

Michael Sampson Coady (plaintiff) v. Burton Canada Company and Wentworth Valley
Developments Limited (defendants)
(Tru No. 302023; 2012 NSSC 257)

Indexed As: Coady v. Burton Canada Co. et al.

Nova Scotia Supreme Court
Warner, J.
July 9, 2012.

Summary:

The plaintiff, a 21 year old male, went to the Wentworth Valley Ski Resort to snowboard. Burton Canada Co., a manufacturer, distributor and retailer of snowboards, had a promotional booth at Wentworth, which was offering snowboarders trial runs on its snowboards and free high-caffeine energy drinks. The plaintiff took Burton up on its offer. After a few runs down the regular ski hills, the plaintiff decided to enter the "Terrain Park". On his first approach to the first feature, a barrel jib, he fell in the icy snow conditions. He suffered a serious fracture of the C-5 vertebrae, with damage to the spinal cord, resulting in partial paralysis. The plaintiff sued Burton and the owner of the ski resort, Wentworth Valley Developments Ltd., for damages for negligence. Burton and Wentworth applied for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04).

The Nova Scotia Supreme Court discussed the application of rule 13.04 (new rule) and dismissed both applications for summary judgment. The plaintiff was awarded costs of the motions, payable forthwith.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - The Nova Scotia Supreme Court noted the differences between the new summary judgment on the evidence rule (Civil Procedure Rules, 2009, rule 13.04) and the old summary judgment rule (1972 Rules as amended in 2002) - The court explained that since 2002 the Nova Scotia Court of Appeal (NSCA) had consistently held that the two-step test set out in *Guarantee Co. v. Gordon Capital Corp* (SCC 1999) applied to Nova Scotia applications for summary judgment on the evidence - Further, the NSCA had recently held that the same two-step *Guarantee* analysis applied to motions for summary judgment on the evidence under new rule 13.04 - See paragraphs 24 to 27.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - The plaintiff was left partially paralyzed after a snowboarding accident at a ski resort - He sued the resort and another company (Burton), the defendants - Burton had a promotional booth at Wentworth, which was offering snowboarders trial runs on its snowboards and free high-caffeine energy drinks - Immediately after discovery, the defendants moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04 (new rule)) - The plaintiff claimed that he was unable to put his "best foot forward" as required by rule 13.04, for reasons beyond his control, including the timing

of the motions (i.e., the hearing was premature) - The Nova Scotia Supreme Court held that the new rule required a party wishing to contest a motion, regardless of when the motion was made, to put his or her best foot forward - However, despite the change in the wording of rule 13.04, a judicial discretion still existed to defer or dismiss a summary judgment motion on the basis that requiring the responding party to put its best foot forward at any time after pleadings close might, in some circumstances, be unfair and unjust - See paragraphs 1 to 45 and 142.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - The Nova Scotia Supreme Court noted that the new summary judgment rule (Civil Procedure Rules, 2009, rule 13.04(1)), provided that a judge who is satisfied that the evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial "must" grant summary judgment - The Nova Scotia Supreme Court stated that "... despite the change in the wording of CPR 13.04, a judicial discretion still exists to defer or dismiss a summary judgment motion on the basis that requiring the responding party to put its best foot forward at any time after pleadings close may, in some circumstances, be unfair and unjust ... Discretion should remain with the motions judge to defer, dismiss or otherwise determine a motion for summary judgment on the evidence, in addition to the criteria in the Guarantee test, when the following circumstances arise: (1) the responding party has been unable to obtain the material evidence, and (2) the relevant material evidence is likely available from sources that are identified and/or identifiable, and (3) the responding party has been diligent in pursuing that evidence" - See paragraphs 142 to 147.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - This matter involved two motions brought by defendants seeking summary judgment on the evidence, immediately after discovery of the plaintiff (Civil Procedure Rules, 2009, rule 13.04 (new rule)) - The Nova Scotia Supreme Court, stated that for purposes of analysis, it assumed "... that the new ... Rule does not grant discretion to deny or defer a decision on the basis of unfairness or prematurity in the absence of material pre-trial disclosure and/or discovery by the moving party, or despite the timing of the motion. To the facts before me, I apply the two-stage Guarantee [SCC 1999] analysis ... Stage one of the Guarantee analysis requires that the moving party show that there is 'no genuine issue of material fact requiring a trial' (described in Hiltz as 'no disputed issue of material fact') ... If a disputed issue of material fact exists, the court should dismiss the application without engaging in the assessment of the merits (stage two). Whether there is a disputed issue of material fact involves a comparison of both party's evidence and positions. If no disputed issue of material fact exists, the burden shifts to the responding party to show that his or her case has a real chance of success" - See paragraphs 42 to 44.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - The plaintiff (Coady) was left partially paralyzed after a snowboarding accident at a ski resort - He sued the operator of a promotional booth at the ski resort (the

