Court File No. CV-16-11331-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

2292319 ONTARIO INC.

Respondent

BRIEF OF AUTHORITIES OF THE COURT-APPOINTED RECEIVER
(FOR RESPONDING FACTUM RE GREEN ISLAND TRADING COMPANY)
(Motion returnable October 13, 2016)

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, Ontario
M5J 2T9

Sanjeev P. Mitra (LSUC No. 37934U)
Tel: (416) 865-3085
Fax: (416) 863-1515
Email: smitra@airdberlis.com

Jeremy Nemers (LSUC # 66410Q)
Tel: (416) 865-7724
Fax: (416) 863-1515
Email: jnemers@airdberlis.com

Lawyers for the Receiver

October 6, 2016

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TAB 1

para. 12

ONTARIO REPORTS

(THIRD SERIES)

REPORTS OF CASES DETERMINED IN
THE COURTS OF ONTARIO

Vol. 80

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Hall v. Powers et al.

[Indexed as: Hall v. Powers]

Superior Court of Justice, Shaughnessy R.S.J. June 28, 2005

Injunctions — Interlocutory injunctions — Setting aside — Plaintiff obtaining interlocutory injunction restraining defendants from preventing him from attending high school prom with his boyfriend — Injunction being granted in expectation that matter would proceed to trial — Plaintiff subsequently seeking to discontinue action — Defendants seeking to set aside injunction under rule 59.06(2) on basis of "newly discovered fact" that plaintiff did not intend to proceed to trial — Rule 59.06(2) not applying — Court not having jurisdiction to set aside interlocutory injunction in circumstances of this case — Plaintiff being granted leave to discontinue action — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 59.06(2).

* This judgment was recently brought to the attention of the editors.

The plaintiff obtained an interlocutory injunction restraining the defendants from preventing him from attending his high school prom with his boyfriend. The plaintiff subsequently sought to discontinue the action without costs. The defendants opposed the request and instead moved to set aside the injunction, which they say was issued on the basis that there would be a later trial at which the legal issues would be finally determined. The defendants relied on rules 23.01(6) and 59.06(2) of the Rules of Civil Procedure. The defendants submitted that the use of a lower standard for the interlocutory injunction had an impact on the decision, which was now a precedent of sorts, and that the plaintiff's present intention not to proceed to trial was a "newly discovered fact".

Held, the defendants' motion should be dismissed; the plaintiff's motion should be granted.

Rule 59.06(2) was not applicable. That rule applies to newly discovered evidence. It does not come into play where the plaintiff has a change in position or change in circumstances. The court did not have jurisdiction to set aside an interim injunction in the circumstances of this case.

Cases referred to

Becker Milk Co. Ltd. v. Consumers' Gas Co. (1974), 2 O.R. (2d) 554, 43 D.L.R. (3d) 498 (C.A.); *Govan Local School Board v. Last Mountain School Division No. 29*, [1991] S.J. No. 635, 3 C.P.C. (3d) 143, 88 D.L.R. (4th) 658, 100 Sask. R. 1, [1992] 2 W.W.R. 481 (C.A.)

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 15(1)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 23.01, 59.06(2)

MOTION by the plaintiff for leave to discontinue an action without costs; MOTION by the defendants to set aside an interlocutory injunction.

Andrew M. Pinto, for plaintiff.
Peter Lauwers, for defendants.
Fay Faraday and *Sheilagh Turkington*, for intervenor The Ontario English Catholic Teachers' Association.
Cheryl Milne and *Kathy Murphy*, for intervenor Canadian Foundation for Children, Youth and the Law.
R. Douglas Elliot and *Gabriel Fahel*, for intervenor The Coalition in Support of Marc Hall.
Brad Elberg, for intervenor The Ontario Catholic School Trustees' Association.

[1] Amended endorsement of SHAUGHNESSY J.:— This proceeding is on the trial list and is set to be heard on October 11, 2005 at Whitby, Ontario. The trial of this action engages the issue of whether a publicly funded school board can establish

and implement policies of general application that are subject to the *Canadian Charter of Rights and Freedoms*. The policy in this case relates to a student wishing to bring a same-sex date to a school prom and whether the School Board's decision violates s. 15(1) of the *Charter*, which prohibits discrimination on the basis of sexual orientation and age.

[2] An interlocutory injunction was granted in this proceeding by Mr. Justice Robert MacKinnon, restraining the defendants and their agents from preventing or impeding Marc Hall from attending his high school prom with his boyfriend on May 10, 2002 ((2002), 59 O.R. (3d) 423, [2002] O.J. No. 1803 (S.C.J.)).

[3] On June 7 and June 27, 2005, counsel for the parties attended before me. The plaintiff has requested permission to discontinue this action without costs. The defendants oppose this request, not on the basis, however, that they will be denied the customary order for costs thrown away if the request is granted, but because they want to have the issue tried. The defendants point out that the injunction was issued on May 10, 2002 by Justice R. MacKinnon on the basis that there would be a later trial at which the legal issues would be finally determined. Justice MacKinnon made the following comment at para. 13 of his decision:

> There is Ontario authority for a proposition that a plaintiff bears a higher onus in cases where the granting of the injunction in effect gives him the ultimate relief which is sought. *This is not the case at bar. It is true that Mr. Hall's immediate interest is in being permitted to attend this Friday's prom with his boyfriend. However, the substantive thrust of his claims for trial, as pleaded, are for trial court declarations that his Charter rights have been violated.* Included among the matters in issue for an eventual trial, if pursued, will be the question of whether the School Board's decision falls within its power to make decisions with respect to denominational matters and thus is protected under s. 93(1) of the *Constitution Act, 1867* and whether the Board's decision violates individual human rights protected under the *Canadian Charter of Rights and Freedoms*, including the right to be free of discrimination on the basis of sexual orientation and age.

(Emphasis added)

[4] Further, Justice MacKinnon stated that in his view, the School Board could have its rights protected at trial, noting at paras. 54 and 56:

> This third branch of the injunctive test considers relative hardship between the parties. My decision will finally determine whether in fact Mr. Hall goes to the prom *but will not, as a matter of law, finally determine either whether he is entitled to trial declaratory relief under the Charter or whether the defendants are entitled to continue to permit same-sex couples to attend only selected school social events in the future . . .*

> . . .[I]f the order is not granted, then until trial it will be acceptable for the defendant school to restrict gay and lesbian students from selected school activities on the basis of their demonstrated sexual orientation . . . *The Board can always seek to have its ongoing rights thoroughly protected at trial* . . .

(Emphasis added)

[5] The defendants submit that the use of a lower standard for the interlocutory injunction had an impact on the decision, which is now a precedent of sorts. In this regard, I would note that injunction reasons are not often accorded great weight, as they are written on an urgent basis based on limited material and the legal issues, out of necessity, are dealt with in a cursory and preliminary manner.

[6] It was the expectation of Justice MacKinnon and the parties, that this matter would proceed to trial and the defendants have expended a considerable amount of money in trial preparation.

[7] The defendants are sympathetic to the plaintiff's stated desire to focus on his university studies. Further, they have graciously agreed not to seek costs from the plaintiff, to which they would ordinarily be entitled on the filing of a Notice of Discontinuance. The defendants are to be commended for their position. It is further regrettable that the defendants will be deprived of the opportunity to advance their legal arguments with the benefit of a more complete evidentiary record that would be available to the trial judge. Their ability to assemble such evidence in the context of the original injunction, was necessarily constrained by the short time frame within which that motion had to proceed. On the basis of that evidence, a trial judge might have reached the conclusion that the defendants' legal position is correct. Accordingly, Justice MacKinnon's Reasons should be read in light of these developments.

[8] The defendants do not allege that there has been any bad faith on the part of the plaintiff, or his counsel, but note that the interlocutory injunction was obtained with an advantage created by the expectation that the matter would proceed to trial.

[9] It is the defendants' position that in the unusual circumstances of this proceeding, the interlocutory injunction of Justice MacKinnon dated May 10, 2002 should be quashed. The defendants state that I have jurisdiction to make such an Order, both as a term of the granting of leave to the plaintiff to discontinue (rule 23.01(b) [of the Rules of civil Procedure, R.R.O. 1990, Reg. 194]) and pursuant to rule 59.06(2), which allows the court to set aside an order "on the ground . . . of facts arising or discovered after it was made". It is submitted that the material fact arising or discovered is that the plaintiff no longer intends to

proceed to trial, which then results in the legal issues not receiving a full consideration as contemplated in the Reasons of Justice MacKinnon.

[10] The plaintiff's position is that he attended his high school prom on May 10, 2002, which is more than three years ago. The plaintiff, a university student, wishes to discontinue this proceeding and focus on his studies. It is submitted that even if I have jurisdiction to quash this injunction, no useful purpose would be served by doing so.

[11] Counsel for the intervenors, the Canadian Foundation for Children, Youth and the Law and the Coalition in Support of Marc Hall, support the plaintiff's position.

Analysis

[12] Rule 59.06(2) on its face, relates to setting aside or varying an Order based on newly discovered evidence or facts. The test for setting aside, or varying an Order is found in *Becker Milk Co. Ltd. v. Consumers' Gas Co.* (1974), 2 O.R. (2d) 554, 43 D.L.R. (3d) 498 (C.A.), at p. 557 O.R. as follows:

(1) That the evidence "might" probably have altered the judgment and,

(2) That the evidence "could not with reasonable diligence have been discovered sooner".

[13] I find that rule 59.06(2) is not applicable as it applies to newly discovered evidence. In my opinion, this rule does not come into play where, as in the present case, the plaintiff has a change in position, or change in circumstances.

[14] I have not been provided with any Canadian authority for the proposition that I have the jurisdiction to set aside an interim injunction in the circumstances of the present case. I am not the trial judge and I do not have a sufficient evidentiary record to satisfy me that the interim injunction is based on a wrong interpretation of the law. The issue of the right to determine a point of law "empowering" a judge to set aside an injunction where there was no final determination of the whole action, was raised, but not decided in *Govan Local School Board v. Last Mountain School Division No. 29*, [1991] S.J. No. 635, 88 D.L.R. (4th) 658 (C.A.).

[15] Accordingly, I find that since there was no determination of the whole action, it is not appropriate for me on this application, to set aside the injunctive relief granted by Justice MacKinnon. Even if I am wrong on the jurisdictional issue, it

appears to me that no useful purpose would be served by doing so, particularly in the present case where the interim injunction has no continuing effect.

[16] Therefore, I decline the defendants' request to set aside the interlocutory injunction and I grant leave to the plaintiff to discontinue this proceeding without costs.

Plaintiff's motion granted; defendants' motion dismissed.

TAB 2

ONTARIO REPORTS

(SECOND SERIES)

REPORTS OF CASES DETERMINED IN
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1974

THE LAW SOCIETY OF UPPER CANADA

LIBRARIES AND REPORTING COMMITTEE

[COURT OF APPEAL]

Becker Milk Co. Ltd. et al. v. Consumers' Gas Co.

GALE, C.J.O., EVANS AND ESTEY, JJ.A. 3RD JANUARY 1974.

Evidence — Fresh evidence — Introduction after judgment — Whether evidence available before judgment may be introduced after judgment.

A litigant will not normally be permitted to introduce new evidence after judgment when that evidence was available before judgment. If such a practice were allowed, litigants dissatisfied with a judgment could seek to vary it by introducing evidence that they had chosen not to present to the trial Judge.

[*Commercial Life Ass'ce Co. v. Williamson et al. (No. 2)*, [1943] 2 W.W.R. 103, 24 C.B.R. 257; *Williamson v. John I. Thornycroft & Co.*, [1940] 2 K.B. 658; *Re Viscount Rothermere*, [1945] 1 Ch. 72; *Murphy v. Stone-wallwork (Charlton) Ltd.*, [1969] 1 W.L.R. 1023, refd to]

APPEAL from an award of damages by Lacourciere, J.

D. K. Laidlaw, Q.C., for appellant.
W. H. O. Mueller, for respondent.

The judgment was delivered by

ESTEY, J.A.:—This is an appeal by the plaintiff, the Becker Milk Co. Limited, from the judgment pronounced by the Honourable Mr. Justice Lacourciere on August 4, 1971, wherein the appellant was awarded the sum of $4,750 for loss of profits, loss of leasehold interest and goodwill suffered by the appellant by reason of an explosion and fire on October 25,

1969, for which the respondent, the Consumers' Gas Company, has assumed liability.

The appellant at the time of the explosion and fire occupied a store at 2919 Derry Rd. E. in Malton, Ontario, under a lease the term of which commenced in 1967 and of which there remained unexpired eight years, together with two rights of renewal of five years each. The appellant operated what is known as a "convenience" store on these premises specializing in milk and dairy products and some lines of groceries. The question of compensation for store fixtures and equipment and inventory was by consent of all parties referred to the Master so that the learned trial Judge was only concerned with the assessment of claims for loss of income, loss of value of the leasehold interest and loss of goodwill connected with the business carried on in that store. In disposing of these claims the learned trial Judge stated: "I therefore assess the loss of profit at $4,750 which sum will include any claim for loss of the leasehold interest and goodwill. The plaintiff will have its costs of the action, to be taxed."

The hearing before the Honourable Mr. Justice Lacourciere took place on March 29, 1971, and reasons for judgment were delivered on August 4, 1971. The transcript of evidence at trial indicates that the appellant had not located itself in another store within the area of service of the store at Derry Rd. E. destroyed in the October fire. At the opening of the appeal to this Court the appellant sought leave to introduce, by way of an affidavit of an officer of the appellant company, further evidence pursuant to Rule 234. Application to do so was made on November 10, 1972, and thereafter counsel for the respondent cross-examined Mr. William M. Baker on his affidavit dated November 10, 1972. The appellant submitted the affidavit, the exhibits thereto, the cross-examination of the affiant and the respondent filed an argument in opposition together with some further documents in connection with the cross-examination. A subsidiary affidavit of Mr. Baker swore to the fact that the matters deposed to in his principal affidavit dated November 10, 1972, occurred after the date of judgment.

It appeared in the course of argument on this application that at least some of the principal events described in the affidavit had in fact taken place after the assessment hearing had been completed in March, 1971, and prior to the release of the decision of the trial Judge in August, 1971. This Court in the course of hearing the appeal decided that the matters referred to in the above-mentioned affidavit could

have been drawn to the attention of the learned trial Judge before he released the judgment on August 4, 1971. It was therefore concluded that having regard to the provisions of Rule 234 leave should not be granted to the appellant when the new evidence was available prior to judgment but was not brought forward until after the appellant had become aware of the decision of the trial Judge. Put shortly, the application to file this additional evidence was rejected because an unsuccessful litigant, save in very special circumstances, should not be allowed to come forward with new evidence available prior to judgment when he was content to have the trial Judge bring forward his judgment based on the record produced at a trial in which that litigant actively participated. I will return to this issue later.

The appellant thereupon took the view that the record before this Court shows that the appellant was unable to replace the location destroyed on October 29, 1969, by the respondent and that therefore the appellant is entitled to the present value, at that date, of the average annual profit enjoyed by the appellant from operations in these premises, over the unexpired eight years of the initial term of the appellant's lease, amounting to approximately $67,000.

The learned trial Judge stated with reference to the efforts by the appellant to relocate within the trading area of the store destroyed: ". . . they were unable to find a suitable location to serve the same market area." Later in his reasons for judgment it was stated:

> The choice of sites is related to many factors such as population density, economic and family levels, location in relation to traffic flow, parking and other factors. Because of these various factors and the uneconomic nearness of competitors, Beckers was unable to relocate in the same area.

It is difficult to read the concluding sentence from the above quotation unless the word "unable" is read as meaning "unwilling". In any case, the judgment concludes: "In view of the inevitable delay involved in the site decision and other factors, I would say that six months would be a reasonable period in which to allow loss of profit . . . ". Elsewhere in his judgment the trial Judge concluded that the average net earnings per annum before taxes for the location in question was $9,500 and accordingly an assessment was made of loss of profits of $4,750 "which sum will include any claim for loss of the leasehold interest and goodwill".

The six-month period used by the learned trial Judge to calculate the lost profits was said to be "a reasonable period" in

which to relocate the branch having regard to the appellant's duty to mitigate its damages by acting with reasonable promptness. The evidence discloses that on the average a new location requires about six months to mature into a profitable operation. While the judgment reveals some consideration was given to this factor in determining the length of the period during which the appellant was deprived of its profits from this branch, no allowance in time seems to have been given for the start up of a new outlet once the premises had been located. I will return to this issue.

