the cross-examination I intended to proceed with was relying on the medical records that I just received today...

THE COURT: Yeah.

MR. BATTISTON: ...from Mr. Ellis at ten after one. Haven't had a chance to go through them certainly not from the perspective of cross-examining Mr. Fiuza. So if I could ask - I mean we have to continue on another day but I haven't had an opportunity to go through these records with any kind of detail that would allow me to cross-examine right now so - most of the delay - I certainly, I must say that I cannot take blame for all the delay that we had today but....

THE COURT: Well I'm not laying any blame at your doorstep.

MR. BATTISTON: Well we wouldn't have been finished today anyway at this point so of course, Your Honour, my hands are a little bit tied at this point.

THE COURT: And certainly, I think depending on your cross-examination in any event, I'm gonna have questions likely for clarification because of what has been stated to date. So I guess what you're saying is we're gonna have to adjourn at this point?

MR. BATTISTON: Well, it was gonna continue on another day any way.

THE COURT: Oh, I know I was gonna make everybody stay 'til 6:00 o'clock tonight on a long weekend just to make up for lost time.

MR. BATTISTON: You know what, in a proper situation I agree but the fact that these records could have been done in a much more...

THE COURT: Oh, I'm not faulting you.

MR. BATTISTON: ...in a way that would have facilitated matters significantly let alone the delays.

THE COURT: Yeah, I certainly agree with that. We've been - believe me. I re-read two days of my notes in preparation for today. I am fully aware and I remember the issues involving the medical records and getting them to this courtroom in a timely fashion. I'm not even sure why Dr. Smith even bothered to show up today. It's just beyond me but in any event...

MR. BATTISTON: Yeah, me too.

THE COURT: ...yeah, I wholly agree with what you've had to say about the production of those records. So, I mean there's no point in proceeding further because even if we stood down your cross-examination

and had Mrs. Fiuza give evidence you're still gonna run into the same problem with the medical records.

MR. BATTISTON: Well, we haven't even heard from Mr. Buonvivere.

THE COURT: No, no, I'm saying getting...

MR. BATTISTON: I haven't even gotten her records yet.

THE COURT: Yeah, okay, great.

MR. BATTISTON: There's an e-mail somewhere that Mr. Ellis said he received them. It's a little bizarre to think how this has....

THE COURT: It's a little more than bizarre. So Mr. Ellis have you given all of the records to all of the defendants, not just Mr. Battiston. I don't mean to not include you but I would expect that if Mr. Battiston's provided with records you should be provided with them as well. So what are we missing now on day three of trial?

MR. ELLIS: I have provided the documents that the doctor has given to me but after we started court again, I've now received five more faxes of documents for medical records. I have given this copy to the Doolings but I have told my friend that I will print and courier all of the documents that I received from the doctor. I was not aware that there was this many pages of documents, Your Honour.

THE COURT: What has Dr. Smith produced for Mr. and Mrs. Fiuza? What's the range of documents she's produced? I want to know.

MR. ELLIS: Before....

MR. BATTISTON: A little odd, Your Honour. First of all, there was a previous treating physician which

again I learn as I go through these documents and Dr. Smith was assumed in the practice in August of 2014. Oh, and then I get that there's this odd sort of - I suppose it's because of the conversion to electronic, Your Honour. I get a printout. It's a running printout of....

THE COURT: Yeah, that's a new way doctors do their notes.

MR. BATTISTON: It is it's you know I'm use to - I'm use to this which is sort of a series of entries and mostly illegible entries like that....

THE COURT: Yeah.

MR. BATTISTON: Dr. Camala's new generation so we get printouts of - which is not bad but she started in August of 2014.

THE COURT: But, included in her records are the prior doctor's records?

MR. BATTISTON: They are.

THE COURT: Okay.

MR. BATTISTON: You know what amazing that for five years I get five pages. Five years of medical history, I get five pages from 2008, nine, ten, eleven. That is from '08 to '11 and then I get a few more. A little more extensive record but not a whole lot. Your Honour, as long as I've got - I can work with this. I don't know, it's a little different than....

THE COURT: Yeah, but I hear there's more to come and I want to make sure...

MR. BATTISTON: You know what, I'm not sure.

THE COURT: Well Mr. Ellis just said there's more to come.

MR. BATTISTON: Well this is Mr. that's Mrs. and then there's a couple more e-mails so.

MR. ELLIS: I've received five e-mails since we've been sitting here, Your Honour.

MR. BATTISTON: I don't want to blow this up into something unnecessary. I thought it was a little - pretty easy exercise to get some documents printed and sent to me.

THE COURT: Yeah, no you're absolutely right sir it is.

MR. ELLIS: I have five faxes, some seventy some pages per fax.

THE COURT: Any idea how many you're gonna get in total?

MR. ELLIS: The last one I received, Your Honour was at a half an hour ago, 2:51 so I'm assuming that's the end of it.

THE COURT: Well, never assume.

MR. ELLIS: No. I will contact the doctor to find out.

THE COURT: Well, I can tell you this isn't going to get back on a trial list anytime soon. So, you should have plenty of time to get all of the records from Dr. Smith for Mr. and Mrs. Fiuza, produce them to all defendants so that they have them in hand to ask questions of for cross-examination because so far all we've got are the few records at Tab 7 in Exhibit 3. So there's still a lot of records to be entered as exhibits.

Just so I know for next time are there any other outstanding issues or I'm gonna have another surprise on the fourth day of trial? What's it gonna be Mr.

Ellis? Really, I'm asking you because this is your case.