defendant Burton), who was offering snowboarders trial runs on its snowboards and free high-caffeine energy drinks, alleging negligence - Immediately after discovery of the plaintiff, the defendant moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04) - The Nova Scotia Supreme Court (Warner, J.) denied summary judgment "... on the basis that there is sufficient evidence before the Court to establish that Burton owed a duty of care to Coady, and standard of care that was owed. The liability of Burton to Coady remains a genuine issue for trial. If I am wrong in my application of the Guarantee [SCC 1999] analysis to Burton's motion, I would find that the motion is premature. I am unable, from the gaps in the 'facts', to get a full appreciation of the evidence required to make a dispositive finding that there is no genuine issue for trial. The plaintiff has not yet had a fair opportunity to put his best foot forward. He has not acted without diligence. The purpose of summary judgment is to stop unmeritorious claims from going to trial, not to prevent claims from reaching the point where it is reasonable to determine whether it is meritorious" - See paragraphs 45 to 154.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - The plaintiff (Coady) was left partially paralyzed after a snowboarding accident at a ski resort (Wentworth) - He sued Wentworth, alleging negligence - Immediately after discovery of the plaintiff, the defendant moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04) - The Nova Scotia Supreme Court was not satisfied that Wentworth has discharged the first part of the Guarantee (SCC 1999) test - There were disputed facts material to the alleged negligence of Wentworth - Based on the facts on the motion, the plaintiff satisfied the court that genuine issues remain for trial - The court opined, however, that if it was wrong in the application of the Guarantee test, the motion could be considered premature - A full appreciation of the evidence was not achievable, based in the evidence presented in this motion - See paragraphs 155 to 239.

Practice - Topic 5702.1

Judgments and orders - Summary judgments - Time for hearing - [See second, fifth and sixth **Practice - Topic 5702**].

Practice - Topic 5708

Judgments and orders - Summary judgments - Bar to application - Existence of issue to be tried - [See fifth and sixth **Practice - Topic 5702**].

Practice - Topic 5710

Judgments and orders - Summary judgments - Evidence - [See first and third **Practice - Topic 5702**].

Practice - Topic 5712

Judgments and orders - Summary judgments - Application or motion - Time for - [See second, fifth and sixth **Practice - Topic 5702**].

Practice - Topic 5719

Judgments and orders - Summary judgments - To dismiss action - [See first, second, third, fifth and sixth **Practice - Topic 5702**].

Practice - Topic 5725

Judgments and orders - Summary judgments - Costs - [See **Practice - Topic 7118.1**].

Practice - Topic 7118.1

Costs - Party and party costs - Special orders - Multiplier - Two defendants moved for summary judgement on the evidence dismissing the plaintiff's negligence action (Civil Procedure Rules, 2009, rule 13.04 (new rule)) - The Nova Scotia Supreme Court (Warner, J.) discussed and interpreted the new rule, and dismissed both summary judgment motions - The court noted that Tariff C applied - Warner, J., stated that "This was a complex matter. It was of great importance to all parties, as success on the motions would have ended the litigation. The possible quantum of damages is unknown, but the injury to the plaintiff appears to have been very serious. The motion, scheduled for one day, consumed six days. The starting point for a six day chambers motion, without application of a multiplier, is \$12,000.00. In my view, the complexity and importance of the matter to the parties merits a multiplier of at least two. The plaintiff should have his costs in the amount of \$24,000.00, plus reasonable disbursements as verified by affidavit, one half from each of the defendants" - Costs were payable forthwith - See paragraphs 239 to 243.