As I have mentioned, the evidence with reference to the actual date of relocation in this area by the appellant was rejected on two grounds, first that notwithstanding an affidavit filed by the appellant introducing this evidence wherein it was stated that the matters sworn to occurred "after the date of judgment", it was evident from the submissions of counsel made to this Court that the primary events leading to the opening of the appellant's store in the immediate area of that destroyed, commenced prior to the pronouncement of judgment and therefore the evidence was available to support an application to the trial Judge to reopen the hearing, and secondly, the appellant by failing to avail itself of the opportunity to so reopen the proceedings should be taken as having elected to have the trial Judge dispose of all issues raised at trial on the basis of the record as it stood at the close of the trial on March 29, 1971.

There is no question that until judgment was issued, the learned trial Judge in his discretion could have admitted further evidence if he were satisfied that the matters in question had come to the knowledge of a party after the trial, could not with reasonable diligence have been discovered sooner, and, if the evidence, as is the case here, were of such a character that it might probably have altered the judgment about to be given: *Commercial Life Ass'ce Co. v. Williamson et al. (No. 2)*, [1943] 2 W.W.R. 103, 24 C.B.R. 257. The appellant did not choose to avail itself of this opportunity.

Ordinarily the assessment of damages is done "once and for all" and is made as of the date of impact so that the tribunal assessing damages looks forward from that date and takes into account actual loss already suffered and future and contingent losses or considerations bearing on the damages suffered including those presently realized or ascertained and those not then crystalized. It is clear however that a trial Court need not shut its eyes to everything which has happened subsequently to the date on which injury is suffered. For ex-

ample, where a widow makes a claim under the *Fatal Accidents Act,* R.S.O. 1970, c. 164, damages are fixed at the moment of death but subsequent events, such as the death of the claimant, may be taken into account: *Williamson v. John I. Thornycroft & Co.*, [1940] 2 K.B. 658. As was stated by Vaisey, J., in *Re Viscount Rothermere,* [1945] 1 Ch. 72 at p. 75: "... the court will not treat as an unknown factor anything which has become known or can be ascertained at the time when such a problem as the present receives its solution, that is to say it will not act on hypotheses when it is able to act on realities."

On the authorities therefore, I conclude, that the trial Judge would have been entitled to receive before judgment and to consider, such additional evidence as was brought forward by the appellant. No doubt an appellate Court in the ordinary case when faced with evidence of this nature would wish to refer the matter back to a trial Court for reassessment of damages taking into account all the facts including those ascertained and introduced after the completion of the initial hearing. If authority were needed for such a proposition it can be found in the House of Lords decision in *Murphy v. Stonewallwork (Charlton) Ltd.*, [1969] 1 W.L.R. 1023. A respondent in such a circumstance as now before this Court might well wish to challenge or at least respond to such new information and therefore a return to a trial forum would seem the best way to do justice to all the litigants.

However, in the circumstances with which this Court is faced different considerations come into play. The appellant, as I have said, was content to allow the trial Court to proceed to judgment on the record established at the hearing in which the appellant fully participated. When the judgment was handed down, the appellant being discontented with the award now seeks to extend and revise the record by the introduction of material much of which was available prior to judgment. Ironically, the alteration has the effect of reducing the period of time during which loss of profits allegedly occurred, from eight years unexpired in the initial term of the lease, to something substantially less. In my view, the approval of such a practice should only be done when there exist the "special grounds" mentioned in Rule 234(3). In the circumstances of this case there are no "special grounds" for the admission of this evidence and in fact its admission at this stage would establish an unhappy precedent in trial procedure. Litigants content with the record at the end of the trial, but finding themselves dissatisfied with the subsequent judgment, could,

armed with such a precedent, advance evidence available before judgment and seek on appeal either a variation of the judgment at trial or a new trial. In such a circumstance litigation would be needlessly protracted and expensive. On the facts in these proceedings the consequences of exclusion of such new material should fall on the party who failed to bring it forward when he had the opportunity rather than impose a new hearing on the innocent party.

The Chief Justice in rejecting the application to introduce new evidence in the course of the hearing of this appeal said:

> We are of the opinion that the admission of the material or new evidence, if you wish to call it that, should be rejected or refused. It is material which would present vital considerations bearing upon the issue, which considerations were not before the trial Judge and it would be unfair to him to give effect to the considerations about which he heard very little, if anything. Secondly, the material could have been presented to the trial Judge while he was seized of the action and therefore to allow it in now would be to permit an unsuccessful litigant to attempt to enlarge the record after it has seen the judgment.

I revert now to the quantum of damages as determined below, namely, one-half year's profit which is $4,750. The record reveals no evidence in support of damages for loss of leasehold interest or goodwill independent of the claim for loss of profits. No argument was advanced by the appellant for any variation of the judgment below except by an increase of the amount awarded for loss of profits. Therefore, only the question of disposition of the loss of profits claim now remains open. For reasons stated above, it would appear that the evidence with reference to a six-month start up period has been overlooked by the learned trial Judge and I would therefore allow the appeal, set aside the judgment below and in place thereof assess the damages of the appellant at $9,500 with costs to the appellant in the Court below and on this appeal.

Appeal allowed in part.

TAB 3

1992 CarswellOnt 345
Ontario Court of Justice (General Division)

Lenskis v. Roncaioli

1992 CarswellOnt 345, [1992] O.J. No. 1713, 11 C.P.C. (3d) 99, 35 A.C.W.S. (3d) 103

RAISA LENSKIS and SONIA GRIMMAN v. IBI RONCAIOLI and JOSEPH RONCAIOLI

E. Macdonald J.

Judgment: July 30, 1992
Docket: Doc. 265714/86

Counsel: *H. Cohen* , for moving parties (defendants).
B. Fotopoulos , for responding parties (plaintiffs).

Subject: Civil Practice and Procedure

Headnote

Practice --- Default proceedings — Application to set aside default judgment — Requirement to show defence on merits

Motion dismissed.

The plaintiff brought an action in 1986 for repayment of a loan to the defendant IR. A settlement agreement was signed by IR but not complied with. The action was undefended. The plaintiff obtained default judgment on February 10, 1992. The defendants moved to set aside the noting of default and the default judgment on the grounds that they had a good defence to the plaintiff's claim. The defence was that the settlement agreement was signed under duress.

Held:

The motion was dismissed.

Although the defendants moved promptly to set aside the judgment, they did not satisfactorily explain why the default arose and they did not set out an arguable case on the merits. There was no convincing evidence that IR was incapacitated or under duress when she signed the settlement documentation.

The delay by the plaintiff in obtaining default judgment was not a factor favouring the defendants.

Table of Authorities

Cases considered:

Dealers Supply (Agriculture) Ltd. v. Tweed Farm & Garden Supplies Ltd. (1987), 22 C.P.C. (2d) 257 (Ont. Dist. Ct.) — *applied*

Earl v. Koloszar (January 15, 1991), Doc. CA 506/89, Tarnopolsky, Finlayson and Galligan JJ.A. (Ont. C.A.), 2 W.D.C.P. (2d) 58 — *followed*

Klein v. Schile, [1921] 2 W.W.R. 78, 14 Sask. L.R. 220, 59 D.L.R. 102 (C.A.) — *applied*

Nelligan v. Lindsay, [1945] O.W.N. 295 (H.C.) — *applied*

Rules considered:

Ontario, Rules of Civil Procedure —

r. 19.09(1)

Motion by defendants to set aside noting of default and default judgment.

***E. Macdonald J.* (orally):**

1 This motion was brought by the defendants, Ibi Roncaioli and Joseph Roncaioli for an order setting aside the noting of pleadings closed, and the default judgment signed against the defendants on Monday, February 10, 1992, pursuant to r. 19.09(1) of the *Rules of Civil Procedure* .

2 The motion record discloses that default judgment was signed by the Honourable Mr. Justice Webb. The judgment ordered the defendants, the moving party in this motion, to pay to the plaintiff Raisa Lenskis ("Lenskis"), the responding party in this motion, the sum of $44,399.48. The judgment further ordered that the defendants would pay to the plaintiff Sonia Grimman ("Grimman") the sum of $13,513.36, and costs as assessed by the court.

3 The essential grounds for the motion brought by the defendants is that they now allege that they have a good defence to the plaintiffs' claim. In support of their position, the defendant Mrs. Roncaioli has sworn an affidavit dated March 11, 1992 deposing to a number of facts and circumstances. She was cross-examined on this affidavit and I was referred on several occasions during argument to the transcript of her cross-examination.

4 Without going into the background in detail, the statement of claim as initially issued, seeks repayment of moneys alleged to be owed by the defendants to the plaintiffs. It is alleged that during the course of the relationship between the parties, substantial amounts of money were lent by the plaintiffs to the defendants. There are allegations of illicit activities made by the defendant Ibi Roncaioli in her affidavit wherein she states that prior to the issuing of the statement of claim, the plaintiff Lenskis owned a variety store and sold illegal contraband cigarettes through her business. She states that at no time did she borrow money from Lenskis, but that Lenskis gave her money to buy cigarettes for Lenskis, and that she did so without making a profit.

5 The defendant Ibi Roncaioli was charged in Provincial Court for defrauding the plaintiffs of moneys exceeding $1,000. At the preliminary hearing before the Honourable Mr. Justice Crossland, the defendant Ibi Roncaioli was discharged. In her affidavit, the defendant Ibi Roncaioli relies on this discharge in support of her position that in these civil proceedings she now has a defence to the plaintiffs' action. The defendant Ibi Roncaioli acknowledges that she executed documents purporting to settle her claims with the plaintiffs in the office of Mr. David Sloan, the solicitor of record for the plaintiffs.

6 In her affidavit filed in support of this motion, the defendant Mrs. Roncaioli attempts to put a different interpretation on the settlement documents and suggests that they were merely documents that she described as "settlement agenda containing figures in a format for payment". She also argues that she was under extreme duress by reason of the following circumstances:

1. She was unrepresented by counsel.

2. She did not want her husband to find out what was going on, as the plaintiffs were actively pressuring her and threatening to expose their illegal enterprises to him.

3. She was under heavy medication at the time, including morphine, as a result of pain and discomfort associated with a serious complication that developed from a broken ankle that had left her partially disabled.

4. She thought if she repaid the plaintiffs' losses she would be able to prevent further trouble.

7 After having made two settlement agreements, both of which she defaulted on, the plaintiffs appeared to have decided not to pursue the matter, but the defendant, Ibi Roncaioli, did not take any steps to dismiss the plaintiffs' claim.

8 Things changed significantly when the defendant, Ibi Roncaioli, won $5 million dollars in the Lotto 649. She now states that she is a very wealthy woman and alleges that the plaintiffs who took no steps in the interim to pursue the matter are now attempting "a fast grab". The plaintiffs' motion record is comprised of two affidavits. One is sworn May 5, 1992 by Suzie Larado, who alleges that she is a former friend of the defendants and that she was involved with the defendants on a direct basis in her dealings with the plaintiffs in late 1985 and 1986. She states that the moving party told her that she owed the money to Ms. Lenskis and that she was agreeable to paying the money back.

9 As a result of her feeling that she owed the money and agreeing to paying it back, the defendant, Ibi Roncaioli, attended at the offices of J. David Sloan, the plaintiffs' solicitor, in January 1986, and in the presence of the deponent of the affidavit that I have just identified, the negotiations were carried out directly between Mr. Sloan and Mrs. Roncaioli.

10 These negotiations resulted in a settlement. I find that there was a settlement, although this settlement was referred to in argument before me as a purported settlement, I see nothing on the face of the documents before me that would suggest that it was not in fact a settlement. The word "purported" was used only to indicate that while a settlement had been reached it was purported in that Mrs. Roncaioli did not meet the obligations for repayment which [was] contemplated in the settlement.

11 In *Dealers Supply (Agriculture) Ltd. v. Tweed Farm & Garden Supplies Ltd.* (1987), 22 C.P.C. (2d) 257 (Ont. Dist. Ct.) , the Honourable Mr. Justice Miesener sets out three requirements that a moving party must meet in order to have judgment against him or her set aside. The requirements are as follows [pp. 262-263]:

1. The motion to set aside a default judgment should be made as soon as possible after the applicant becomes aware of the judgment.

2. More importantly, the moving party's affidavit must set out circumstances under which the default arose that give a plausible explanation for the default.

3. The moving party must set forth facts to support the conclusion that there is at least an arguable case to present on its merits.

12 In addition, Miesener D.C.J. commented that there is still a broad obligation to look at all the circumstances and to be satisfied that no injustice is done to the innocent party, the respondent to the motion, in any order that is finally made. Miesener D.C.J. cited with approval the decision of Urquhart J. in *Nelligan v. Lindsay*, [1945] O.W.N. 295 (H.C.) , and while it is an older case, it is still good authority for the principles that are to be followed in a motion of this sort.

13 In *Nelligan v. Lindsay* , supra, the delay was short, and it occurred by reason of a misunderstanding between the solicitors for the parties, with the result that the pleadings were noted closed. The delay was negligible and the court found that there could be no prejudice caused to the plaintiff who was capable of being compensated for in costs. In addition, and most importantly, the defendant set out in his motion material circumstances which could afford a defence.

Urquhart J. quoted from *Klein v. Schile*, [1921] 2 W.W.R. 78, 14 Sask. L.R. 220, 59 D.L.R. 102 (C.A.) , at p. 221 [Sask. L.R.] as follows:

> It is not sufficient to merely state that the defendant has a good defence upon the merits. The affidavits must show the nature of the defence and set forth facts which will enable the Court or Judge to decide whether or not there was a matter which would afford a defence to the action.

14 Counsel for the moving party has drawn to my attention a recent decision of the Ontario Court of Appeal; *Earl v. Koloszar* , [1991] O.J. 45, oral reasons released January 17, 1991 [(Doc. CA 506/89), Tarnopolsky, Finlayson and Galligan JJ.A.]. Counsel on behalf of the moving party today, strenuously argued that the decision of the Court of Appeal in *Earl v. Koloszar* relaxes the tests and considerations which were set forth in *Nelligan v. Lindsay* , supra. The Court of Appeal made the following comments with respect to the setting aside a default judgment [at pp. 1-2 unreported]:

> While the decision whether or not to set aside a default judgment is a matter of discretion, the exercise of that discretion is reviewable by an appellant court. The principles to be applied in such cases have been set out in numerous decisions. It is not necessary to make any review of authority because the factors and principles can vary depending on the circumstances. However, among the factors which always have to be considered and which apply in this case are the following:
>
> 1. the delay between the default and the noting pleadings closed;
>
> 2. the delay on the part of the defendant between learning of the default judgment and moving to set it aside;
>
> 3. the reasons for the delay;
>
> 4. the prejudice, if any, which either or both of those delays caused the plaintiff;
>
> 5. whether or not there was a matter disclosed which could afford a defence to the motion.

15 I do not agree with counsel that the Court of Appeal decision relaxes the tests or in any way departs from the principles which emerge from *Dealers Supply v. Tweed Farm* , supra, and *Nelligan v. Lindsay* , supra.

16 In this case, I find Mrs. Roncaioli did move with relative speed and accordingly I do not find anything under this heading of the test which deprives her of her right to bring the motion. I do not find however that Mrs. Roncaioli has set out in her affidavit material, circumstances which are acceptable to this court that explain the reasons why the default arose. In addition, she has not set forth in the material filed, facts which support the conclusion that she would have an arguable case to present on the merits. In addition, I do not find anything that suggests to me that the moving party when she reached her settlement, was incapacitated and I am cognizant of the extensive medical material that was provided to me which suggests that this moving party had a history of medical problems. There is nothing in the material that convinces me that when she attended at Mr. Sloan's office, she was suffering in any way from any disability which made her unable to understand what she was attempting to do in achieving settlement.

17 On the material in this motion before me, I do not find facts that afford a valid defence. As I have indicated, I do not accept what appears to be some defence related to duress in respect of the settlement negotiations, nor do I find the fact that there was a discharge in the criminal proceedings, is one which I should take as being compelling or conclusive in my considerations with respect to this civil matter.

18 The issue of delay is one that requires some comment. A statement of claim was initially issued on May 7, 1986. The defendant changed solicitors several times and a notice of intention to defend was filed, but no statement of defence was ever filed. The notice of intent to defend was filed June 24, 1986 by Mr. Olah who then represented the moving party, but shortly thereafter removed himself from the record as her solicitor. There was some suggestion that laches should be applied to the benefit of the moving party. I disagree, and I see no valid reason, nor was any legal reason cited to me as to why the application of the doctrine of laches would be appropriate in this matter.

19 In view of the absence of a defence, or if the defendant has a valid defence, it is not adequately set out in the pleadings as mandated by the authorities. The motion to set aside the default judgment is dismissed accordingly.

Motion dismissed.

Lenskis v. Roncaioli, [1996] O.J. No. 381

Ontario Judgments

Ontario Court of Appeal
Toronto, Ontario
Houlden, Weiler and Moldaver JJ.A.
February 7, 1996.
Court File No. 12955

[1996] O.J. No. 381 | 45 C.P.C. (3d) 57 | 1996 CarswellOnt 330

Between Raisa Lenskis and Sonia Grimman, respondents, and Ibi Roncaioli and Joseph Roncaioli, appellants

(2 pp.)

