

Combined Air Mechanical Services Inc., Dravo Manufacturing Inc. and Combined Air Mechanical Services (plaintiffs/appellants) v. William Flesch, WJF Investments Inc., Service Sheet Metal Inc. and James Searle (defendants/respondents)
(C51986)

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Clear, Carolyn Clear, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith (plaintiffs/respondents) v. Cassels Brock & Blackwell LLP, Gregory Jack Peebles and Robert Hryniak (defendants/appellant)
(C52912)

Bruno Appliance and Furniture, Inc. (plaintiff/respondent) v. Cassels Brock & Blackwell LLP, Gregory Jack Peebles and Robert Hryniak (defendants/appellant)
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394 Lakeshore Oakville Holdings Inc. (plaintiffs/respondent) v. Carol Anne Misek and Janet Purvis (defendants/appellant)
(C53035)

Marie Parker, Katherine Stiles and Siamak Khalajabadi (plaintiffs/appellants) v. Eric Casalese, Gerarda Dina Bianco Casalese, Pino Scarfo, Antonietta Di Lauro and Mauro Di Lauro (defendants/respondents)
(C53395); 2011 ONCA 764

Indexed As: Combined Air Mechanical Services Inc. et al. v. Flesch et al.

Ontario Court of Appeal
Winkler, C.J.O., Laskin, Sharpe, Armstrong and Rouleau, J.J.A.
December 5, 2011.

Summary:

On January 1, 2010, rule 20 of the Rules of Civil Procedure was amended to, inter alia, allow a judge on a summary judgment motion to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence, unless the judge was of the view that it was in the interest of justice for such powers to be exercised only at a trial. Prior to the amendments, jurisprudence had precluded considerations of such matters on a summary judgment motion. Following the amendments to rule 20, there was some controversy and uncertainty as to when it was appropriate for a motions judge to use the new powers conferred by the amended rule 20. To provide some guidance to the profession, the Court of Appeal convened a five-judge panel to hear five appeals from decisions under the amended rule. In some of these cases, summary judgment was granted, while in others the motion was dismissed in whole or in part. With their varying outcomes, those cases raised a number of issues concerning the interpretation of the new rule 20, including the nature of the test for determining whether summary judgment should be granted, the scope and purpose of the new powers that had been given to judges hearing motions for summary judgment, and the types of cases that were amenable to summary judgment.

The Ontario Court of Appeal: (1) provided a historical review of rule 20 before the 2010 amendments, including a review of some of the leading cases interpreting the former rule; (2) examined the findings and recommendations of the former Associate Chief Justice of Ontario (Osborne) in his report entitled Civil Justice Reform Project: Summary of Findings and Recommendations (2007); (3) analyzed the 2010 amendments to determine the extent to which Mr. Osborne's recommendations concerning summary judgment were implemented; (4) explained the general principles to be followed in applying the amended rule 20; and (5) applied those principles to the five appeals before the court.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - On January 1, 2010, rule 20 of the Rules of Civil Procedure Rules was amended to allow a judge on a summary judgment motion to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence in determining whether there was a "genuine issue requiring a trial", unless the judge was of the view that it was in the interest of justice for such powers to be exercised only at a trial - Prior to the amendments, jurisprudence had precluded considerations of such matters on a summary judgment motion (i.e., a restrictive analytical approach) - The Ontario Court of Appeal provided a historical review of the former rule 20 and the leading cases interpreting the rule - The court also discussed findings and recommendations respecting the former rule 20 given by the former Associate Chief Justice of Ontario (Osborne), who had been commissioned to provide recommendations for making the justice system in Ontario more accessible and affordable - The court thereafter analyzed the 2010 amendments to determine the extent to which Osborne's recommendations concerning summary judgment were implemented - See paragraphs 9 to 34.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - Rule 20.04(2.1) of the Rules of Civil Procedure provided that "In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial: 1. Weighing the evidence. 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence" - The Ontario Court of Appeal stated that "The threshold issue in understanding the application of the powers granted to the motions judge by rule 20.04(2.1) is the meaning to be attributed to the phrase 'interest of justice'. This phrase operates as the limiting language that guides the determination whether a motions judge should exercise the powers to weigh evidence, evaluate credibility, and draw reasonable inferences from the evidence on a motion for summary judgment, or if these powers should be exercised only at a trial. The phrase reflects that the aim of the civil justice system is to provide a just result in disputed matters through a fair process. The amended rule recognizes that while there is a role for an expanded summary judgment procedure, a trial is essential in certain circumstances if the 'interest