Practice - Topic 7364

Costs - Party and party costs - Costs of interlocutory proceedings - Costs of motions or applications - [See **Practice - Topic 7118.1**].

Practice - Topic 7372

Costs - Costs of interlocutory proceedings - Payment forthwith - [See **Practice - Topic 7118.1**].

Cases Noticed:

Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423; 247 N.R. 97; 126 O.A.C. 1, reld to. [para. 26].

United Gulf Developments Ltd. et al. v. Iskandar et al. (2004), 222 N.S.R.(2d) 137; 701 A.P.R. 137; 2004 NSCA 35, reld to. [para. 26].

MacNeil v. Bethune et al. (2006), 241 N.S.R.(2d) 1; 767 A.P.R. 1; 2006 NSCA 21, reld to. [para. 26].

Jeffrey v. Naugler (2006), 248 N.S.R.(2d) 372; 789 A.P.R. 372; 2006 NSCA 117, reld to. [para. 26].

Huntley v. Larkin - see Huntley et al. v. Hogeterp et al.

Huntley et al. v. Hogeterp et al. (2007), 256 N.S.R.(2d) 20; 818 A.P.R. 20; 2007 NSCA 75, reld to. [para. 26].

Young v. Meery - see Young v. Ward et al.

Young v. Ward et al. (2009), 277 N.S.R.(2d) 49; 882 A.P.R. 49; 2009 NSCA 47, reld to. [para. 26].

Ristow v. National Bank Financial Ltd. - see National Bank Financial Ltd. v. Potter et al. National Bank Financial Ltd. v. Potter et al. (2010), 296 N.S.R.(2d) 32; 940 A.P.R. 32;