Case Summary

Practice — Appeals.

Appeal.

HELD: Appeal dismissed without prejudice to an application being brought in the General Court to set aside the judgment.

Counsel

Howard C. Cohen for the appellants. No counsel mentioned for the respondents.

The judgment of the Court was delivered by

HOULDEN J.A. (endorsement)

1 On agreement, appeal dismissed without prejudice to application being brought in the General Court to set aside the judgment. No order is to costs.

HOULDEN J.A.

TAB 4

page 273c

ONTARIO REPORTS

(THIRD SERIES)

REPORTS OF CASES DETERMINED IN
THE COURTS OF ONTARIO

Vol. 41

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Tsaoussis, by her Litigation Guardian, The Children's Lawyer et al. v. Baetz*

Tsaoussis by Litigation Guardian, Metcalf v. Baetz

[Indexed as: Tsaoussis (Litigation Guardian of) v. Baetz]

Court of Appeal for Ontario, Doherty, Abella and Charron JJ.A.
September 2, 1998

Judgments and orders — Setting aside — Infant settlements — Settlement of claim by minor plaintiff in personal injury action approved by court in 1992 and judgment granted accordingly — Judgment set aside in 1997 on ground that medical evidence developed after judgment indicated that plaintiff significantly undercompensated as she had sustained serious brain damage which was unsuspected at time of settlement — Motions judge erring in finding that plaintiff's best interests sole factor for consideration in deciding whether to set aside judgment — Judgment approving settlement of minor's personal injury claim that has not been appealed final and should be given same force and effect as any other final judgment — Parens patriae jurisdiction not enabling court to create different compensation regime for minor plaintiffs involving periodic reviews of adequacy of compensation — Plaintiff failing to show that evidence developed after 1992 judgment could not have been available by exercise of reasonable diligence prior to judgment — Defendant's appeal allowed.

In 1992, counsel for the minor plaintiff brought an application seeking court approval of the settlement of the plaintiff's claim for damages arising out of a motor vehicle accident. On the basis of evidence which indicated that the plaintiff had suffered a skull fracture in the accident but that she should make a complete recovery, the settlement was approved and judgment was granted accordingly. Assessments done after the 1992 judgment revealed that the plaintiff had numerous ongoing medical and developmental problems, some of which were attributed to the head injury suffered in the car accident. In 1994, a new action was commenced claiming that the defendant's negligence had caused injuries to the plaintiff resulting in damages of some $2.2 million. In her defence, the defendant pleaded that the claim had been settled by the 1992 judgment, leaving the plaintiff with no cause of action against her. In 1996, counsel brought a motion in the 1994 action to set aside the 1992 judgment on the basis of the medical evidence which had come into existence since that judgment. In granting the motion and setting aside the 1992 judgment, the motions judge made it clear that she had considered only the best interests of the plaintiff. In her view, the criteria generally applied on a motion to set aside a final judgment did not apply on a motion to set aside a judgment approving an infant settlement. She specifically held that prejudice to the defendant was irrelevant. The defendant appealed.

Held, the appeal should be allowed.

---

* An application for leave to appeal was filed in the Supreme Court of Canada on October 29, 1998, and was submitted to court on December 21, 1998.

The motions judge erred in holding that the best interests of the plaintiff governed whether the 1992 judgment should be set aside. A judgment approving the settlement of a minor's personal injury claim that has been signed, entered and not appealed is final, and must be given the same force and effect as any other final judgment. A motion to set aside that judgment should be tested according to the same criteria used on motions to set aside other final judgments.

Because damages are assessed on a once and for all basis and a single lump sum amount is awarded, judges must determine what constitutes full and fair compensation on the basis of information available at the time the adjudication is made. It is almost inevitable, particularly where future damages are involved, that the amount awarded will in time prove to provide over- or under-compensation. However, one time lump sum awards are seen as having sufficient advantages over other proposed forms of compensation to justify the inaccuracy inherent in those awards. Paramount among those advantages is finality. Attempts to re-open matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after the judgment became final which shows that the judgment awards too much or too little. On that approach, finality would be an illusion.

A minor plaintiff, like any other plaintiff, is entitled to full but fair compensation if the minor establishes a personal injury claim. The court's *parens patriae* jurisdiction does not expand that entitlement. A minor, like any other plaintiff, is entitled to have the compensation assessment made on a once and for all basis and to be paid that compensation in a single lump sum. The *parens patriae* jurisdiction does not enable the court to create a different compensation regime for minor plaintiffs involving periodic reviews of the adequacy of the compensation provided to the minor. The court must protect the minor's best interests, but it must do so within the established structure for the compensation of personal injury claims. The risk of under-compensation in minors' personal injury claims, especially those involving very young children with head injuries, is very real. That risk demands that the court vigorously exercise its *parens patriae* jurisdiction when asked to approve a settlement. Once the settlement is approved, however, and the judgment is final and not appealed, the *parens patriae* jurisdiction is spent. It can only be re-asserted if there is a valid basis for setting aside the final judgment.

The motions judge erred in equating her position on a motion to set aside a final judgment with that of an appellate court asked to admit evidence of events which occurred between the judgment and the appeal. While finality concerns are relevant in both situations, they must carry a great deal more weight where the judgment is final and the proceedings which culminated in that judgment have long since ended.

In deciding whether to set aside a judgment based on evidence said to be discovered after judgment, the court must first decide whether that evidence could have been tendered before judgment. Evidence which could reasonably have been tendered prior to judgment cannot be used to afford a party a second opportunity to re-litigate the same issue. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are final. In a personal injury case, new evidence demonstrating that the plaintiff was inadequately compensated cannot, standing alone, meet that

onus. In this case, the plaintiff failed to show that the evidence developed after the 1992 judgment could not have been available by the exercise of reasonable diligence prior to obtaining that judgment. The order of the motions judge should be set aside and the 1994 action should be dismissed.

Makowka v. Anderson (1990), 45 B.C.L.R. (2d) 136, 67 D.L.R. (4th) 751 (C.A.), **distd**

Other cases referred to

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452, 19 N.R. 50, 8 A.R. 182, 3 C.C.L.T. 225, [1978] 1 W.W.R. 577; *Braithwaite v. Haugh* (1978), 19 O.R. (2d) 288, 84 D.L.R. (3d) 590 (Co. Ct.); *Carter v. Junkin* (1984), 47 O.R. (2d) 427, 6 O.A.C. 310, 11 D.L.R. (4th) 545, [1984] I.L.R. ¶1-1815 (Div. Ct.); *Castlerigg Investments Inc. v. Lam* (1991), 2 O.R. (3d) 216, 47 C.P.C. (2d) 270 (Gen. Div.); *Eve (Re)*, [1986] 2 S.C.R. 388, 61 Nfld. & P.E.I.R. 273, 31 D.L.R. (4th) 1, 71 N.R. 1, 185 A.P.R. 273, 13 C.P.C. (2d) 6; *Glatt v. Glatt*, [1937] S.C.R. 347, [1937] 1 D.L.R. 794, 19 C.B.R. 14, affg [1936] O.R. 75, [1936] 1 D.L.R. 387, 17 C.B.R. 219 (C.A.); *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621, 61 D.L.R. (3d) 455, 7 N.R. 299, [1976] 1 W.W.R. 388; *Hennig v. Northern Heights (Sault) Ltd.* (1980), 30 O.R. (2d) 346, 116 D.L.R. (3d) 496, 17 C.P.C. 173 (C.A.); *Kendall v. Kindl Estate* (1992), 10 C.P.C. (3d) 24 (Ont. Gen. Div.); *L.M. Rosen Realty Ltd. v. D'Amore* (1988), 29 C.P.C. (2d) 106 (Ont. H.C.J.); *McCann v. Shepherd*, [1973] 2 All E.R. 885, [1973] 1 W.L.R. 540, 117 Sol. Jo. 323 (C.A.); *McGuire v. Naugh*, [1934] O.R. 9 (C.A.); *Mercer v. Sijan* (1976), 14 O.R. (2d) 12 (C.A.); *Poulin v. Nadon*, [1950] O.R. 219, [1950] 2 D.L.R. 303 (C.A.); *Phosphate Sewage Co. v. Molleson* (1879), 4 App. Cas. 801 (H.L.); *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 35 Man. R. (2d) 83, 19 D.L.R. (4th) 1, 59 N.R. 321, [1985] 4 W.W.R. 385, 3 C.R.R. D-1; *R. v. Sarson*, [1996] 2 S.C.R. 223, 135 D.L.R. (4th) 402, 197 N.R. 125, 36 C.R.R. (2d) 1, 107 C.C.C. (3d) 21, 49 C.R. (4th) 75; *R. v. Thomas*, [1990] 1 S.C.R. 713, 108 N.R. 147, 75 C.R. (3d) 352; *Russell v. Brown*, [1948] O.R. 835 (C.A.); *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208, 111 D.L.R. (4th) 19, 1 L.W.R. 46, 25 C.P.C. (3d) 61, 2 R.F.L. (4th) 232 (C.A.); *Steeves v. Fitzsimmons* (1975), 11 O.R. (2d) 387, 66 D.L.R. (3d) 230 (H.C.J.); *Tepperman v. Rosenberg* (1985), 48 C.P.C. 317 (Ont. H.C.J.); *Tiwana v. Popove* (1988), 23 B.C.L.R. (2d) 392 (S.C.); *Toronto General Trusts Corp. v. Roman*, [1963] 1 O.R. 312, 37 D.L.R. (2d) 16 (C.A.), affd [1963] S.C.R. vi, 41 D.L.R. (2d) 290; *Watkins v. Olafson*, [1989] 2 S.C.R. 750, 39 B.C.L.R. (2d) 294, 61 Man. R. (2d) 81, 61 D.L.R. (4th) 577, 100 N.R. 161, [1989] 6 W.W.R. 481, 50 C.C.L.T. 101 (*sub nom. Watkins v. Manitoba*); *Whitehall Development Corp. v. Walker* (1977), 17 O.R. (2d) 241, 4 C.P.C. 97 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 116
Family Law Act, R.S.O. 1990, c. F.3

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rules 7, 59.06

Authorities referred to

Jacob, *The Fabric of English Civil Justice*, Hamlyn Lectures, 1987, pp. 23-24
Report on Compensation for Personal Injuries and Death, Ontario Law Reform Commission (1987), chap. 5
Waddams, *The Law of Damages* (looseleaf ed.), pp. 3.10-3.260

APPEAL from an order of Leitch J. (1997), 33 O.R. (3d) 679, 13 C.P.C. (4th) 136 (Gen. Div.) setting aside a judgment approving an infant settlement.

Sheldon A. Gilbert, Q.C., for appellant.
André I.G. Michael, for respondents.

The judgment of the court was delivered by

DOHERTY J.A.: —

The Issue

Should a judgment approving a settlement made on behalf of a minor plaintiff in a personal injury case be set aside some four and one-half years later if, based on medical assessments done after the settlement, it appears that the minor was significantly under-compensated by the terms of the settlement?

I.

In April 1990, the respondent, Lorrie Tsaoussis (Lorrie), aged three, was struck by a car driven by the appellant, Juanita Baetz. Lorrie was hospitalized for three days and subsequently seen by her family doctor and paediatrician. Her mother, Carol Metcalf, retained counsel who, within a month of the accident, notified the appellant of Lorrie's claim against her. After negotiations between Lorrie's former counsel and counsel for the appellant's insurer, the parties reached a settlement. As the settlement involved a minor plaintiff, it had to be approved by the court.

Early in 1992, former counsel for Lorrie brought an application under rule 7.08 seeking court approval of the settlement of Lorrie's claim against the appellant arising out of the accident. In compliance with rule 7.08(4), counsel filed his affidavit and the affidavit of Carol Metcalf, Lorrie's mother and litigation guardian. Counsel also attached the hospital records and reports from Lorrie's family doctor and her paediatrician to his affidavit. According to that material, Lorrie had suffered a skull fracture in the accident. Although she had some medical problems in the weeks following the accident, they seemed relatively minor. Assessments done in the six months following the accident indicated that Lorrie was essentially "normal". Nearly a year after the accident her family doctor said:

> It is my impression that she should have a complete recovery without any significant sequela anticipated.

In Ms. Metcalf's affidavit, she indicated that the information supplied on the medical records was correct, and that based on
a counsel's advice, she had accepted the terms of the settlement on behalf of Lorrie.

On February 7, 1992, Scott J. of the Ontario Court (General Division) approved the settlement and granted judgment (the 1992 judgment). Under the terms of the settlement and judgment, $5,420
b was paid into court for the benefit of Lorrie and $1,250 was paid by the appellant in full satisfaction of costs. After the funds were paid into court, counsel for Ms. Baetz wrote to Lorrie's counsel confirming that "this resolves all claims arising out of this accident".

Ms. Metcalf remained concerned about her daughter's health.
c Lorrie had headaches, did not sleep through the night, seemed easily distracted and had become increasingly clumsy. With the help of a social worker, Lorrie's mother arranged to have Lorrie seen by a paediatric neurologist at Children's Hospital in London, Ontario. Assessments done between the summer of 1992 and the fall of 1994 revealed that Lorrie had numerous ongoing
d medical and developmental problems, some of which were attributed to the head injury she had suffered in the car accident in 1990. By February 1996, Lorrie's doctor opined that Lorrie's "attention and concentration problems are attributable to the motor vehicle accident". Her doctor also felt that the full extent of
e those problems could not be determined for another year or two.

At some point, Lorrie's mother retained new counsel on behalf of Lorrie. In the fall of 1994, that counsel commenced a new action (the 1994 action) claiming that the appellant's negligence had caused injuries to Lorrie resulting in damages of some $2.2 million. Counsel also claimed damages under the *Family Law*
f *Act*, R.S.O. 1990, c. F.3 on behalf of Lorrie's mother and sister. In her defence, Ms. Baetz pleaded that the claim had been settled by the 1992 judgment leaving Lorrie with no cause for action against her. Ms. Baetz also denied any liability for the accident.

In the fall of 1996, counsel brought a motion in the 1994 action
g to set aside the 1992 judgment.[1] Although counsel argued that Scott J. should not have approved the settlement in 1992, the affidavits filed on the motion make it clear that medical evidence developed after the 1992 judgment provided the sole basis for setting aside that judgment. The final paragraph of counsel's affida-
h vit filed on the motion summarizes his position:

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1 Under the terms of rule 59.06(2), the motion should have been brought in the 1992 proceedings, but it would appear that nothing turns on this procedural irregularity.

> There is no doubt in my mind that the present medical evidence now clearly establishes that the court approved settlement was not in the best interests of either Lorrie or her mother. The medical tests and assessments which have been performed since the time of the court approval have clearly provided new evidence of the extent and effect of the brain damage sustained by Lorrie which was not available to Madam Justice Scott. It is my opinion that the interests of justice require that the judgment of Madam Justice Scott be set aside.

Leitch J., for reasons reported at (1997), 33 O.R. (3d) 679, granted the motion, set aside the 1992 judgment and directed that the 1994 action should proceed.[2] In doing so, she did not purport to review the correctness of the judgment as of the date it was made. Instead, Leitch J. held that she was obliged to consider the medical evidence developed after the 1992 judgment and decide whether in the light of that evidence the 1992 judgment could be said to be in the best interests of Lorrie. She said, at p. 688:

> I find it necessary to consider evidence that was not before the judge who approved the settlement in 1992 not to show that the assessment of the previously existing evidence was incorrect but to allow this court to assess whether Lorrie's best interests have been met.

After a careful review of the new medical evidence, Leitch J. concluded that as the 1992 judgment had been premised on medical information indicating that Lorrie's injury was relatively minor and would cause no long-term effects, it could not be said to meet Lorrie's best interests in the face of medical evidence indicating a much more serious injury with significant long-term effects. Leitch J. made it clear that in setting aside the 1992 judgment she had considered only the best interests of Lorrie. In her view, the criteria generally applied on a motion to set aside a final judgment did not apply on a motion to set aside a judgment approving an infant settlement. She specifically held that prejudice to the appellant was irrelevant.

I think Leitch J. properly characterized her function on the motion to set aside the 1992 judgment. She was not, and indeed could not, sit on appeal from the decision of Scott J. Arguments as to whether Scott J. should have approved the settlement based on the information placed before her could only be prop-

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2 Justice Leitch also directed that the payment pursuant to the 1992 judgment should be treated as an advance payment to Lorrie under the terms of the *Insurance Act*, R.S.O. 1990, c. I.8. She further dismissed a motion brought by Ms. Baetz for summary judgment on the derivative action brought by Lorrie's mother, Carol Metcalf under the *Family Law Act*. Given my disposition of the appeal from the order setting aside the 1992 judgment, I need not consider the correctness of either of these orders.

erly made by way of a direct appeal from that judgment and no such appeal was ever taken.

