

Case Name: Laura McCluskey -v- Scott Wilson Scotland Limited

Case Ref No: A91/13

Date of Hearing: Tuesday 6 August 2024 at 10.30 (1 day)

Division and Senators: First Division (Lord President, Lord Malcolm, Lord Pentland)

Livestreamed Hearing?: Yes No

Agents and Counsel:

Agents / Counsel for the Pursuer and Respondent (*Laura McCluskey*):

Allan McDougall, Solicitors

Robert Sutherland

Agents / Counsel for the Defenders and Reclaimers (appellants) (*Scott Wilson Scotland Ltd*):

CMS Cameron McKenna (Scotland) LLP

Jonathan Barne KC and Paul Reid KC

Link to Judgment Appealed:

<https://www.scotcourts.gov.uk/media/u1ln4ydh/2024csoh4-laura-mccluskey-against-scott-wilson-scotland-limited.pdf>

Case Description:

This is a reclaiming motion (appeal) against a decision of the Lord Ordinary to allow the claim for damages for personal injuries brought by the pursuer, Ms McCluskey, to proceed to an evidential hearing.

Ms McCluskey is one of a cohort of pursuers who raised actions for damages against the defenders in 2013. Forty four actions were raised. The pursuers are residents or former residents of properties in the Watling Street housing development in Motherwell. They claim to have suffered personal injuries as a result of inhaling harmful vapours which emanated from contaminants in the ground beneath the development. The defenders are civil engineers who worked on the development. They were contracted by the site's owners to investigate the ground for contamination and advise on, administer and supervise the remediation work needed to ready the site for residential occupation.

Most of the actions were sisted (paused) pending the outcome of the claim brought by Angela and Robert McManus, which was the case chosen to be the lead action from the cohort. In 2020, the Lord Ordinary heard a proof (an evidential hearing) and determined the McManuses' claim. He found that the defenders had owed a duty of care to any future residents of the site. That duty was to exercise reasonable care when performing their agreed role under the various contracts they entered into with the site's owners. However, the defenders had not breached their duty of care to the site's future residents. They had investigated the site conditions in accordance with usual and normal practice at the time. The defenders had recommended the removal of contaminated land found on site in 1995 and there was nothing to indicate that that had not been carried out. The

defenders had been entitled to rely upon what they had been told by other parties had been done on site.

Ms McCluskey then sought to progress her own action. The Lord Ordinary heard a legal debate in November 2023, at which the defenders argued that Ms McCluskey's claim ought to be dismissed because she was bound by the terms of the decision in the McManus case, and was attempting to re-litigate the issues determined by the Lord Ordinary in that action. Her claim was therefore *res judicata* (a matter already judged) and ought to be dismissed. On broadly the same grounds, they argued that Ms McCluskey's action was irrelevant (lacking in legal validity) and amounted to an abuse of process, and so ought to be dismissed.

The Lord Ordinary did not agree, and allowed Ms McCluskey a proof. Although Ms McCluskey could not ask the court to redetermine the same issues, she had alleged further breaches of duty by the defenders and had made various averments in support of this. Those averments should be permitted to go to proof to enable the court to hear evidence about them.

The defenders appeal this decision. The First Division will hear the appeal on Tuesday 6 August 2024.