2010 NSCA 79, refd to. [para. 27].
Hiltz v. 2420188 Nova Scotia Ltd. et al. (2011), 307 N.S.R.(2d) 89; 975 A.P.R. 89; 2011 NSCA 74, refd to. [para. 27].
Combined Air Mechanical Services Inc. et al. v. Flesch et al. (2011), 286 O.A.C. 3; 2011 ONCA 764, refd to. [para. 29].
Lameman et al. v. Canada (Attorney General) et al. (2008), 372 N.R. 239; 429 A.R. 26; 421 W.A.C. 26; 2008 SCC 14, refd to. [para. 42].
Campbell v. Lienaux et al. (1998), 167 N.S.R.(2d) 196; 502 A.P.R. 196 (C.A.), refd to. [para. 127].
Flewelling v. Scotia Island Property Ltd. et al., [2009] N.S.R.(2d) Uned. 75; 2009 NSSC 94, refd to. [para. 129].
Veritas Geophysical (Nigeria) Ltd. et al. v. Energulf Resources Inc., [2010] B.C.T.C. Uned. 1253; 2010 BCSC 1253, refd to. [para. 129].
Bank of Montreal v. Scotia Capital Inc. et al. (2002), 210 N.S.R.(2d) 78; 659 A.P.R. 78; 2002 NSSC 252, refd to. [para. 129].
MacNeil v. Nova Scotia (Attorney General) et al. (2010), 290 N.S.R.(2d) 140; 920 A.P.R. 140; 2010 NSSC 138, refd to. [para. 132].
Whelton v. Mercier et al. (2004), 277 N.B.R.(2d) 251; 727 A.P.R. 251; 2004 NBCA 83, refd to. [para. 134].
SAR Petroleum Inc. v. Peace Hills Trust Co., 2009 NBQB 197, refd to. [para. 136].
6459652 Ontario Inc. v. Guardian Insurance Co., 1989 CarswellOnt 884 (S.C.), refd to. [para. 137].
Halifax (Regional Municipality) Pension Committee v. State Street Bank and Trust Co. et al. (2012), 315 N.S.R.(2d) 99; 998 A.P.R. 99; 2012 NSSC 160, refd to. [para. 146].
Cherny v. Glaxo Smith Kline Inc. (2009), 279 N.S.R.(2d) 192; 887 A.P.R. 192; 2009 NSCA 68, refd to. [para. 158].
Civitello v. Ski Sundown Inc., 2000 WL 804598 (Conn. Super. Ct.), refd to. [para. 158].
Santopietro v. New Haven (City) (1996), 239 Conn. 207; 682 A.2d 106 (Sup. Ct.), refd to. [para. 158].
O'Brien v. Ski Sundown Inc., 2003 WL 1228070 (Conn. Super. Ct.), refd to. [para. 158].
Langille v. Bernier et al. (2010), 296 N.S.R.(2d) 127; 940 A.P.R. 127; 2010 NSSC 402, refd to. [para. 162].
Smith v. Atlantic Shopping Centres Ltd. (2006), 243 N.S.R.(2d) 293; 772 A.P.R. 293; 2006 NSSC 133, refd to. [para. 162].
Gallant v. Roman Catholic Episcopal Corp. (2001), 200 Nfld. & P.E.I.R. 105; 603 A.P.R. 105 (Nfld. C.A.), refd to. [para. 162].
Epp v. Ridgetop Builders Ltd. and Norris (1978), 15 A.R. 120 (T.D.), refd to. [para. 168].
Potozny v. Burnaby (City), [2001] B.C.T.C. 837; 2001 BCSC 837, refd to. [para. 172].
Rozenhart v. Skier's Sport Shop (Edmonton) Ltd. et al. (2002), 323 A.R. 143; 2002 ABQB 509, refd to. [para. 172].
Feniuk et al. v. Board of Education of School District No. 54 (Bulkley Valley) et al., [1991] B.C.T.C. Uned. 744 (S.C.), refd to. [para. 172].
Abbot v. Silver Star Sports Ltd., [1986] B.C.J. No. 3203 (S.C.), refd to. [para. 172].
Roumanis et al. v. Mt. Washington Ski Resort Ltd. et al., [1995] B.C.T.C. Uned. 573 (S.C.), refd to. [para. 172].

Tremblay v. Whistler Mountain Ski Corp., [1997] B.C.T.C. Uned. 845 (S.C.), refd to. [para. 172].
Hughes v. Seven Springs Farm Inc. (2000), 563 Pa. 501; 762 A.2d 339 (Sup. Ct.), refd to. [para. 173].
Melnychuk v. Ronaghan et al. (1999), 237 A.R. 110; 197 W.A.C. 110; 1999 ABCA 170, refd to. [para. 188].
LeBrun v. Ingram, [2000] O.T.C. 499 (Sup. Ct.), refd to. [para. 188].
Slaferrek v. TCG International Inc. et al., [1998] 3 W.W.R. 600; 207 A.R. 113 (Q.B.), refd to. [para. 205].
Murao v. Blackcomb Skiing Enterprises Limited Partnership et al., [2003] B.C.T.C. 558; 2003 BCSC 558, refd to. [para. 205].
Wishneski v. Harper Mountain Lifts Ltd. et al., [1990] B.C.T.C. Uned. 138 (Co. Ct.), refd to. [para. 205].
Merks Poultry Farms Ltd. et al. v. Wittenberg et al. (2010), 296 N.S.R.(2d) 36; 940 A.P.R. 36; 2010 NSSC 395, refd to. [para. 243].

Statutes Noticed:

Civil Procedure Rules (N.S.) (2009), rule 13.04 [para. 4].
Rules of Civil Procedure (N.S.) - see Civil Procedure Rules (N.S.).
Rules of Court (N.S.) - see Civil Procedure Rules (N.S.).

Authors and Works Noticed:

Linden, Alan M., and Feldthusen, Bruce, Canadian Tort Law (8th Ed. 2006), pp. 107 to 110 [para. 91].