Leitch J. also properly avoided any consideration of the adequacy of former counsel's representation of Lorrie in making her determination that the 1992 judgment should be set aside. Former counsel is not a party to these proceedings, and it would be inappropriate to take anything said by Leitch J. or by me as a comment on the adequacy of his representation. If Lorrie wishes to take issue with that representation, she can do so in separate proceedings instituted against the former counsel for that express purpose.[3]

II.

If, as Leitch J. held, the best interests of Lorrie is the only factor to consider in deciding whether to set aside the 1992 judgment, her decision is unassailable. The medical evidence gathered after the 1992 judgment strongly suggests that if the appellant is responsible for Lorrie's injuries, Lorrie was significantly undercompensated by the terms of the 1992 judgment. I cannot agree, however, that the best interests of Lorrie govern the decision whether the 1992 judgment should be set aside. In my view, a judgment approving the settlement of a minor's personal injury claim that has been signed, entered and not appealed is final, and must be given the same force and effect as any other final judgment. A motion to set aside that judgment should be tested according to the same criteria used on motions to set aside other final judgments. Applying those criteria, I would hold that the 1992 judgment should not have been set aside.

III.

A person who is injured as a result of the negligence of another is entitled to full but fair compensation for those injuries: *Watkins v. Olafson*, [1989] 2 S.C.R. 750 at p. 757, 61 D.L.R. (4th) 577 at p. 581. Under our system of adjudication of personal injury cases, full but fair compensation is determined at a specific point in time on a once and for all basis, and awarded in the form of a single lump sum payment. Absent statutory authority, a court cannot provide for periodic payments to a plaintiff in a personal injury case, or periodically review damages based on developments subsequent to the initial assessment: *Watkins v. Olafson*,

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[3] In the cross-examination of Ms. Metcalf on her affidavit, counsel for Lorrie indicated that the former solicitor had been put on notice of a possible claim against him based on the 1992 settlement. That lawsuit is being held in abeyance pending the result of this appeal.

supra, at pp. 756-64 S.C.R., pp. 580-86 D.L.R. Because we assess damages on a once and for all basis and award a single lump sum amount, judges must determine what constitutes full but fair compensation on the basis of information available at the time the adjudication is made. Judges must also factor future costs and future losses into that assessment in many personal injury cases. It is almost inevitable, particularly where future damages are involved, that the amount awarded will in time prove to provide over- or under-compensation. Despite the likelihood of inaccuracy which has spawned strong judicial and academic criticism of one time lump sum awards,[4] this province maintains that approach in personal injury cases in all but very limited circumstances.[5] One time lump sum awards are seen as having sufficient advantages over other proposed forms of compensation to justify the inaccuracy inherent in those words.[6]

Paramount among those advantages is finality. Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, *The Fabric of English Civil Justice*, Hamlyn Lectures 1987, at pp. 23-24.

The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indetermi-

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4 *E.g.*, see the comments of Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at p. 236, 83 D.L.R. (3d) 452.

5 Section 116 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides for periodic payment and review of damages on consent of the parties and in one other very limited circumstance.

6 The arguments for and against one time lump sum payments are set out in Waddams, *The Law of Damages* (loose leaf edition) 3.10-3.260, and in the *Report on Compensation for Personal Injuries and Death, Ontario Law Reform Commission* (1987), chap. 5. The majority of the Commission did not favour a periodic payment scheme.

nate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. Under our system for the adjudication of personal injury claims, that end point occurs when a final judgment has been entered and has either not been appealed, or all appeals have been exhausted.

Finality is important in all areas of the law, but is stressed more in some than in others. Its significance in tort law was highlighted by McLachlin J. in *Watkins v. Olafson*, *supra*, at p. 763 S.C.R., p. 585 D.L.R., where in the course of discussing problems associated with a scheme of compensation based on reviewable periodic payments, she said:

> Yet another factor meriting examination is the lack of finality of periodic payments and the effect this might have on the lives of plaintiff and defendant. Unlike persons who join voluntarily in marriage or contract — areas where the law recognizes periodic payments — the tortfeasor and his or her victim are brought together by a momentary lapse of attention. A scheme of reviewable periodic payments would bind them in an uneasy and unterminated relationship for as long as the plaintiff lives.

The importance attached to finality is reflected in the doctrine of *res judicata*. That doctrine prohibits the re-litigation of matters that have been decided and requires that parties put forward their entire case in a single action. Litigation by instalment is not tolerated: *Toronto General Trusts Corp. v. Roman*, [1963] 1 O.R. 312, 37 D.L.R. (2d) 16 (C.A.), affirmed [1963] S.C.R. vi, 41 D.L.R. (2d) 290. Finality is so highly valued that it can be given priority over the justice of an individual case even where fundamental liberty interests and other constitutional values are involved: *R. v. Thomas*, [1990] 1 S.C.R. 713, 75 C.R. (3d) 352; *R. v. Sarson*, [1996] 2 S.C.R. 223, 107 C.C.C. (3d) 21; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 757, 19 D.L.R. (4th) 1.

That is not to say that finality interests always win out over other interests once final judgment is signed and entered. Sometimes the rigor of the *res judicata* doctrine will be relaxed: *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621 at p. 638, 61 D.L.R. (3d) 455; *Hennig v. Northern Heights (Sault) Ltd.* (1980), 30 O.R. (2d) 346, 116 D.L.R. (3d) 496 (C.A.). The court also has the power to set aside final judgments: *Glatt v. Glatt*, [1937] S.C.R. 347, [1937] 1 D.L.R. 794, affirming [1936] O.R. 75, [1936] 1 D.L.R. 387 (C.A.); *Whitehall Development Corp. v. Walker* (1977), 17 O.R. (2d) 241, 4 C.P.C. 97 (C.A.). The limitations on the *res judicata* doctrine and the power to set aside previous judgments are, however, exceptions to the general rule that final judgments mark the end of litigation. Those exceptions recognize that despite the value placed on finality, there will be situations

in which other legitimate interests clearly outweigh finality concerns. The power to set aside a final judgment obtained by fraud is the most obvious example. As important as finality is, it must give way when the preservation of the very integrity of the judgment process is at stake.

Attempts, whatever their form, to re-open matters which are the subject of a final judgment must be carefully scrutinized. It cannot be enough in personal injury litigation to simply say that something has occurred or has been discovered after the judgment became final which shows that the judgment awards too much or too little. On that approach, finality would become an illusion. The applicant must demonstrate circumstances which warrant deviation from the fundamental principle that a final judgment, unless appealed, marks the end of the litigation line. I think Anderson J. struck the proper judicial tone on applications to re-open final judgments in *L.M. Rosen Realty Ltd. v. D'Amore* (1988), 29 C.P.C. (2d) 106 (Ont. H.C.J.). He was asked to set aside a judgment and vary the rate of post-judgment interest granted because subsequent events showed that the rate was much too high. He said, at p. 109:

> Even if I thought I had the discretion, I would be reluctant to intervene because I feel it would be offensive to the basic proposition that there should be finality in litigation. Adjusting the result after judgment, save in response to unusual circumstances, would be a conspicuous and dangerous meddling with that proposition.

I am not aware of any personal injury case in which a final judgment has been set aside, other than on appeal, because evidence developed after the judgment indicated that the award was much too high or much too low.[7] I would be surprised to find such a case as it would be entirely inconsistent with our system of one time lump sum awards for personal injuries. As assessments which ultimately prove to be inaccurate are inherent in that scheme, I do not see how the demonstration of that inaccuracy in a particular case could, standing alone, justify departure from the finality principle.

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7 In *Tiwana v. Popove* (1988), 23 B.C.L.R. (2d) 392 (S.C.), the court re-opened the trial after it had delivered its reasons for judgment, set aside its reasons and allowed the plaintiff to call further evidence concerning certain medical evidence which had developed after the trial had ended. In that case, however, formal judgment had not been entered when the plaintiff moved to set aside the reasons and call further evidence. A trial judge has a wide discretion to permit the re-opening of a case prior to the entering of judgment: *Castlerigg Investments Inc. v. Lam* (1991), 2 O.R. (3d) 216, 47 C.P.C. (2d) 270 (Gen. Div.).

IV.

The approach taken by Leitch J. constitutes a departure from the traditional approach taken to final judgments in personal injury litigation. She discounts finality concerns entirely. If she is correct, no judgment approving an infant settlement is final. Instead, all carry the unwritten *caveat* — subject to being set aside if subsequent events reveal that the plaintiff may have been under-compensated.[8] Nor, in my view, would it be an unusual case in which this *caveat* would come into play. Medical assessments change, unanticipated losses arise and estimates of anticipated costs prove inaccurate. In all such situations where the change was significant, minor plaintiffs would be entitled to set aside a judgment approving a settlement and re-litigate their claim based on the latest information available as to the extent of the damage suffered by them.

In addition to discounting finality concerns, Leitch J. has, in effect, introduced a scheme of compensation by reviewable periodic payments in personal injury cases involving minor plaintiffs. Amounts awarded pursuant to settlements approved by the court would become periodic payments if, before the minor reached majority, circumstances revealed that the amount awarded did not provide full compensation. This is the sort of drastic innovation in our tort compensation scheme which the court in *Watkins v. Olafson*, *supra*, instructed should be left to the legislature.

The respondent contends that the court's obligation to ensure that the best interests of Lorrie were met trumped all other concerns. There can be no doubt that a court is obliged to look to and protect the best interests of minors who are parties to legal proceedings.[9] This obligation, sometimes referred to as the court's *parens patriae* jurisdiction, requires that the court abandon its normal umpire-like role and assume a more interventionist mode. For example, the court must decide who will act on behalf of the minor (rules 7.03-7.06) and the court must take control of

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8 Leitch J. was concerned with a judgment approving a settlement; however, if she is correct in holding that the best interests of the child are paramount, I see no reason why a judgment following a trial could not also be set aside if subsequent events showed that the child had been under-compensated by the amount awarded at trial.

9 The *parens patriae* jurisdiction over minors extends beyond claims to which minors are a party. It also protects others who are under a legal disability: see *Re Eve*, [1986] 2 S.C.R. 388 at pp. 407-27, 31 D.L.R. (4th) 1 at pp. 13-28; Rule 7. I refer only to minors, and only to the exercise of the *parens patriae* jurisdiction in the context of proceedings in which a minor is a party because those are the circumstances which operate in this case.

any proceeds paid to the benefit of the minor (rule 7.09). The supervisory powers of the court are most clearly evinced by the requirement that the court approve any consent judgment to which a minor is a party and the closely aligned requirement that the court approve any settlement of a minor's claim before that settlement will bind the minor (rule 7.08). The duty on the court when a motion for approval of a settlement is made was authoritatively described by Robertson C.J.O. in *Poulin v. Nadon*, [1950] O.R. 219 at p. 225, [1950] 2 D.L.R. 303:

> If, upon proper inquiry, the judge shall be of the opinion that the settlement is one that, in the interests of the infant, should be approved, he may give the required approval. If, on the other hand, the judge is not of the opinion that the settlement is one that should be approved, he may give such direction as to the trial of the action as may be proper.

The inquiry described by Robertson C.J.O. requires that the court make its own determination whether the proposed settlement is in the minor's best interests. Rule 7.08(4) demands that the parties place sufficient material before the court to allow it to make that determination.

As important and far reaching as the *parens patriae* jurisdiction is, it does not exist in a vacuum, but must be exercised in the context of the substantive and adjectival law governing the proceedings. The *parens patriae* jurisdiction is essentially protective. It neither creates substantive rights nor changes the means by which claims are determined.

The proper limits of the *parens patriae* jurisdiction were drawn in *Carter v. Junkin* (1984), 47 O.R. (2d) 427, 11 D.L.R. (4th) 545 (Div. Ct.). The defendant insurance company proposed to make an advance payment to a minor under the provisions of the *Insurance Act*. The defendant applied for an order approving the advance payment, but the motion judge refused to make that order unless the insurer agreed to a term which would protect the minor's claim to pre-judgment interest. The defendant refused to make the payment on that term and appealed. The Divisional Court held, at p. 430:

> The court has no jurisdiction to compel an insurer to pay money into court under s. 224 [the *Insurance Act*], and to make good the interest differential. But that is not what was done here. The learned motions court judge did not require the insurer to pay money into court. He simply granted leave to the insurer to do so, if the insurer was willing to agree to give the undertaking as to the interest differential. The insurer can still decline to make the payment, in which event the infant plaintiff will recover at trial the full amount of prejudgment interest to which he is entitled.

The court properly drew a distinction between a court imposed term on a voluntary payment as a condition to court approval of

that payment and the court requiring that the defendant make a payment. The former protected the minor's best interests under the scheme of voluntary payments established under the *Insurance Act* and was a proper exercise of the *parens patriae* jurisdiction. A forced payment would, however, have gone beyond the limits of the statute and given the minor rights which he did not have under that statute. While a forced advance payment may have been in the minor's best interests, it was not within the scope of the *parens patriae* jurisdiction as it was not contemplated under the statutory scheme.

A minor plaintiff, like any other plaintiff, is entitled to full but fair compensation if the minor establishes a personal injury claim. The *parens patriae* jurisdiction does not expand that entitlement. For example, a minor plaintiff who cannot establish that the defendant's negligence caused the injury, cannot succeed on the basis that, despite that failure, compensation is in the minor's best interests. Similarly, a minor, like any other plaintiff, is entitled to have the compensation assessment made on a once and for all basis and to be paid that compensation in a single lump sum. The *parens patriae* jurisdiction does not enable the court to create a different compensation regime for minor plaintiffs involving periodic reviews of the adequacy of the compensation provided to the minor. The court must protect the minor's best interests, but it must do so within the established structure for the compensation of personal injury claims: *Kendall v. Kindl Estate* (1992), 10 C.P.C. (3d) 24 at pp. 27-28 (Ont. Gen. Div.).

Finality is as important in cases involving minor plaintiffs as it is in cases involving adult plaintiffs. The need for finality must temper the goal of meeting the minor's best interests just as it must temper the desire to provide every plaintiff with full but fair compensation. Proposed settlements of minors' personal injury claims, especially those involving very young children with head injuries, raise real concerns about the adequacy of compensation provided by those settlements. The risk of under-compensation in those cases is very real.[10] That risk demands that the court vigorously exercise its *parens patriae* jurisdiction when asked to approve a settlement. Once the settlement is approved, however, and the judgment is final and not appealed, the *parens patriae* jurisdiction is spent. It can only be re-asserted if there is a valid basis for setting aside the final judgment.

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10 *Steeves v. Fitzsimmons* (1975), 11 O.R. (2d) 387, 66 D.L.R. (3d) 230 (H.C.J.) provides an interesting approach to this problem. The settlement approved by the court provided that the minor could apply to vary the judgment at any time before his seventh birthday.

In arriving at the conclusion that the best interests of the minor justified setting aside the previous final judgment, Leitch J. relied exclusively on the decision of the British Columbia Court of Appeal in *Makowka v. Anderson* (1990), 67 D.L.R. (4th) 751, 45 B.C.L.R. (2d) 136. In *Makowka*, a motion judge was asked to approve an infant settlement. He did so over the objections of the Public Trustee acting on behalf of the infant. The Public Trustee argued that more time was needed to assess the extent of the minor's head injury and the cause of her various medical problems. The Public Trustee appealed the judgment approving the settlement and sought to introduce evidence on appeal of medical assessments done between the judgment approving the settlement and the hearing of the appeal. Those assessments confirmed the Public Trustee's concerns and indicated that the minor's injuries were serious and that in all likelihood she would suffer significant long-term disabilities.

On a motion to admit the fresh evidence heard before the actual appeal, Lambert J.A., for the court, while accepting the importance of finality, even in litigation involving minors, acknowledged that the appeal court could receive evidence of matters arising after the judgment appealed from. He stressed that the evidence proffered by the Public Trustee was not directed to a purely factual question, but rather to the assessment of the minor's best interests. The reasons of Lambert J.A. admitting the evidence are referred to in the reasons disposing of the appeal. He said, at p. 758:

> So the purpose of the introduction of fresh evidence in this appeal is not to show that a factual assessment of the previously existing evidence was incorrect, but it is to show that the best interests of the infant may not in fact have been carried through in the way that the chambers judge thought he was carrying them through.
>
> Accordingly, the factors are quite different in this case. Having regard to the crucial ones, which are the best interests of the child and the good administration of justice, it would, in my opinion, in the words of the cases, be an affront to justice to insist on imposing this settlement on this infant if it was, when it was agreed upon, an unjust settlement.

The court hearing the appeal described its task in words that were adopted by Leitch J. (at p. 758):

> So we are entitled to look at the new evidence, which includes subsequent medical reports, for the purpose of determining whether the settlement originally placed before the court seems a just one today. We are not limited to considering the strengths and weaknesses of Meghan's [the minor] case as they appeared from the material placed before the judge below.