MR. ELLIS: I don't believe there is, Your Honour.

THE COURT: All right. Okay, so just for time purposes we'll have to finish with the cross-examination of Mr. Fiuza. Then we'll have the chief and cross-exam of Mrs. Fiuza. Is that going to be the end of your case or do you have any other witnesses?

MR. ELLIS: That's the end of my case other than the summonses that I produced for the witnesses of the defendant.

THE COURT: Well, are you going to be calling them?

MR. ELLIS: No, not if - if he's....

MR. BATTISTON: I'm going to be relying on the statements and calling them. They should be bound over.

THE COURT: Okay, so they're bound over. Those summonsed. I'll put that in my endorsement.

MR. ELLIS: Thank you, Your Honour.

THE COURT: Can you give me those names please?

MR. BATTISTON: Christopher Ford and...

THE COURT: Spelled in the usual way?

MR. BATTISTON: Yes, right? And Jaimee, she's Mrs. J-A-I-M-E-E.

MR. ELLIS: That's correct.

THE COURT: E-E, okay.

MR. BATTISTON: E-E, double E.

THE COURT: Ford or another name?

MR. BATTISTON: Ford.

THE COURT: All right. Okay so that leaves four more witnesses for the plaintiffs' case and then you'll be calling the landlord, Mr. Battiston?

MR. BATTISTON: Correct.

THE COURT: Anyone else or just the landlord or are you going to....

MR. BATTISTON: I have Mr. Dooling under subpoena.

THE COURT: Yeah, you can call him.

MR. BATTISTON: I think you're going to be here right?

MR. DOOLING: Yes.

MR. BATTISTON: He's going to be here.

THE COURT: Well just so I know, okay and then Ms. Ferguson potentially. Potentially seven more people and I know this is going to be the most foolish question I've asked today but are we gonna get done in another day if it actually started at say 10:00 o'clock and we went to 4:30 or are we gonna need two more days?

MR. BATTISTON: I think no.

THE COURT: You would think so?

MR. BATTISTON: If we start when we're supposed to, I think we should....

THE COURT: 'Cause I can say it's first on the list and nothing else gets on the list for example, not that anybody will necessarily listen but I can put it in my endorsement and we'll see what happens. I just want to make sure that there wasn't two more days of trial that we require.

Okay, Mr. Fiuza, Madam Interpreter you may return to your seats. Sorry to hold you up here. Thank you. Mr. Ellis you will advise Mr. and Mrs. Ford that

their summonses have been ordered in effect for the next trial date and you will notify them promptly upon getting receipt of that date.

MR. ELLIS: Yes, Your Honour.

THE COURT: All right. I've endorsed the record as follows:

[As read] Trial not complete. Plaintiffs are to deliver the balance of the medical documents to all defendants forthwith [and forthwith means now and not a few days before the next trial date or even a week or a month before the next trial date. It means now as soon as you get them.] Summonses for Christopher Ford and Jaimee Ford are to be in effect for the next trial date.

One full day of trial required to be scheduled first and only on the list by the Clerk.

And I take it that's everything for today?

MR. BATTISTON: Are we getting a date, Your Honour?

THE COURT: No because I don't even have my schedule.

MR. BATTISTON: Oh, oh, oh, okay.

THE COURT: It's not so....

MR. ELLIS: They haven't done the next setting.

MR. BATTISTON: What's that?

MR. ELLIS: They haven't done the next sitting for July, August, September.

MR. BATTISTON: So, we're done.

THE COURT: Yeah, the next quarter is not scheduled. I can't give you my June dates because they're already taken up with other trial continuations so....

MR. BATTISTON: Any consultation before - sort of an interaction thing with the office.

MR. ELLIS: As soon as I found out her dates then I'll contact you. We'll figure out a date so there's....

MR. BATTISTON: The last thing I want...

THE COURT: No, no, no, no, wait a minute. Wait a minute. Mr. Ellis you don't get involved in scheduling trial dates with the staff downstairs.

MR. ELLIS: I wasn't, Your Honour. I was saying that as soon as I find out what your next available date is that we can go I would contact....

THE COURT: I don't even know my next available date and nor does the court so the Clerk has just been ordered by me to schedule this for one full day...

MR. BATTISTON: All right.

THE COURT: ...and they'll advise you accordingly. You're not even supposed to ask the Clerk what my scheduling days are. That is highly improper.

Lawyers aren't even allowed to do that. I can't go into the Superior Court and ask when the judge's dates are.

Mr. Battiston, I put your brief in the file although it's not marked so it's just put in the file just so we know it's there.

MR. BATTISTON: Yes, great.

THE COURT: It's not lost for next time.

MR. BATTISTON: Duly noted.

THE COURT: All right is that everything. All right. Thank you.

CLERK OF THE COURT: All rise. This court is now closed.

C O U R T A D J O U R N E D

(03:33:21)

80.

R. v. Fiuza v Creekside et al
Certification.

FORM 2

Certificate of Transcript
Evidence Act, subsection 5(2)

5

I, **Gloria Scheerer**, certify that this document is a true and accurate transcript of the recording of ***Fiuza et al vs. Creekside et al*** in the Small Claims Court, Superior Court of Justice held at **85 Frederick St., Kitchener**, Ontario, taken from Recording No. **4411_CrtRm-504_20180518_083402__2_SCC**, which has been certified in Form 1 by Harvinder Bindra.

10

August 13, 2019

CCR, ACT

15

.....

(Date)

(Signature of authorized person)

20

25

30