Counsel:

Sean F. Layden, Q.C., for the plaintiff, Michael Coady;
G. Grant Machum and Jennifer White, for the defendant, Burton Canada Company;
Jocelyn M. Campbell, for the defendant, Wentworth Valley Developments Limited

This case was heard at Halifax, N.S., on January 27, February 10, 11, March 14, 16 and 21, 2011, by Warner, J., of the Nova Scotia Supreme Court, who delivered the following decision on July 9, 2012.

Order accordingly.

Editor: Elizabeth M.A. Turgeon

Practice - Topic 5702.1

Judgments and orders - Summary judgments - Time for hearing - The plaintiff was left partially paralyzed after a snowboarding accident at a ski resort - He sued the resort and another company (Burton), the defendants - Burton had a promotional booth at Wentworth, which was offering snowboarders trial runs on its snowboards and free high-caffeine energy drinks - Immediately after discovery, the defendants moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04 (new rule)) - The

plaintiff claimed that he was unable to put his "best foot forward" as required by rule 13.04, for reasons beyond his control, including the timing of the motions (i.e., the hearing was premature) - The Nova Scotia Supreme Court held that the new rule required a party wishing to contest a motion, regardless of when the motion was made, to put his or her best foot forward - However, despite the change in the wording of rule 13.04, a judicial discretion still existed to defer or dismiss a summary judgment motion on the basis that requiring the responding party to put its best foot forward at any time after pleadings close might, in some circumstances, be unfair and unjust - See paragraphs 1 to 45 and 142.

Practice - Topic 5702.1

Judgments and orders - Summary judgments - Time for hearing - The plaintiff (Coady) was left partially paralyzed after a snowboarding accident at a ski resort - He sued the operator of a promotional booth at the ski resort (the defendant Burton), who was offering snowboarders trial runs on its snowboards and free high-caffeine energy drinks, alleging negligence - Immediately after discovery of the plaintiff, the defendant moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04) - The Nova Scotia Supreme Court (Warner, J.) denied summary judgment "... on the basis that there is sufficient evidence before the Court to establish that Burton owed a duty of care to Coady, and standard of care that was owed. The liability of Burton to Coady remains a genuine issue for trial. If I am wrong in my application of the Guarantee [SCC 1999] analysis to Burton's motion, I would find that the motion is premature. I am unable, from the gaps in the 'facts', to get a full appreciation of the evidence required to make a dispositive finding that there is no genuine issue for trial. The plaintiff has not yet had a fair opportunity to put his best foot forward. He has not acted without diligence. The purpose of summary judgment is to stop unmeritorious claims from going to trial, not to prevent claims from reaching the point where it is reasonable to determine whether it is meritorious" - See paragraphs 45 to 154.

Practice - Topic 5702.1

Judgments and orders - Summary judgments - Time for hearing - The plaintiff (Coady) was left partially paralyzed after a snowboarding accident at a ski resort (Wentworth) - He sued Wentworth, alleging negligence - Immediately after discovery of the plaintiff, the defendant moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04) - The Nova Scotia Supreme Court was not satisfied that Wentworth has discharged the first part of the Guarantee (SCC 1999) test - There were disputed facts material to the alleged negligence of Wentworth - Based on the facts on the motion, the plaintiff satisfied the court that genuine issues remain for trial - The court opined, however, that if it was wrong in the application of the Guarantee test, the motion could be considered premature - A full appreciation of the evidence was not achievable, based in the evidence presented in this motion - See paragraphs 155 to 239.