Not surprisingly, the court went on to conclude that the amount provided for in the settlement was totally inadequate and set aside the order approving the settlement.

The facts in *Makowka* are quite similar to our facts. The pro-

ceedings were, however, fundamentally different. *Makowka* was a direct appeal from the judgment approving the settlement. When the fresh evidence was tendered the matter was still in the litigation system and the rights and obligations of the parties were subject to appellate review, the purpose of which was to determine the correctness of the order approving the settlement. The defendant in *Makowka* had no reason to think the end of the litigation line had been reached. The Public Trustee continued to maintain that the settlement should not have been approved and the new evidence went directly to the central issue both on the motion and on the appeal.

On this motion, Leitch J. was not asked to, and could not, review the correctness of the order of Scott J. Instead, she was asked to allow Lorrie to begin her claim afresh and to re-litigate a claim which, in the eyes of the law and the mind of Ms. Baetz, had ceased to exist when it became the subject of final judgment in 1992. In my opinion, there is an important difference between allowing a party to supplement a record at the appellate stage of an ongoing proceeding and allowing a party to resurrect a claim which is the subject of a final judgment. That distinction has been recognized by appellate courts faced with applications to admit fresh evidence concerning events which occurred between the judgment and the appeal. In *McCann v. Shepherd*, [1973] 2 All E.R. 881 at p. 885 (C.A.), Lord Denning M.R., said:

> The general rule in accident cases is that the sum of damages falls to be assessed once and for all at the time of the hearing; and this court will be slow to admit evidence of subsequent events to vary it. It will not normally do so after the time for appeal has expired without an appeal being entered — because the proceedings are then at an end. They have reached finality. But if notice of appeal has been entered in time — and pending the appeal, a supervening event occurs such as to falsify the previous assessment — then the court will be more ready to admit fresh evidence — because until the appeal is heard and determined, the proceedings are still pending. Finality has not been reached.

Admitting fresh evidence on appeal of events which occurred between the judgment and the appeal raises finality concerns for the reasons set out by Lord Denning, however, those concerns are moderated, first by the fact that the proceeding is still underway and second because the parties know that their rights remain undetermined until appellate remedies have been exhausted. Even in those circumstances, evidence is only admitted where it would be "an affront to common sense" to refuse to admit the evidence on appeal: *Mercer v. Sijan* (1976), 14 O.R. (2d) 12 at p. 17 (C.A.); *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 at p. 211 (C.A.). This was the test applied in *Makowka*.

Leitch J. erred in equating her position on a motion to set aside a final judgment with that of an appellate court asked to admit evidence of events which occurred between the judgment and the appeal.[11] While finality concerns are relevant in both situations, they must carry a great deal more weight where the judgment is final and the proceedings which culminated in that judgment have long since ended. The court in *Makowka* did not have to address the threshold issue raised on this motion — should a litigant, based on evidence developed after final judgment and after proceedings have ended, be allowed to start the litigation process all over again? That issue could not be resolved by reliance on the *parens patriae* jurisdiction.

V.

A party who would otherwise be bound by a previous judgment can bring an action to set aside that judgment. Fraud in the obtaining of the initial judgment is the most common ground relied on in such actions: *McGuire v. Naugh*, [1934] O.R. 9 at pp. 11-13 (C.A.); *Russell v. Brown*, [1948] O.R. 835 at pp. 846-48 (C.A.), *per* Hogg J.A. (concurring); *Glatt v. Glatt*, *supra*, at p. 79 (C.A.). Rule 59.06 allows that kind of relief to be claimed by way of a motion in the original proceedings. The rule does not, however, confer the power to set aside a previous judgment, nor does it articulate a test to be applied in deciding whether a previous judgment should be set aside. The rule merely provides a more expeditious procedure for seeking that remedy: *Glatt v. Glatt*, *supra*; *Braithwaite v. Haugh* (1978), 19 O.R. (2d) 288 at p. 289, 84 D.L.R. (3d) 590 (Co. Ct.). The language of Rule 59.06 does, however, provide insight into the varied factual circumstances which may give rise to motions to set aside a judgment.

For present purposes, I am concerned with Rule 59.06(2)(*a*) and particularly, the part of the rule which refers to motions to

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11 *Tepperman v. Rosenberg* (1985), 48 C.P.C. 317 (Ont. H.C.J.) is more on point than *Makowka*. In that case an infant plaintiff moved before O'Leary J. to set aside an order of Craig J. approving a settlement. The infant relied on evidence that was not before Craig J. O'Leary J. considered the fresh evidence so that he could decide whether the settlement was in the infant's best interests. He held that it was and dismissed the motion. As the fresh evidence did not affect the result, O'Leary J. did not have to decide whether he could have set aside the judgment of Craig J. solely on the basis that the new evidence suggested that the child's best interests were not served. The concluding paragraphs of his reasons (p. 320) suggest he would have set the judgment aside if he thought the fresh evidence supported the conclusion that it was not in the child's best interests. In my view, it would have been wrong to do so without first considering the other relevant factors.

set aside orders "on the ground . . . of facts arising or discovered after it [the order] was made". The rule draws a distinction between facts which come into existence after the judgment was made and facts which, while existing when the judgment was made, were discovered after judgment. In this case, the facts relied on to set aside the previous judgment concerned the exact nature of Lorrie's head injury and, more importantly, its potential impact on her physical, intellectual and cognitive development. That injury and those potential effects existed at the time of the judgment.

In deciding whether to set aside a judgment based on evidence said to be discovered after judgment, the court must first decide whether that evidence could have been tendered before judgment. Evidence which could reasonably have been tendered prior to judgment cannot be used to afford a party a second opportunity to re-litigate the same issue. In *Glatt v. Glatt*, *supra*, the appellant moved to set aside a judgment partly on the basis of evidence discovered after the judgment. Duff C.J.C., for a unanimous court, rejected the claim stating, at p. 350:

> It is well established law that a judgment cannot be set aside on such a ground unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. The importance of this rule is obvious and it is equally obvious that the finality of judgments generally would be gravely imperilled unless the rule were applied with the utmost strictness.

That same view prevailed in the majority judgment in *Grandview v. Doering*, *supra*, some 40 years later. Mr. Doering sued the Town of Grandview alleging that it was responsible for the flooding of his land. The suit was dismissed. A few months later he commenced a second action, again claiming damages for the flooding of his land. The second claim referred to different years than the first claim and alleged a different means by which the flooding occurred. An expert consulted by Mr. Doering after the first trial had developed a new theory explaining how the flooding had occurred. The Town moved to have the second action stayed on the basis that it was *res judicata*. A closely divided Supreme Court of Canada sided with the Town and stayed Mr. Doering's claim. The minority were of the view that the two actions did not raise the same issue. The majority took the position that the two actions were sufficiently similar to warrant the application of *res judicata*. Ritchie J., for the majority, went on to consider whether the new theory as to the cause of the flooding could provide a basis for re-litigating the Town's liability. He cited with approval, at p. 636, the judgment of Lord Cairns in *Phosphate Sewage Co.*

v. Molleson (1879), 4 App. Cas. 801 at pp. 814-15 (H.L.), where His Lordship said:

> As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. *My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before.*

(Emphasis added)

Ritchie J., at p. 638, observed that Mr. Doering had not alleged, much less proved, that the expert evidence advancing the new theory concerning the flooding could not have been available by the exercise of reasonable diligence at the first trial. Consequently, Mr. Doering had not cleared the first hurdle required to allow him to re-litigate a claim which was *res judicata*.

These and numerous other authorities (*e.g.*, *Whitehall Development Corp. v. Walker*, *supra*, at p. 98) recognize that the finality principle must not yield unless the moving party can show that the new evidence could not have been put forward by the exercise of reasonable diligence at the proceedings which led to the judgment the moving party seeks to set aside. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are exactly that, final. In a personal injury case, new evidence demonstrating that the plaintiff was inadequately compensated cannot, standing alone, meet that onus.

Lorrie cannot show that the evidence developed after the 1992 judgment could not have been available by the exercise of reasonable diligence prior to obtaining that judgment. Ms. Metcalf testified that she told Lorrie's former lawyer that Lorrie was having problems sleeping and walking before the 1992 judgment. According to Ms. Metcalf, the former counsel was aware that arrangements had already been made to have Lorrie seen at the Brain Injury Clinic in London when the settlement was made in

February 1992. Documentation produced by Lorrie's present counsel in response to undertakings given during Ms. Metcalf's cross-examination indicates that the arrangements were actually made shortly after the 1992 judgment. The fact remains, however, that according to Ms. Metcalf, she and Lorrie's former counsel were aware of Lorrie's ongoing problems and Ms. Metcalf's desire to have a further medical assessment done. Ms. Metcalf testified that Lorrie's former counsel did not suggest that the settlement be delayed pending further assessment and Ms. Metcalf did not request that the settlement be delayed for that purpose.

The reasons no further assessments were made prior to proceeding with the settlement and judgment are irrelevant in this proceeding. Certainly, there is no suggestion that Ms. Baetz or her insurers were aware that further assessments were needed or even contemplated. Those acting on behalf of Lorrie chose to proceed with the settlement without further medical assessments. It cannot now be said that the evidence eventually generated by further assessments could not have been available by the exercise of reasonable diligence prior to the judgment approving the settlement.

I would allow the appeal, set aside the order of Leitch J., and in its place make an order dismissing the 1994 action. Ms. Baetz is entitled to her costs both here and in the court below.

Appeal allowed.

Tsaoussis (Litigation guardian of) v. Baetz, [1998] S.C.C.A. No. 518

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada
Record created: October 29, 1998.
File No.: 26945

[1998] S.C.C.A. No. 518

Lorrie Tsaoussis, by her Litigation Guardian, The Children's Lawyer, Carol Metcalf personally, and Angela Tsaoussis, by her Litigation Guardian, Carol Metcalf v. Juanita M. Baetz And between Lorrie Tsaoussis, by her Litigation Guardian, Carol Metcalf v. Juanita M. Baetz

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Status:

Application for leave to appeal dismissed with costs (without reasons) January 28, 1999.

Catchwords:

Torts — Damages — Motor vehicles — Procedural law — Civil procedure — Court approved settlement of minor's claim — Whether the Court of Appeal erred regarding the test for setting aside court approved settlement — Whether there are conflicting appellate authorities — Whether the Court of Appeal erred regarding the parens patriae doctrine — Whether the Court of Appeal erred regarding the doctrine of reasonable discoverability.

Counsel

André I.G. Michael (Siskind, Cromarty, Ivey & Dowler), for the motion. Sheldon A. Gilbert, Q.C. (Gilbert, Wright & Kirby), contra.

Chronology:

1. Application for leave to appeal:

FILED: October 29, 1998. S.C.C. Bulletin, 1998, p. 1749.

2. Motion to extend the time in which to serve and file the respondent's response granted December 14, 1998. Time extended to December 7, 1998. Before: A. Roland, Registrar. S.C.C. Bulletin, 1998, p. 1991.

3. Application for leave to appeal:

SUBMITTED TO THE COURT: December 21, 1998. S.C.C.

Bulletin, 1999, p. 11.
DISMISSED WITH COSTS: January 28, 1999 (without reasons).
S.C.C. Bulletin, 1999, p. 152.
Before: Lamer C.J. and McLachlin and Iacobucci JJ.

Procedural History:

Judgment at first instance: Applicants' motion for an order

setting aside the order of Scott J. approving the settlement granted; leave granted to proceed with 1994 action; Respondent's cross-motion for summary judgment dismissed.
Ontario Court of Justice (General Division), Leitch J., April 28, 1997.
33 O.R. (3d) 679; *[1997] O.J. No. 2292*.

Judgment on appeal: Respondent's appeal allowed: Respondent's motion for summary judgment granted, 1994 action dismissed, order of Leitch J. set aside with costs. Ontario Court of Appeal, Doherty, Abella and Charron JJ.A., September 4, 1998.
165 D.L.R. (4th) 268; *[1998] O.J. No. 3516*.

TAB 5

paras. 47-48

2007 CarswellOnt 5737
Ontario Superior Court of Justice

Edwards Builders Hardware (Toronto) Ltd. v. Aventura Properties Inc.

2007 CarswellOnt 5737, [2007] O.J. No. 3445, 160 A.C.W.S. (3d) 427

EDWARDS BUILDERS HARDWARE (TORONTO) LTD. (Plaintiff) and AVENTURA PROPERTIES INC. (Defendant)

DiTomaso J.

Heard: August 29, 2007
Judgment: September 12, 2007
Docket: Newmarket CV-07-082429-SR

Counsel: Scott Hamilton for Plaintiff
Pamela Miehls for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial; Contracts; Property

Headnote

Civil practice and procedure --- Default proceedings — Application to set aside default judgment — Evidence on application — General principles

Plaintiff supplied goods and services to property owned by A II Inc. but brought action against A Inc. and obtained default judgment — Defendant, A Inc., brought motion to set aside default judgment on ground that A Inc. was not party to supply of goods and services by plaintiff — Principals of A Inc. and A II Inc. were same and they alleged that they continued in mistaken belief that action was commenced against A II Inc. until after default judgment was obtained and notice of garnishment was received — Motion dismissed — At no point between time plaintiff supplied goods and services and time it received notice of action dismissal did principals or employees of A Inc. indicate that A II Inc. owned property which plaintiff supplied — Evidence supported finding that plaintiff was not mistaken in commencing action against A Inc., and principals of two companies were not mistaken in their belief that A II Inc. was target defendant responsible to pay plaintiff's account — A Inc. failed to provide adequate explanation about circumstances which led to default judgment since controlling minds of A Inc. were well aware of existence of statement of claim but never bothered to determine who plaintiff brought action against — Notice of action dismissal was forwarded to A Inc. and it made no response, which was further evidence of its conscious decision not to defend action — A Inc. failed to show that it had arguable case on merits since it did not contest fact that plaintiff was owed money reflected in default judgment and failed to provide any evidence to differentiate business of operations of A Inc. and A II Inc. — Evidence showed that A Inc. was proper party to action since invoices sent to it were partially satisfied without issue for approximately six months and no documentary evidence suggested that they were to be sent to A II Inc.

Civil practice and procedure --- Default proceedings — Defences to default proceedings — Error or inadvertence by defaulting party

Plaintiff supplied goods and services to property owned by A II Inc. but brought action against A Inc. and obtained default judgment — Defendant, A Inc., brought motion to set aside default judgment on ground that A Inc. was not party to supply of goods and services by plaintiff — Principals of A Inc. and A II Inc. were same and they alleged that they continued in mistaken belief that action was commenced against A II Inc. until after default judgment was obtained and notice of garnishment was received — Motion dismissed — At no point between time plaintiff

supplied goods and services and time it received notice of action dismissal did principals or employees of A Inc. indicate that A II Inc. owned property which plaintiff supplied — Evidence supported finding that plaintiff was not mistaken in commencing action against A Inc., and principals of two companies were not mistaken in their belief that A II Inc. was target defendant responsible to pay plaintiff's account — A Inc. failed to provide adequate explanation about circumstances which led to default judgment since controlling minds of A Inc. were well aware of existence of statement of claim but never bothered to determine who plaintiff brought action against — Notice of action dismissal was forwarded to A Inc. and it made no response, which was further evidence of its conscious decision not to defend action — A Inc. failed to show that it had arguable case on merits since it did not contest fact that plaintiff was owed money reflected in default judgment and failed to provide any evidence to differentiate business of operations of A Inc. and A II Inc. — Evidence showed that A Inc. was proper party to action since invoices sent to it were partially satisfied without issue for approximately six months and no documentary evidence suggested that they were to be sent to A II Inc.