Practice - Topic 5708

Judgments and orders - Summary judgments - Bar to application - Existence of issue to be tried - The plaintiff (Coady) was left partially paralyzed after a snowboarding accident at a ski resort - He sued the operator of a promotional booth at the ski resort (the

defendant Burton), who was offering snowboarders trial runs on its snowboards and free high-caffeine energy drinks, alleging negligence - Immediately after discovery of the plaintiff, the defendant moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04) - The Nova Scotia Supreme Court (Warner, J.) denied summary judgment "... on the basis that there is sufficient evidence before the Court to establish that Burton owed a duty of care to Coady, and standard of care that was owed. The liability of Burton to Coady remains a genuine issue for trial. If I am wrong in my application of the Guarantee [SCC 1999] analysis to Burton's motion, I would find that the motion is premature. I am unable, from the gaps in the 'facts', to get a full appreciation of the evidence required to make a dispositive finding that there is no genuine issue for trial. The plaintiff has not yet had a fair opportunity to put his best foot forward. He has not acted without diligence. The purpose of summary judgment is to stop unmeritorious claims from going to trial, not to prevent claims from reaching the point where it is reasonable to determine whether it is meritorious" - See paragraphs 45 to 154.

Practice - Topic 5708

Judgments and orders - Summary judgments - Bar to application - Existence of issue to be tried - The plaintiff (Coady) was left partially paralyzed after a snowboarding accident at a ski resort (Wentworth) - He sued Wentworth, alleging negligence - Immediately after discovery of the plaintiff, the defendant moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04) - The Nova Scotia Supreme Court was not satisfied that Wentworth has discharged the first part of the Guarantee (SCC 1999) test - There were disputed facts material to the alleged negligence of Wentworth - Based on the facts on the motion, the plaintiff satisfied the court that genuine issues remain for trial - The court opined, however, that if it was wrong in the application of the Guarantee test, the motion could be considered premature - A full appreciation of the evidence was not achievable, based in the evidence presented in this motion - See paragraphs 155 to 239.

Practice - Topic 5710

Judgments and orders - Summary judgments - Evidence - The Nova Scotia Supreme Court noted the differences between the new summary judgment on the evidence rule (Civil Procedure Rules, 2009, rule 13.04) and the old summary judgment rule (1972 Rules as amended in 2002) - The court explained that since 2002 the Nova Scotia Court of Appeal (NSCA) had consistently held that the two-step test set out in Guarantee Co. v. Gordon Capital Corp (SCC 1999) applied to Nova Scotia applications for summary judgment on the evidence - Further, the NSCA had recently held that the same two-step Guarantee analysis applied to motions for summary judgment on the evidence under new rule 13.04 - See paragraphs 24 to 27.

Practice - Topic 5710

Judgments and orders - Summary judgments - Evidence - The Nova Scotia Supreme Court noted that the new summary judgment rule (Civil Procedure Rules, 2009, rule 13.04(1)), provided that a judge who is satisfied that the evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial "must" grant summary judgment - The Nova Scotia Supreme Court stated that "... despite the change in the wording of CPR 13.04, a judicial discretion still exists to defer or

dismiss a summary judgment motion on the basis that requiring the responding party to put its best foot forward at any time after pleadings close may, in some circumstances, be unfair and unjust ... Discretion should remain with the motions judge to defer, dismiss or otherwise determine a motion for summary judgment on the evidence, in addition to the criteria in the Guarantee test, when the following circumstances arise: (1) the responding party has been unable to obtain the material evidence, and (2) the relevant material evidence is likely available from sources that are identified and/or identifiable, and (3) the responding party has been diligent in pursuing that evidence" - See paragraphs 142 to 147.

Practice - Topic 5712

Judgments and orders - Summary judgments - Application or motion - Time for - The plaintiff was left partially paralyzed after a snowboarding accident at a ski resort - He sued the resort and another company (Burton), the defendants - Burton had a promotional booth at Wentworth, which was offering snowboarders trial runs on its snowboards and free high-caffeine energy drinks - Immediately after discovery, the defendants moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04 (new rule)) - The plaintiff claimed that he was unable to put his "best foot forward" as required by rule 13.04, for reasons beyond his control, including the timing of the motions (i.e., the hearing was premature) - The Nova Scotia Supreme Court held that the new rule required a party wishing to contest a motion, regardless of when the motion was made, to put his or her best foot forward - However, despite the change in the wording of rule 13.04, a judicial discretion still existed to defer or dismiss a summary judgment motion on the basis that requiring the responding party to put its best foot forward at any time after pleadings close might, in some circumstances, be unfair and unjust - See paragraphs 1 to 45 and 142.

Practice - Topic 5712

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Practice - Topic 5712

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Practice - Topic 5719

Judgments and orders - Summary judgments - To dismiss action - The Nova Scotia Supreme Court noted the differences between the new summary judgment on the evidence rule (Civil Procedure Rules, 2009, rule 13.04) and the old summary judgment rule (1972 Rules as amended in 2002) - The court explained that since 2002 the Nova Scotia Court of Appeal (NSCA) had consistently held that the two-step test set out in Guarantee Co. v. Gordon Capital Corp (SCC 1999) applied to Nova Scotia applications for summary judgment on the evidence - Further, the NSCA had recently held that the same two-step Guarantee analysis applied to motions for summary judgment on the evidence under new rule 13.04 - See paragraphs 24 to 27.

Practice - Topic 5719

Judgments and orders - Summary judgments - To dismiss action - The plaintiff was left partially paralyzed after a snowboarding accident at a ski resort - He sued the resort and another company (Burton), the defendants - Burton had a promotional booth at Wentworth, which was offering snowboarders trial runs on its snowboards and free high-caffeine energy drinks - Immediately after discovery, the defendants moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04 (new rule)) - The plaintiff claimed that he was unable to put his "best foot forward" as required by rule 13.04, for reasons beyond his control, including the timing of the motions (i.e., the hearing was premature) - The Nova Scotia Supreme Court held that the new rule required a party wishing to contest a motion, regardless of when the motion was made, to put his or her best foot forward - However, despite the change in the wording of rule 13.04, a judicial discretion still existed to defer or dismiss a summary judgment motion on the basis that requiring the responding party to put its best foot forward at any time after pleadings close might, in some circumstances, be unfair and unjust - See paragraphs 1 to 45 and 142.

Practice - Topic 5719

Judgments and orders - Summary judgments - To dismiss action - The Nova Scotia Supreme Court noted that the new summary judgment rule (Civil Procedure Rules, 2009, rule 13.04(1)), provided that a judge who is satisfied that the evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial

"must" grant summary judgment - The Nova Scotia Supreme Court stated that "... despite the change in the wording of CPR 13.04, a judicial discretion still exists to defer or dismiss a summary judgment motion on the basis that requiring the responding party to put its best foot forward at any time after pleadings close may, in some circumstances, be unfair and unjust ... Discretion should remain with the motions judge to defer, dismiss or otherwise determine a motion for summary judgment on the evidence, in addition to the criteria in the Guarantee test, when the following circumstances arise: (1) the responding party has been unable to obtain the material evidence, and (2) the relevant material evidence is likely available from sources that are identified and/or identifiable, and (3) the responding party has been diligent in pursuing that evidence" - See paragraphs 142 to 147.

Practice - Topic 5719

Judgments and orders - Summary judgments - To dismiss action - The plaintiff (Coady) was left partially paralyzed after a snowboarding accident at a ski resort - He sued the operator of a promotional booth at the ski resort (the defendant Burton), who was offering snowboarders trial runs on its snowboards and free high-caffeine energy drinks, alleging negligence - Immediately after discovery of the plaintiff, the defendant moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04) - The Nova Scotia Supreme Court (Warner, J.) denied summary judgment "... on the basis that there is sufficient evidence before the Court to establish that Burton owed a duty of care to Coady, and standard of care that was owed. The liability of Burton to Coady remains a genuine issue for trial. If I am wrong in my application of the Guarantee [SCC 1999] analysis to Burton's motion, I would find that the motion is premature. I am unable, from the gaps in the 'facts', to get a full appreciation of the evidence required to make a dispositive finding that there is no genuine issue for trial. The plaintiff has not yet had a fair opportunity to put his best foot forward. He has not acted without diligence. The purpose of summary judgment is to stop unmeritorious claims from going to trial, not to prevent claims from reaching the point where it is reasonable to determine whether it is meritorious" - See paragraphs 45 to 154.