Table of Authorities

Cases considered by *DiTomaso J.*:

Allen v. 398827 Ontario Ltd. (1985), 5 C.P.C. (2d) 294, 1985 CarswellOnt 611 (Ont. H.C.) — referred to

Bank of Montreal v. Chu (1994), 1994 CarswellOnt 260, 24 C.B.R. (3d) 136, 17 O.R. (3d) 691 (Ont. Gen. Div.) — referred to

Bramalea Ltd. v. 620923 Ontario Inc. (1992), 8 O.R. (3d) 151, 1992 CarswellOnt 1095 (Ont. Gen. Div.) — referred to

Chitel v. Rothbart (1988), 29 C.P.C. (2d) 136, 1988 CarswellOnt 451 (Ont. C.A.) — referred to

Dunay Enterprises Inc. v. Goodish (2005), 2005 CarswellOnt 1160 (Ont. S.C.J.) — referred to

Grieco v. Marquis (1998), 38 O.R. (3d) 314, 1998 CarswellOnt 1593 (Ont. Gen. Div.) — referred to

Hunt v. Brantford (City) (1994), 1994 CarswellOnt 1059, 34 C.P.C. (3d) 379 (Ont. Gen. Div.) — referred to

Keewatin Electric & Diesels Ltd. v. Durall Ltd. (April 13, 1976), Solomon J. (Man. Q.B.) — referred to

Luciano v. Spadafora (2004), 2004 CarswellOnt 4307, 1 C.P.C. (6th) 345 (Ont. S.C.J.) — referred to

Martosh v. Horton (2005), 2005 CarswellOnt 6729 (Ont. S.C.J.) — referred to

Rogers Cable TV Ltd. v. 373041 Ontario Ltd. (1994), 1994 CarswellOnt 166, 22 O.R. (3d) 25 (Ont. Gen. Div.) — referred to

Ron Miller Realty Ltd. v. Honeywell, Wotherspoon (1991), 4 O.R. (3d) 492, 46 C.L.R. 239, 1 C.P.C. (3d) 134, 1991 CarswellOnt 368 (Ont. Gen. Div.) — referred to

Rozin v. Ilitchev (2003), 66 O.R. (3d) 410, 175 O.A.C. 4, 2003 CarswellOnt 3052 (Ont. C.A.) — referred to

Toronto Dominion Bank v. 718699 Ontario Inc. (1993), 62 O.A.C. 158, 1993 CarswellOnt 779 (Ont. Div. Ct.) — referred to

Transportaction Lease Systems Inc. v. Topping (2007), 2007 CarswellOnt 3389 (Ont. S.C.J.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 19.08 — considered

MOTION by defendant to set aside default judgment.

***DiTomaso J.*:**

The Motion

1 The defendant Aventura Properties Inc. ("Aventura") brings a motion to set aside the default judgment dated July 11, 2007 against it on the grounds that the action was brought and the judgment was obtained against Aventura who was not a party to the supply of goods and services by the plaintiff Edwards Builders Hardware (Toronto) Ltd. ("Edwards").

Position of the Defendant Aventura

2 Aventura submits that it is a separate and distinct corporation from Aventura II Properties Inc. ("Aventura II"). Aventura is a holding company with its head office located at 1310 Creditstone Road, Concord, Ontario. Its sole function is the ownership of the Creditstone property. Aventura II is the company that owns a sports recreational facility the ("Pavilion") which is located at 130 Racco Parkway in Thornhill, Ontario. Aventura II owns the land at Racco Parkway. Jonathan Anava and Johny Druckmann are the two Directors of Aventura II. Both Anava and Druckmann made and executed decisions in connection with the operation of Aventura II.

3 It was Aventura II and not Aventura that entered into a contractual relationship with Edwards in January 2005 to provide goods and services in relation to the construction of the Pavilion. Druckmann retained Edwards on behalf of Aventura II in respect of the supply of such goods and services. Aventura submits that it was not involved in the construction of the Pavilion and did not benefit from the goods and services supplied by the plaintiff whatsoever.

4 Aventura further alleges that a consultant of Aventura II, Alex Zolotnitsky was responsible for the supervision of all the trades in relation to the construction of the Pavilion. Mr. Zolotnitsky ordered the goods and services from Edwards on behalf of Aventura II for a period of approximately 18 months and the goods and services supplied by Edwards to Aventura II were delivered to and installed at the Pavilion. Mr. Zolotnitsky was not and has never been employed by Aventura. All of his fees relating to his consulting work for Aventura II are paid for by Aventura II.

5 Mr. Henry Karl is the internal auditor for Aventura II. From time to time he dealt with Edwards in respect of the payment of its invoices relating to the supply of goods and services to Aventura II. Mr. Karl was not nor has he ever been employed by Aventura. All of his fees relating to his consulting work for Aventura II are paid for by Aventura II.

6 It is submitted that Aventura has an arguable case on the merits of the action. Aventura II rather than Aventura is responsible for the plaintiff's account for goods and services provided to Aventura II. Simply put, Edwards sued the wrong company.

7 In addition, Aventura submits that it has provided an adequate explanation which led to the default. Aventura was mistaken that an action had been commenced against it. Rather, the principals of Aventura and Aventura II (which just happen to be the same Jonathan Anava and Johny Druckmann) mistakenly believed that the action had been commenced against Aventura II. They had continued in that mistaken belief until on July 16, 2007 when Mr. Anava contacted Mr. Gary Mayzel of Edwards regarding the enforcement of the default judgment herein in respect of Aventrua's bank account. Aventura seeks to have Edwards' default judgment set aside and the enforcement proceedings halted.

Position of Edwards

8 Edwards submits that Aventura is the proper defendant to which it supplied goods and services. It was Aventura that owed Edwards money for the supply of such goods and services and Edwards and Aventura knew it at all material times. Edwards entered into a contractual relationship with Aventura for the supply of goods and services in relation to the construction of the Pavilion in Thornhill. In October of 2004, Mr. Gary Mayzel, President of Edwards, met at the site of the Pavilion project with Mr. Zolotnitsky. Mr. Zolotnitsky was a consultant in the employ of Aventura who was acting as the project site supervisor. After discussing the scope in terms of the contract between Edwards and Aventura, Mr. Zolotnitsky provided his business card which was an Aventura business card to Mr. Mayzel. Mr. Zolotnitsky advised that Aventura should be invoiced for the work and services provided by Edwards. The accounts were all rendered to Aventura between November 11, 2004 and May 16, 2006.

9 In respect of the Pavilion project, there was correspondence on Aventura's letterhead directed to the City of Vaughan relating to various development issues.

10 Although some monies were received as payment on account and notwithstanding the fact that some Aventura II cheques were received regarding payment, by approximately February 2006 no further payments were received from Aventura by Edwards.

11 A demand letter was sent in respect of the outstanding account. That demand letter was dated December 22, 2006, demanding payment in the amount of $75,457.94 for amounts owed to Edwards for goods sold and delivered and services provided to Aventura for the Pavilion project. There was no response from Aventura indicating that the wrong party had been sued at that point in time or any time prior.

12 The statement of claim was served on Aventura on January 9, 2007. A further copy was forwarded to Aventura later in January 2007. Neither Mr. Anava nor Mr. Druckmann ever bothered to determine who Edwards was claiming against in the Statement of Claim. In meetings with Mr. Anava, Mr. Druckmann, Mr. Zolotnitsky and Mr. Karl, on January 16, 2007 and January 19, 2007, did any of the persons connected with either Aventura or Aventura II advise anyone from Edwards that Edwards had sued the wrong defendant.

13 In addition, there were further dealings between Edwards and Aventura on January 31, 2007 and June 4, 2007 regarding which there was no response by Aventura.

14 It was only after default judgment was obtained and notice of garnishment was received on July 16, 2007 that Mr. Anava for the first time advised Mr. Mr. Gary Mayzel of Aventura II's apparent involvement in the Pavilion project. At that time, Mr. Mayzel advised that he would investigate whether Edwards had incorrectly commenced an action and obtained judgment against Aventura. After his subsequent review of the matter, he was satisfied that Edwards had entered into a contact and supplied goods and services to Aventura.

15 Edwards submits that there is no plausible explanation for the default and there is no arguable case on the merits.

Issue

16 The issue to be determined is whether the Court should grant Aventura's motion to set aside default judgment and order Edwards to cease any and all steps to enforce that default judgment.

Analysis

17 While Aventura submits that Aventura is a company distinct and separate from Aventura, certainly as of December 2006, Jonathan Anava and Johny Druckmann were corporate officers and directors of each company. The corporate searches clearly set out a relationship between the two companies insofar as their corporate officers and directors was concerned. This relationship takes on an additional importance as Mr. Anava and Mr. Druckmann were corporate directors of Aventura and Mr. Anava was secretary for that company at the time that the statement of claim in this action was served.

18 As of May 30, 2007, again, both men were directors of Aventura II with Jonathan Anava serving as secretary for that company. The corporation profile reports in evidence reflect that 1310 Creditstone Road, Concord, Ontario is the corporate address for each corporation. Clearly, although the two corporations may be separate legal entities in law, we are not dealing with arms length companies.

19 The affidavit of Gary Mayzel dated August 9, 2007 states that by correspondence dated March 18, 2004, Mr. Druckmann on behalf of Aventura confirmed with Mr. Castellarin of the accounting department of the City of Vaughan that Aventura was in the Permit Stage of developing the Pavilion and would appreciate "all the help the City can provide".

20 On or about April 19, 2004, Aventura formally requested the City of Vaughan defer the development charges for three years in relation to the Pavilion. During a City of Vaughan counsel meeting on April 26, 2004, Aventura's request for a deferral of City of Vaughan development charges in relation to the Pavilion was denied. This is further deposed to in Gary Mayzel's affidavit sworn August 9, 2007.

21 Additional, facts are deposed to in Mr. Mayzel's affidavit which I accept. In or about October 2004, Edwards entered into a contractual relationship with Aventura for the supply of goods and services in relation to the construction of the Pavilion at 130 Racco Parkway, Thornhill, Ontario. In late October 2004 Mr. Mayzel, President of Edwards, met at the Pavilion site with Mr. Zolotnitsky, a consultant in the employ of Aventura who was acting as the project site supervisor. Mr. Edwards was presented with the business card of Mr. Zolotnitsky which was Aventura's business card and further, Mr. Edwards was advised by Mr. Zolotnitsky that Aventura should be invoiced for the work and services provided by Edwards.

22 Presented on the motion was the correspondence on Aventura letterhead directed to the City of Vaughan as well as Aventura's business card presented by Mr. Zolotnitsky to Mr. Mayzel.

23 On or about November 11, 2004, Edwards began to invoice Aventura for goods and services provided in relation to the construction of the Pavilion. Edwards sent 110 invoices to Aventura between November 11, 2004 and May 16, 2006. Until approximately June 2005 those invoices were paid either partially or completely. However, beginning in June 2005 invoices were rarely satisfied and by approximately February 2006 no further payments were received from Aventura by Edwards.

24 This prompted counsel for Edwards to send a demand letter dated December 22, 2006 to Mr. Druckmann and Mr. Anava demanding payment of $75,457.94 for amounts owed to Edwards for goods sold and delivered and services provided to Aventura for the Pavilion project. The letter was sent to Mr. Druckmann c/o Aventura Properties, 130 Racco Parkway, Thornhill and to John Anava c/o of Aventura Properties Inc., 1310 Creditstone Road, Concord. The letter was sent via registered mail and regular mail.

25 Not receiving any satisfaction in respect of that letter, on January 9, 2007, counsel for Edwards served a Statement of Claim on Aventura by personally serving Ms. Kim Tiller at 1310 Creditstone Road, Concord, Ontario. Ms. Tiller verbally advised said counsel, Mr. David Mayzel that she was the bookkeeper of Aventura. While there is some dispute as to whether or not Aventura was properly served as it is alleged that Ms. Tiller worked for another company located

at that address, I am satisfied that she was properly served by David Mayzel on January 9, 2007 as is reflected by his affidavit of service.

26 I find that Aventura was provided with a second copy of the Statement of Claim later in January 2007. I also conclude that neither Mr. Anava nor Mr. Druckmann ever bothered to determine against whom Edwards was making its claim.

27 On January 16, 2007, Gary and David Mayzel met with Mr. Anava and Mr. Druckmann in order to arrange a payment plan between Aventura and Edwards. There is no dispute that this meeting took place. What is in issue is whether the meeting took place between the directors of Aventura II or Aventura. It is clear that they are one in the same. Aventura blames Gary and David Mayzel for causing Mr. Anava and Mr. Druckmann to think that the claim was being advanced against Aventura II as opposed to Aventura. In their affidavits, Mr. Anava and Mr. Druckmann depose that they were told by the Mayzels that Edwards had commenced an action against Aventura II relating to these unpaid invoices. Although the Mayzels handed an envelope to Mr. Druckmann which enclosed a copy of the Statement of Claim in the action, neither Mr. Anava nor Mr. Druckmann reviewed the Statement of Claim or confirmed that Aventura II was the defendant. They did not have any reason to believe that Edwards was suing any company other than Aventura II.

28 I do not accept the version of events leading up the January 16, 2007 meeting as deposed to by Mr. Anava and Mr. Druckmann. Rather, I find that Mr. Anava was fully aware of the Statement of Claim served on Aventura on January 9, 2007 with an additional copy of the Statement of Claim being handed to Mr. Druckmann at the meeting. At the meeting of January 16, 2007, both men were aware that the action had been commenced by Edwards against Aventura. This knowledge was further buttressed by Mr. Gary Mayzel's concern that Aventura's assests would be dissipated or concealed. Given that concern, Mr. David Mayzel raised at the meeting the issue of the existence of a number of companies that appeared related to Aventura, including, Aventura II. At no point did Mr. Anava or Mr. Druckmann advise that Aventura II was involved in the Pavilion project in any manner. Further, at the meeting, the parties attempted to come to some agreement as to a repayment schedule which was confirmed by David Mayzel by letter dated January 31, 2007. That repayment schedule was between Edwards and Aventura.

29 In furtherance of the January 16, 2007 meeting, on January 19, 2007, Mr. Gary Mayzel met with Mr. Henry Karl, the internal auditor of Aventura, Mr. Zolotnitsky and Mr. Druckmann to reconcile all outstanding invoices. Notwithstanding Mr. Karl's affidavit that he was solely in the employ of Aventura II, I find that at this meeting, Edwards' invoices to Aventura were reviewed individually by Mr. Druckmann, Mr. Zolotnitsky and or Mr. Karl. In some cases, Edwards agreed to provide minor credits on a couple of invoices. Either Mr. Zolotnitsky or Mr. Karl personally signed the invoices on behalf of Aventura, confirming which invoices they agreed would be satisfied.

30 I find that at the January 19, 2007 meeting, neither Mr. Karl, Mr. Zolotnitsky nor Mr. Druckmann advised that they were acting as representatives, consultants, directors, officers, administrators, employees or agents of Aventura II.

31 Edwards' position in this regard is further fortified by the letter confirming the January 16, 2007 meeting from Mr. David Mayzel to Henry Karl and John Anava. The letter clearly confirms the events of the meeting and what was agreed to between Edwards and Aventura. At the bottom of each page of the letter is a signing line for John Anava or Henry Karl for Aventura Properties Inc., setting out "I have the authority to bind the corporation". There is absolutely no evidence from Aventura subsequent to the January 31, 2007 letter indicating that Edwards was dealing with the wrong defendant. The January 31, 2007 letter clearly indicates at para. 7:

> Should you not agree to the proposal contained within para. 6, above, you are to deliver a defence to my client's claim by 5:00 p.m. on February 8, 2007 failing which I will proceed to note you in default and seek a default judgment.

32 On May 26, 2007, the Local Registrar from the Newmarket Courthouse sent a Notice of Action Dismissal to Mr. David Mayzel, notifying Edwards that its action as against Aventura would be dismissed as abandoned on July 20, 2007, if a Statement of Defence was not filed or the action was set down for trial or disposed of by final Order of Judgment.

33 By correspondence dated June 4, 2007, Mr. David Mayzel advised Aventura that if the action was not settled prior to July 2, 2007, then Edwards would seek judgment. This letter was addressed to Aventura Properties Inc., at 1310 Creditstone Road, Concord, Attention Manager.

34 Aventura never contacted Mr. David Mayzel in response to his January 31, 2007 letter confirming the January 16, 2007 meeting nor did it respond to the June 4, 2007 correspondence regarding the Notice of Action Dismissal.

35 On July 11, 2007, Edwards obtained default judgment against Aventura in the sum of $82,736.87 and $1,038 for costs.

36 On July 16, 2007, Mr. Gary Mayzel received a telephone call from Mr. Anava regarding the enforcement of the judgment dated July 11, 2007. Paragraph 21 of Aventura's factum and para. 20 of Edwards' factum give different versions of that telephone call. Aventura's version was that Mr. Mayzel advised Mr. Anava that Aventura should not "worry" about the default judgment and that the action was "mistakenly" initiated against the wrong company. Mr. Mayzel initially told Mr. Anava that he would take steps to remedy the problem but then after speaking with his counsel decided not to make any changes. Returning a later call, Mr. Mayzel advised Mr. Anava that the only basis on which he would change the identity of the defendant in the action was if he was provided with some sort of security that would ensure that the new (but proper) defendant would pay. Mr. Anava had no authority or ability to offer this to Mr. Mayzel.

37 Mr. Mayzel's recollection of the telephone call July 16, 2007 is quite different. On July 16, 2007, Mr. Mayzel received a telephone call from Mr. Anava regarding the enforcement of the judgment dated July 11, 2007. Mr. Anava advised that although he recognized monies were owed to Edwards, he was currently in legal proceedings against Mr. Druckmann in connection with the Pavilion project and that he had been advised not to pay any "personal money" to Edwards. Mr. Anava for the first time advised of Aventura II's apparent involvement in the Pavilion project and Mr. Mayzel advised that he would investigate whether Edwards had incorrectly commenced an action and obtained judgment against Aventura. After reviewing the matter, Mr. Gary Mayzel was satisfied that Edwards had entered into a contract with and supplied goods and services to Aventura and instructed counsel to continued with steps necessary to enforce the judgment.

38 I accept Mr. Mayzel's evidence that at no point between November 2004 and June 2007 did Mr. Anava, Mr. Druckmann or any other employee/consultant of Aventura indicate that a company by the name of Aventura II Properties Inc. ("Aventura II") owned the land on which the Pavilion was being constructed or was the corporate entity solely responsible for the construction of the Pavilion. Edwards was never instructed to send invoices to Aventura II either at an office at 1310 Creditstone Road, Concord, Ontario or 130 Racco Parkway, Thornhill, Ontario.

39 All of the evidence that I have considered including the phone call of July 16, 2007 from Mr. Anava to Mr. Gary Mayzel supports the finding that neither Edwards was mistaken in commencing the action against Aventura nor were Mr. Anava and Mr. Druckmann mistaken in their belief that Aventura II was the target defendant responsible to pay Edwards' account. The position asserted by Aventura in all of the circumstances, does not have "an air of reality".

The Test To Set Aside Default Judgment

40 The test for setting aside default judgment is threefold. The moving party must establish:

> (a) the motion to set aside the default judgment was made as soon as possible after the applicant became aware of the judgment;
>
> (b) the moving party's affidavit must set out the circumstance under which the default arose that gives a plausible explanation for the default; and
>
> (c) the moving party must set forth facts to support the conclusion that there is at least an arguable case on its merits.

Rules of Civil Procedure, R.O. 1990 Reg. 194 rule 19.08

Grieco v. Marquis, [1998] O.J. No. 1635 (Ont. Gen. Div.) at para. 12.

41 These requirements are not to be viewed as rigid rules, but rather factors to be considered in the overall exercise of judicial discretion.

Chitel v. Rothbart, [1988] O.J. No. 1197 (Ont. C.A.) at p.2

Dunay Enterprises Inc. v. Goodish, [2005] O.J. No. 1132 (Ont. S.C.J.) at p. 2

42 I am aware that in determining whether these requirements have been met, the Court ought to lean in favour of an affirmative answer simply because *prima facia* no one should suffer judgment against him except after a full hearing and after a careful determination of the merits.

43 There is residual discretion in the Court to set aside a default judgment where a defence on the merits is disclosed. Any motion is brought within reasonable time, even where the explanation for delay in defending the action is questionable. The underlying premise of rule 19.08 is that a judge in exercising judicial discretion will see that justice is done in the particular circumstances of the case before the Court.

Transportaction Lease Systems Inc. v. Topping, [2007] O.J. No. 2132 (Ont. S.C.J.)

44 There is no issue as to the timeliness of the motion brought by Aventura to set aside the default judgment.

45 Rather, the issues are whether the circumstances which led to the default have been adequately explained and whether Aventura has an arguable case on the merits.

46 I am neither satisfied that Aventura has provided an adequate explanation to the circumstances which led to the default nor has Aventura persuaded the Court that it has an arguable case on the merits for the following reasons.

Whether Circumstances Which Led to the Default Have Been Adequately Explained

47 A motion to set aside a default judgment should be dismissed where a default arose not as a result of an accidental slip or omission but rather due to the intentional decision of the applicant not to defend an action.

Allen v. 398827 Ontario Ltd., [1985] O.J. No. 533 (Ont. H.C.)

48 A default judgment will not be set aside if a defendant is aware that a lawsuit had been initiated against it, had an opportunity to defendant and fails to explain why it did nothing in the face of that knowledge. A conscious decision by a defendant not to participate in an action is a complete bar to setting aside a default judgment.

Martosh v. Horton, [2005] O.J. No. 5005 (Ont. S.C.J.)

Luciano v. Spadafora, [2004] O.J. No. 4311 (Ont. S.C.J.)

Toronto Dominion Bank v. 718699 Ontario Inc., [1993] O.J. No. 260 (Ont. Div. Ct.)

49 Aventura was personally served with a Statement of Claim on January 9, 2007 and again at the meeting of January 16, 2007. The controlling minds of Aventura, Mr. Anava and Mr. Druckmann were aware of the existence of the Statement of Claim but never bothered to determine against whom Edwards brought its action. The bookkeeper with Aventura, Ms. Tiller was personally served on January 9, 2007. Neither Ms. Tiller, Mr. Anava nor Mr. Druckmann have denied that she provided the principals of Aventura with a copy of the Statement of Claim. She was personally served by Edwards' counsel and I am satisfied that Aventura was properly served under the *Rules of Civil Procedure.*

50 The evidence has established that service was further effected by counsel for Edwards by personally handing an envelope containing the Statement of Claim to Mr. Druckmann at the January 16, 2007 meeting between the parties. Given the circumstances in which the envelope was delivered, the claim by Mr. Druckmann that he never opened the envelope prior to default judgment being obtained lacks credibility.

51 By correspondence dated December 22, 2006, January 31, 2007 and June 4, 2007, Edwards' legal counsel advised Aventura representatives that Aventura was the defendant in the within action. There was no correspondence or any indication by Aventura to the contrary.

52 By correspondence dated May 26, 2007, the Registrar at the Newmarket Courthouse served a Notice of Action Dismissal in the action. Correspondence was forwarded to Aventura in this regard but no response was received from the moving party. This is further evidence of Aventura's conscious decision not to defend the action even after receiving this notice.

53 I am satisfied on all the evidence that Aventura has not given an adequate explanation as to the circumstances leading to default judgment in this case.

Whether Aventura Has An Arguable Case On The Merits

54 I am not persuaded that Aventura has an arguable case on the merits. I am not satisfied that Edwards sued Aventura and obtained a judgment against Aventura as the wrong defendant.

55 The moving party should file a Draft Statement of Defence on a motion to set aside default judgment to assist in the determination as to whether a good defence on the merits exist. Aventura has failed to do so in this case. *Martosh v. Horton, supra.*

56 The principles applicable to a motion for summary judgment should be considered in assessing whether a default judgment ought to be set aside.

Hunt v. Brantford (City) (1994), 49 A.C.W.S. (3d) 1047 (Ont. Gen. Div.) [1994 CarswellOnt 1059 (Ont. Gen. Div.)]

Bank of Montreal v. Chu, [1994] O.J. No. 388 (Ont. Gen. Div.)

Irving Ungerman Ltd. v. Galanis (1987), 22 C.P.C. 257 (Ont.Dist.Ct.)

57 The summary judgment test to determine whether defence on the merits exists includes:

(a) Does the defence on the merits raise a genuine issue for trial?

(b) Does the defence have an air of reality about it in light of the evidence brought forward in the motion?

(c) Are there real credibility issues relating to important facts? *Irving Ungerman, supra*

58 The parties on a motion to set aside default judgment and on a summary judgment motion are to put their "best foot forward" and the Court is to assume that if the case were to go to trial the parties would not present any additional evidence.

Rogers Cable TV Ltd. v. 373041 Ontario Ltd., [1994] O.J. No. 2196 (Ont. Gen. Div.)

59 Self-serving affidavits that merely assert defences without providing some detailed or supporting evidence are not sufficient to create a genuine issue for trial.

Rozin v. Ilitchev, [2003] O.J. No. 3158 (Ont. C.A.)

60 The Court has a duty to take a hard look at the merits of the action at this preliminary stage and may freely canvas the facts and the law in order to determine whether or not there is a genuine issue for trial.

Ron Miller Realty Ltd. v. Honeywell, Wotherspoon, [1991] O.J. No. 1251 (Ont. Gen. Div.)

Rogers Cable TV Ltd., supra

61 An apparent factual conflict between Aventura and Edwards does not end the inquiry on a motion to set aside a default judgment. The Court may, on a common sense basis, draw inferences from the evidence. *Ron Miller Realty Ltd., supra*

62 Aventura has not contested the fact that Edwards is owed money reflected in the default judgment and only advances the argument that the claim has been brought against the wrong corporation.

63 I find that Aventura has failed to provide any evidence to differentiate the business operations of Aventura and Aventura II. It is not contested that at the time of the creation of the disputed contract, Aventura and Aventura II were working out of the same office at 1310 Creditstone Road, Concord, Ontario and that all officers and directors of both corporations were the same. No evidence has proffered to establish that Aventura II was anything more than an instrument of Aventura to hold real estate for an Aventura business venture.

64 When partners operate two inter-related companies from the same office, there is a very heavy onus on them to prove they were dealing on any given occasion in the name of the company for which they claim they were dealing.

Keewatin Electric & Diesels Ltd. v. Durall Ltd., [1976] M.J. No. 270 (Man. Q.B.)

Bramalea Ltd. v. 620923 Ontario Inc. (1992), 8 O.R. (3d) 151 (Ont. Gen. Div.)

65 The following facts existing at the time the contract was formed and executed establishes that Aventura was the proper party to the contract:

(a) During contract negotiations between Mr. Gary Mayzel and Mr. Zolotnitsky in October 2004 on site, Mr. Zolotnitsky held himself out to be a representative of Aventura and produced a business card confirming same;

(b) All of Edwards' invoices were rendered to Aventura and these invoices were completely or partially satisfied without issue for approximately 6 months, between November 2004 and June 2005; and

(c) There is no documentary evidence to support Aventura's submission that Edwards' invoices were to be sent to Aventura II or that Edwards invoices were being sent to the incorrect corporate entity until after default judgment was obtained.

66 Prior to Edwards issuing the Statement of Claim, Mr. Druckmann on Aventura letterhead wrote to the City of Vaughan requesting assistance in developing the Pavilion. In April 2004, Aventura formally requested the City of Vaughan to defer development charges in respect of the Pavilion project. Further, Aventura and Aventura II were working from the same office and had the identical directors and officers.

67 After Edwards issued the Statement of Claim, there are other facts that confirm that Aventura was a party to the contract with Edwards. These facts include:

(a) Approximately seven days after the Statement of Claim was served on Aventura, a meeting was held between Mr. Gary Mayzel acting on behalf of Edwards and Mr. Anava and Mr. Druckmann, who at the time were the only individuals named on Aventura's Corporate Profile;

(b) Aventura has not denied receipt of Mr. David Mayzel's correspondence dated January 31, 2007 or June 4, 2007. Aventura has elected to provide no reason as to why this correspondence went unanswered;

(c) Not until after default judgment was obtained did any one with Aventura or Aventura II ever assert that Edwards had contracted with Aventura II and not Aventura; and

(d) Despite Mr. Druckmann and Mr. Anava swearing affidavits on August 17, 2007, in response to Mr. Gary Mayzel's affidavit sworn August 9, 2007, no explanation was given as to why Mr. Zolotnitsky provided a business card in October 2004 indicating he was under the employ of Aventura and why Mr. Druckmann was representing to the City of Vaughan that Aventura was developing the Pavilion in March and April 2004, has been provided.

68 Accordingly, in my view, Aventura has failed to provided an adequate explanation of the circumstances under which the default arose. Further, Aventura has failed to establish that it has a good defence on the merits. It did not file a draft statement of defence in respect of this motion. Its alleged defence does not have an air of reality about it in light of the evidence on the motion. There are no real credibility issues relating to important facts. While I am aware that the rules governing the setting aside of a default judgment are not to be applied rigidly, in all of the circumstances in this case, I am satisfied that this motion should be dismissed.

Disposition

69 For the reasons given, this motion to set aside default judgment dated July 11, 2007 is hereby dismissed. As for costs, the parties agree that costs are to be dealt with by way of written submissions. The parties shall exchange and file a concise costs outline and draft bill of costs within 14 days of this Order with the trial co-ordinator at Newmarket.

Motion dismissed.

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TAB 6

paras. 24-25

2010 ONSC 975
Ontario Superior Court of Justice

Valente v. Personal Insurance Co.

2010 CarswellOnt 884, 2010 ONSC 975, 185 A.C.W.S. (3d) 603, 86 C.C.L.I. (4th) 35, 88 C.P.C. (6th) 138

Rui Valente and Angie Valente, Plaintiffs/Responding Parties and The Personal Insurance Company, Defendant/Moving Party

Beth Allen J.

Heard: February 2, 2010
Judgment: February 10, 2010
Docket: CV-08-00361632

Counsel: Vanessa Tanner, for Plaintiffs / Responding Parties
Danielle Wilkinson, for Defendant / Moving Party

Subject: Insurance; Civil Practice and Procedure; Property

Headnote

Insurance --- Actions on policies — Practice and procedure — Miscellaneous issues

Homeowners suffered damage to home as result of flood and elected, under insurance policy, to replace goods with goods of similar quality — Company was employed to do restoration and repair work on home — Homeowners were not satisfied with work done by that company — Homeowners brought action against insurer for damages — Parties entered into settlement negotiations and homeowners permitted defendant to waive filing of statement of defence — Once homeowners received notice that their action would be dismissed as abandoned, they revoked waiver — Insurer was noted in default and default judgment was obtained — Insurer brought motion to set aside default judgment — Motion dismissed — Insurer failed to provide adequate explanation for delay between time it was advised of default judgment and time it brought motion to set aside default judgment — Motion was brought seven months after defendant advised it would be bringing motion — Insurer failed to explain why it did not file its defence until one and one half years after claim was served — Insurer failed to establish genuine issue for trial.

Insurance --- Actions on policies — Practice and procedure — Costs — General principles

Homeowners suffered damage to home as result of flood and elected, under insurance policy, to replace goods with goods of similar quality — Company was employed to do restoration and repair work on home — Homeowners were not satisfied with work done by that company — Homeowners brought action against insurer for damages — Parties entered into settlement negotiations and homeowners permitted defendant to waive filing of statement of defence — Once homeowners received notice that their action would be dismissed as abandoned, they revoked waiver — Insurer was noted in default and default judgment was obtained — Insurer brought motion to set aside default judgment — Motion dismissed — Homeowners were entitled to costs of motion to obtain default judgment as awarded — Homeowners properly proceeded under R. 76 of Rules of Civil Procedure — Homeowners were entitled to costs of motion to set aside default judgment — Costs of $9,000 were awarded — Costs were payable within 30 days.

Table of Authorities

Cases considered by *Beth Allen J.*:

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, (sub nom. *Boucher v. Public Accountants Council for the Province of Ontario)* 71 O.R. (3d) 291 (Ont. C.A.) — followed

Chitel v. Rothbart (1988), 29 C.P.C. (2d) 136, 1988 CarswellOnt 451 (Ont. C.A.) — considered

Citifinancial Services of Canada v. 1472354 Ontario Inc. (2003), 2003 CarswellOnt 507 (Ont. Master) — followed

Embro v. Stojadinovich (2009), 2009 CarswellOnt 1013 (Ont. S.C.J.) — considered

Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd. (1985), 8 O.A.C. 369, 1 C.P.C. (2d) 24, 1985 CarswellOnt 357 (Ont. C.A.) — referred to

Helix Interactive Production Ltd. v. 2030123 Ontario Ltd. (2006), 2006 CarswellOnt 7018 (Ont. S.C.J.) — considered

Hunt v. Brantford (City) (1994), 1994 CarswellOnt 1059, 34 C.P.C. (3d) 379 (Ont. Gen. Div.) — referred to

Lenskis v. Roncaioli (1992), 11 C.P.C. (3d) 99, 1992 CarswellOnt 345 (Ont. Gen. Div.) — followed

Phan v. Jevco Insurance Co. (2006), 2006 CarswellOnt 3937, 39 C.C.L.I. (4th) 293 (Ont. S.C.J.) — followed

Rozin v. Ilitchev (2003), 66 O.R. (3d) 410, 175 O.A.C. 4, 2003 CarswellOnt 3052 (Ont. C.A.) — followed

Sinnadurai v. Laredo Construction Inc. (2005), 20 C.P.C. (6th) 234, 38 R.P.R. (4th) 7, 2005 CarswellOnt 7305, 78 O.R. (3d) 321, 206 O.A.C. 235 (Ont. C.A.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 19.03 — pursuant to

R. 19.03(1) — considered

R. 19.08 — pursuant to

R. 19.08(1) — considered

R. 57.01(1) — referred to

R. 76 — considered

MOTION by defendant insurer to set aside noting in default and default judgment.

***Beth Allen J.*:**

Background

1 The moving party, The Personal Insurance Company ("the defendant) brings this motion under Rules 19.03 and 19.08 of the *Rules of Civil Procedure* to set aside a noting in default and to set aside a default judgment obtained against it by the responding parties, Rui Valente and Angie Valente ("collectively the plaintiffs"). Those Rules state:

> **19.03(1)** The noting of default may be set aside by the court on such terms as are just.
>
> **19.08(1)** A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.