Practice - Topic 5719

Judgments and orders - Summary judgments - To dismiss action - The plaintiff (Coady) was left partially paralyzed after a snowboarding accident at a ski resort (Wentworth) - He sued Wentworth, alleging negligence - Immediately after discovery of the plaintiff, the defendant moved for summary judgment on the evidence (Civil Procedure Rules, 2009, rule 13.04) - The Nova Scotia Supreme Court was not satisfied that Wentworth has discharged the first part of the Guarantee (SCC 1999) test - There were disputed facts material to the alleged negligence of Wentworth - Based on the facts on the motion, the plaintiff satisfied the court that genuine issues remain for trial - The court opined, however, that if it was wrong in the application of the Guarantee test, the motion could be considered premature - A full appreciation of the evidence was not achievable, based in the evidence presented in this motion - See paragraphs 155 to 239.

Practice - Topic 5725

Judgments and orders - Summary judgments - Costs - Two defendants moved for

summary judgement on the evidence dismissing the plaintiff's negligence action (Civil Procedure Rules, 2009, rule 13.04 (new rule)) - The Nova Scotia Supreme Court (Warner, J.) discussed and interpreted the new rule, and dismissed both summary judgment motions - The court noted that Tariff C applied - Warner, J., stated that "This was a complex matter. It was of great importance to all parties, as success on the motions would have ended the litigation. The possible quantum of damages is unknown, but the injury to the plaintiff appears to have been very serious. The motion, scheduled for one day, consumed six days. The starting point for a six day chambers motion, without application of a multiplier, is \$12,000.00. In my view, the complexity and importance of the matter to the parties merits a multiplier of at least two. The plaintiff should have his costs in the amount of \$24,000.00, plus reasonable disbursements as verified by affidavit, one half from each of the defendants" - Costs were payable forthwith - See paragraphs 239 to 243.

Practice - Topic 7364

Costs - Party and party costs - Costs of interlocutory proceedings - Costs of motions or applications - Two defendants moved for summary judgement on the evidence dismissing the plaintiff's negligence action (Civil Procedure Rules, 2009, rule 13.04 (new rule)) - The Nova Scotia Supreme Court (Warner, J.) discussed and interpreted the new rule, and dismissed both summary judgment motions - The court noted that Tariff C applied - Warner, J., stated that "This was a complex matter. It was of great importance to all parties, as success on the motions would have ended the litigation. The possible quantum of damages is unknown, but the injury to the plaintiff appears to have been very serious. The motion, scheduled for one day, consumed six days. The starting point for a six day chambers motion, without application of a multiplier, is \$12,000.00. In my view, the complexity and importance of the matter to the parties merits a multiplier of at least two. The plaintiff should have his costs in the amount of \$24,000.00, plus reasonable disbursements as verified by affidavit, one half from each of the defendants" - Costs were payable forthwith - See paragraphs 239 to 243.

Practice - Topic 7372

Costs - Costs of interlocutory proceedings - Payment forthwith - Two defendants moved for summary judgement on the evidence dismissing the plaintiff's negligence action (Civil Procedure Rules, 2009, rule 13.04 (new rule)) - The Nova Scotia Supreme Court (Warner, J.) discussed and interpreted the new rule, and dismissed both summary judgment motions - The court noted that Tariff C applied - Warner, J., stated that "This was a complex matter. It was of great importance to all parties, as success on the motions would have ended the litigation. The possible quantum of damages is unknown, but the injury to the plaintiff appears to have been very serious. The motion, scheduled for one day, consumed six days. The starting point for a six day chambers motion, without application of a multiplier, is \$12,000.00. In my view, the complexity and importance of the matter to the parties merits a multiplier of at least two. The plaintiff should have his costs in the amount of \$24,000.00, plus reasonable disbursements as verified by affidavit, one half from each of the defendants" - Costs were payable forthwith - See paragraphs 239 to 243.