2 The plaintiffs' home was damaged on August 30, 2007 by a flooding incident resulting in damage to the home and a need for repairs and restoration. The plaintiffs were insured by the defendant under a homeowner's insurance policy that offered coverage for damages and losses sustained as a result of flooding. The plaintiffs had the option under the policy of taking the replacement cost for the damaged goods to replace the goods with goods of similar quality or the cash value of the damaged goods with respect to the depreciated value immediately before the loss.

3 The plaintiffs chose replacement value which required the services of a company to undertake repairs and restoration. Burke's Restoration Inc. ("Burke's") undertook the work. The plaintiffs were not satisfied with Burke's work and allege that their home has not been restored to an adequate and suitable condition and that they have not been wholly compensated for the damage to their home. The plaintiffs commenced an action against the defendant for damages.

Reasons

Chronology of Pertinent Dates

(a) August 30, 2007 — flood damage occurred

(b) August 29, 2008 — plaintiffs commenced action

(c) September 2, 2008 — defendant served with plaintiffs' claim

(d) September 12, 2008 — parties started settlement negotiations

(e) November 24, 2008 settlement negotiations failed and waiver of defence offered by plaintiffs until December 5, 2008

(f) December 3, 2008 — defendant retained counsel and plaintiffs, on request of defendant, gave a further 30 days waiver of defence

(g) December 30, 2008 — by letter defendant requested further two-week waiver which the plaintiffs granted

(h) January 12, 2009 — plaintiffs receive Notice of Action Dismissal advising that their action will be dismissed as abandoned on March 9, 2009

(i) January 13, 2009 — plaintiffs' letter advising defendant that waiver of defence was revoked effective that date

(j) January 23, 2009 — no statement of defence delivered, defendant noted in default

(k) February 27, 2009 — plaintiffs wrote notifying defendant of noting in default; that notice of action dismissal was issued; that plaintiffs were taking steps to move for judgment

(l) March 5, 2009 — no communication from defendant; plaintiffs brought *ex parte* motion and obtained default judgment, four days before action to be dismissed, for damages of $23,529.40; pre-judgment interest of $368.33 and costs of $4,615.45

(m) March 9, 2009 — defendant received service of default judgment

(n) March 10, 2009 — parties exchange correspondence; plaintiffs request payment on the judgment and, on request, default motion materials forwarded by plaintiffs to the defendant; defendant advises it will bring a motion to set aside default judgment; further attempt at settlement; defendant confirmed its understanding the period of settlement negotiations would not prejudice its arguments on delay on motion to set aside

(o) March 27, 2009 — plaintiffs contacted defendant to inquire about motion to set aside and to request costs ordered on motion for judgment; no dates for motion to set aside suggested

(p) April 22, 2009 — no steps by defendant to bring motion; plaintiffs demand payment of judgment and costs by April 30, 2009

(q) June 2, 2009 — by letter plaintiffs demand payment on the judgment and costs by June 8, 2009

(r) June 9,2009 — defendant confirms it will move to set aside default judgment

(s) July 3 and July 6, 2009 — parties discuss dates for motion

(t) October 19, 2009 — defendant's letter to plaintiffs providing their available dates in January 2010 for motion to set aside

(u) October 30, 2009 — by letter defendant advises plaintiffs the motion to set aside default judgment is set for February 2, 2010

Factors to be Considered

4 Courts have set down factors for judges to consider in exercising their discretion in determining whether to set aside a default judgment. The moving party is required to:

(a) move as soon as possible to set aside the default judgment after becoming aware of the judgment;

(b) set out the circumstances under which the default arose that give a plausible explanation for the default; and

(c) set forth facts to support the conclusion that there is at least an arguable case to present on the merits.

[*Lenskis v. Roncaioli*, [1992] O.J. No. 1713 (Ont. Gen. Div.)]

Delay in Moving to Set Aside

5 The factor of delay in bringing the motion to set aside must be weighed along with the other factors in the circumstances of a case. [*Lenskis, supra*, at p. 3]

6 The defendant received service of the default judgment on March 9, 2009 and three months later on June 9, 2009 advised it would bring the motion. Then about seven months later on October 30, 2009 the defendant set the date for the motion to be heard on February 2, 2010. The date for the motion before me comes about 11 months after the defendant received notice of the judgment.

7 The defendant points to the waivers provided by the plaintiffs as a reason for the delay in bringing the motion to set aside. However the waivers were given by the plaintiffs before default judgment was obtained and cannot be a reason for any delay in bringing the motion.

8 In its oral submissions, the defendant referred to as confirming a waiver its March 10, 2009 letter to the plaintiffs where the defendant confirms its understanding that no prejudice would result from any time lapse created by the attempt

to settle. The defendant submits settlement failed on June 9, 2009 when it confirmed it would move to set aside the judgment and as such submits the three months period of negotiation from March 10, 2009 to June 9, 2009 should be seen as a valid reason for that period of delay in bringing the motion. The plaintiffs submit there was a brief settlement discussion in March 2009.

9 I am inclined to accept the plaintiffs' position as the plaintiffs had obtained a judgment in their favour and I find it reasonable they might have little motivation for prolonged negotiations. Moreover, the defendant has provided no proof that settlement talks extended over three months. I do not accept the defendant's argument that I should accept settlement negotiations during this period as a reason for delay.

10 The record reveals between March 9, 2009 when the defendant received notice of the default and October 30, 2009 when the date was set for the motion, the plaintiffs communicated numerous times with the defendant attempting to move the matter along — inquiring about the defendant's intentions with respect to the motion to set aside, demanding payment on the judgment and costs and indicating its intention to challenge the motion.

11 The defendant's affidavit in support of this motion refers to scheduling problems as a basis for the delay in setting a date for the motion. Both parties indicate there were attempts in July 2009 to agree on dates. The defendant says there was a further attempt on September 28, 2009 where the defendant offered dates in January 2010 and the plaintiffs failed to provide dates. I have no evidence the plaintiffs failed to cooperate in attempting to agree on dates particularly in view of their many attempts to move the matter forward. The plaintiffs agreed to February 2, 2010. There is no reason for me to believe the plaintiffs should bear the blame for any delay in the defendant scheduling the date for the motion and hence I do not accept administrative scheduling problems as an acceptable reason for delay.

12 The defendant argues failure to move promptly to set aside the default judgment should not be fatal to its motion. [*Chitel v. Rothbart*, [1988] O.J. No. 1197 (Ont. C.A.) at p. 2]. However, the motions judge in *Chitel* found the defendant had brought the motion to set aside in a reasonable time and had a good defence on the merits and the Court of Appeal was of the view in those circumstances that an unsatisfactory explanation for the default in filing a defence was not fatal to the defendant's motion to set aside.

13 I find the defendant does not provide an adequate explanation for the delay between March 9, 2009 when it was notified of the default judgment and October 30, 2009 when the defendant scheduled the motion for February 2, 2010. The motion is brought seven months after the defendant advised it would be bringing the motion with no reasonable explanation for its delay. A motion to set aside a default judgment has been dismissed when the motion was not brought as soon as possible and was only brought as result of pressure from the plaintiff. [*Embro v. Stojadinovich*, [2009] O.J. No. 796 (Ont. S.C.J.), at paras. 10-12]. I find this to be the situation with the defendant's delay in the case before me.

Explanation of Circumstances of the Default

14 In looking at the weight that ought to be given to the various factors in the test for setting aside a default judgment, the Ontario Court of Appeal held serious consideration ought to be given to the requirement that the moving party explain the circumstances that led to the default. The court held that factor ought not to be ignored even where there is an arguable defence. [*Sinnadurai v. Laredo Construction Inc.*, [2005] O.J. No. 5429 (Ont. C.A.) at paras. 25-27]. Other cases have held even when the defendant can establish a triable issue, where the explanation for the default is inadequate the court can dismiss a motion to set aside a default judgment.

15 In the case before me, the defendant received notice of the plaintiffs' claim when served on September 2, 2007. The plaintiffs granted three indulgences to allow the defendant to file its defence — one before the defendant had retained counsel and two further indulgences after counsel was retained. On November 24, 2008 the plaintiffs granted a waiver of defence until December 5, 2008. On December 3, 2008, on request of the defendant's counsel, the plaintiffs granted a further 30 days and on December 30, 2007 on further request the plaintiffs granted another two weeks extension of the waiver. In addition to the indulgences, the plaintiffs communicated with the defendant on numerous occasions urging

the matter forward by inquiring about the defence and by advising of the notice of dismissal of action and the noting in default.

16 The defendant submits inadvertence on the part of its counsel is behind the default. The defendant relies on case law that has held a defendant's interests should not be irrevocably jeopardized by any inadvertence or inattention of its counsel. [*Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd.*, [1985] O.J. No. 101 (Ont. C.A.) and *Hunt v. Brantford (City)*, [1994] O.J. No. 1867 (Ont. Gen. Div.)]. In the cases cited, the particulars of the defence counsel's own conduct that amounted to inadvertence or deliberate neglect were before the court and in those circumstances the courts determined it would not be fair to attribute the counsel's conduct to the defendant.

17 However, the defendant in the case before me has failed to provide any facts detailing its inadvertence. The defendant did not explain why with three indulgences by the plaintiffs it did not deliver its defence until about one and a half years after it was served with the claim. I find its bare assertion as to inadvertence without establishing the facts of the inadvertence is not sufficient. Generic comments as to inadvertence are of no assistance when few details are provided. [*Embro v. Stojadinovich*, *supra*, at para. 15 (Ont. S.C.J.)].

18 The defendant argues it is evident it intends to vigorously defend the action. I find the record indicates the contrary. Despite the plaintiffs' indulgences to extend the time to deliver the defence, the defendant did not do so until a day before the motion. A copy of a draft statement of defence was first presented to the court on the day of the motion. While providing a draft statement of defence is not mandatory on a motion to set aside, more prompt delivery of the defence in the circumstances might have assisted to show an intent to vigorously defend.

19 As a result, I find the defendant has failed to meet the second test of providing a satisfactory explanation for the default.

Valid Defence on the Merits

20 The defendant asserts there is a defence on the merits that the plaintiffs ought to have asserted its claim against Burke's and not the insurer. The plaintiffs submit they have always dealt with the defendant in making the claims under the home owner's insurance policy for the damage to their home and for reimbursement of the living expenses incurred while they had to reside outside their home. For that reason, the plaintiffs say it was appropriate for them to bring the action against the defendant. The plaintiffs say the defendant selected Burke's to perform the work on the home and is liable for damages.

21 The defendant's position is the plaintiffs selected Burke's and was a party to the contract with Burke's and not the defendant. The defendant says it is therefore not liable for damages and would be seeking to add Burke's as a third party. Notably, the defendant did not deliver a third party claim with its defence.

22 The test to set aside a default judgment has been held to be similar to the test to obtain summary judgment. The moving party must:

(a) demonstrate there is a genuine issue for trial;

(b) put forward a defence that has an air of reality; and

(c) show the court there is a real credibility issue relating to important facts.

[*Phan v. Jevco Insurance Co.*, [2006] O.J. No. 2614 (Ont. S.C.J.), at para. 36]

23 Courts have held the moving party must adduce on the motion the evidence it intends to lead at trial and demonstrate an arguable case, "putting its best foot forward" or "lead with trump." [*Helix Interactive Production Ltd. v. 2030123 Ontario Ltd.* (Ont. S.C.J.), at para. 18]. For the reasons set out below, I agree with the plaintiffs that the defendant has not satisfactorily met what is expected of a party seeking to establish the merits of its defence.

24 On this motion the defendant initially delivered only an affidavit from a solicitor from the firm representing it in this litigation. *The Rules of Professional Conduct*, under Rule 4.02 and Commentary, restrict lawyers from expressing personal opinions or beliefs or asserting as fact anything that is properly subject to legal proof, cross-examination of challenge. The solicitor's affidavit reveals the solicitor did not have first-hand knowledge of the facts and has mainly relied on what the defendant has told her. In that circumstance, the solicitor is not in a position to attest to the truth of allegations in the pleadings as is reasonably expected of an affiant in a motion to set aside a default judgment. I find the affidavit crosses the line drawn as to what can be properly provided in an affidavit by a lawyer. Ultimately, I find the affidavit does not assist the defendant in meeting the test of presenting the material facts of its defence.

25 The defendant short served, the day before the motion and filed at the motion, a further affidavit by an adjuster with the defendant insurer. There are no particulars in his affidavit as to the period of his involvement with the plaintiffs' claims or as to the role if any he had in adjusting the plaintiffs' claims. It appears from his affidavit the adjuster also lacked first-hand knowledge of the material facts with respect to the contract with Burke's and rather provides his beliefs on contentious issues and what he learned through reviewing the file. I find this is not sufficient to establish a genuine issue for trial. The Court of Appeal held self-serving affidavits that merely assert defences without providing some detail or supporting evidence are not sufficient to create a genuine issue for trial. [*Rozin v. Ilitchev*, [2003] O.J. No. 3158 (Ont. C.A.), at para. 8].

26 The adjuster asserts the defendant immediately contacted Burke's and another contractor to prepare estimates which points to some type of connection between the defendant and Burke's, the company ultimately selected. The presentation of a third party claim would have contained material facts to clarify the defendant's connection with Burke's and might have served to validate the merits of its defence that it was not a party to the contract and strengthen the defendant's contention it intends to vigorously defend the action.

27 As a result, I find the defendant did not put its best foot forward in failing in these circumstances to provide the facts of the third party claim and failing to provide affidavits from persons in a position to address the issue of merits. [*Citifinancial Services of Canada v. 1472354 Ontario Inc.*, [2003] O.J. No. 525 (Ont. Master), paras 38 and 39]. The defendant did not satisfy the test of showing a valid defence on the merits.

Conclusion on Whether to Set Aside Default Judgment

28 The defendant failed to satisfy the tests for setting aside a default judgment. As the plaintiffs point out this is not a subrogated claim. The plaintiffs are two individuals who have been seeking redress from their insurer for damage done to their home over two years ago. Without reasonable explanation the defendant, a large corporate entity, has dragged its feet in responding to the action at considerable expense to the plaintiffs. There has to be finality to the time wasted and the expense the plaintiffs have incurred in carrying this litigation.

29 I find in all the circumstances, the motion must be dismissed.

Plaintiffs' Entitled to the Full Judgment

30 The defendant submits if default judgment is granted, the plaintiffs should not be allowed the full damages awarded by O'Marra, J. in the March 5, 2009 default judgment. I do not agree. As noted earlier, neither the affidavit of the solicitor nor the adjuster is based on personal knowledge of the facts. They contain self-serving opinions and conclusory statements on disputed facts and while provide no new evidence to contradict the damages awarded. It was within O'Marra, J.'s authority to have required *viva voce* evidence if he was not satisfied with the materials before him and he saw fit not to exercise that authority. I therefore uphold the damages awarded by O'Marra, J. on March 5, 2009.

Plaintiffs' Entitlement to Costs of the Motion for Default Judgment

31 The defendant contends the plaintiffs did not properly proceed pursuant to the Simplified Rules Procedure under Rule 76 and as such are not entitled to costs as awarded under the default judgment. On the contrary, the amount claimed is within the monetary jurisdiction of the simplified procedure in place at that time and the record shows the plaintiffs did commence the action under Rule 76 as is clearly set out in The Information for Court Use form attached to their statement of claim and other documents on the record. The plaintiffs are therefore entitled to the costs awarded on March 5, 2008 by O'Marra, J.

Costs of the Motion to Set Aside

32 Both counsel submitted bills of costs for the motion. The plaintiffs were successful on the motion and are entitled to costs pursuant to Rule 57.01(1). They seek partial indemnity costs of $5,765.89 and actual costs of $9,609.81. I find the hourly fees charged for Ms. Tanner's services and those of the more junior lawyer and articling student and the disbursements to be within a reasonable range.

33 In view of my findings with respect to the defendant's conduct in not acting promptly in bringing this motion and their late service of their draft statement of defence and affidavit, I find it appropriate to allow costs fixed at $9,000.00 payable within 30 days. That quantum is fair, within the reasonable expectations of the parties, and in accord with the principles set out by the Court of Appeal in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.).

Order

34 This Court orders:

(a) the motion be and is hereby dismissed

(b) costs against the Defendant, The Personal Insurance Company, fixed in the amount of $9,000.00 payable within 30 days.

Motion dismissed.

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ROYAL BANK OF CANADA - and - **2292319 ONTARIO INC.**

Applicant

Respondent

Court File No. CV-16-11331-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES OF THE RECEIVER
(FOR RESPONDING FACTUM RE GREEN ISLAND TRADING COMPANY)
(Motion returnable October 13, 2016)

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

Sanjeev P. Mitra (LSUC No. 37934U)
Tel: (416) 865-3085
Fax: (416) 863-1515
Email: smitra@airdberlis.com

Jeremy Nemers (LSUC # 66410Q)
Tel: (416) 865-7724
Fax: (416) 863-1515
Email: jnemers@airdberlis.com

Lawyers for the Receiver