of justice' is to be served" - See paragraphs 29 and 45.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended - The Ontario Court of Appeal analysed the amended rule - The court noted that in the two years since the amendment there had been conflicting jurisprudence respecting the rule from the Superior Court - The court declined to comment on the relative merits of the various interpretative approaches found in the case law because the Court of Appeal's decision marked a "new departure and a fresh approach" to the interpretation and application of the amended rule 20 - See paragraph 35.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended - The Ontario Court of Appeal stated that the amendment was meant to introduce significant changes in the manner in which summary judgment motions were to be decided - The new rule made it clear that the jurisprudential restrictions on the analytical tools available to the motions judge were no longer applicable - A motions judge could now weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence in determining whether there was a genuine issue requiring a trial with respect to a claim or defence - Moreover, the new rule also enabled the motions judge to direct the introduction of oral evidence to further assist the judge in exercising these powers - The amended rule permitted the motions judge to decide the action where satisfied that by exercising the powers now available on a summary judgment motion, there was no factual or legal issue raised by the parties that required a trial for its fair and just resolution - The court emphasized that "the purpose of the new rule is to eliminate unnecessary trials, not to eliminate all trials. The guiding consideration is whether the summary judgment process, in the circumstances of a given case, will provide an appropriate means for effecting a fair and just resolution of the dispute before the court" - See paragraphs 36 to 39.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended - The Ontario Court of Appeal stated that generally speaking, and without attempting to be exhaustive, there were three types of cases that were amenable to summary judgment under amended rule 20 - First were cases where the parties agreed that it was appropriate to determine an action by way of a motion for summary judgment (rule 20.04(2)(b)) - Second were cases where the claim or defence had no chance of success - Third, the amended wording of rule 20 (i.e., "genuine issue for trial" was replaced by "genuine issue requiring a trial"), coupled with the enhanced powers under rules 20.04(2.1) and (2.2), permitted the motions judge to dispose of cases summarily where the interest of justice did not require a trial - See paragraphs 40 to 44.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended - The Ontario Court of Appeal stated that the amended wording of rule 20 (i.e., "genuine issue for trial" was replaced by "genuine issue requiring a trial"), coupled with the enhanced powers under rules 20.04(2.1) and (2.2) permitted the motions judge to dispose of cases on the merits where the trial process was not required in the "interest of justice" - The court discussed when it was appropriate for a motions judge to exercise the powers in rule 20.04(2.1) - The court stated that "In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial? We think this 'full appreciation test' provides a useful benchmark for deciding whether or not a trial is required in the interest of justice ..." - The court elaborated on the "full appreciation test" - See paragraphs 45 to 63.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended - The Ontario Court of Appeal stated that the amended wording of rule 20 (i.e., "genuine issue for trial" was replaced by "genuine issue requiring a trial"), coupled with the enhanced powers under rules 20.04(2.1) and (2.2) permitted the motions judge to dispose of cases on the merits where the trial process was not required in the "interest of justice" - The court stated that "... we add an important caveat to the 'best foot forward' principle in cases where a motion for summary judgment is brought early in the litigation process. It will not be in the interest of justice to exercise rule 20.04(2.1) powers in cases where the nature and complexity of the issues demand that the normal process of production of documents and oral discovery be completed before a party is required to respond to a summary judgment motion. In such a case, forcing a responding party to build a record through affidavits and cross-examinations will only anticipate and replicate what should happen in a more orderly and efficient way through the usual discovery process" - See paragraphs 29 and 48.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended - The Ontario Court of Appeal stated that there were three types of cases that were amenable to summary judgment under amended rule 20, the second type being cases where the claim or defence had no chance of success - The court stated that "... a judge may use the powers provided by rules 20.04(2.1) and (2.2) to be satisfied that a claim or defence has no chance of success. The availability of these enhanced powers to determine if a claim or defence has no chance of success will permit more actions to be weeded out through the mechanism of summary judgment. However, before the motions judge decides to weigh evidence, evaluate credibility, or draw reasonable inferences from the evidence, the motions judge must apply the full

appreciation test." - See paragraph 73.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended - The Ontario Court of Appeal in discussing the types of cases that were amenable to summary judgment stated that "The amended rule also now permits the summary disposition of a third type of case, namely, those where the motion judge is satisfied that the issues can be fairly and justly resolved by exercising the powers in rule 20.04(2.1). In deciding whether to exercise these powers, the judge is to assess whether he or she can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record - as may be supplemented by oral evidence under rule 20.04(2.2) - or if the attributes and advantages of the trial process require that these powers only be exercised at a trial" - See paragraph 74.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended - The Ontario Court of Appeal, in analysing the amended rule 20, stated the following under the heading "The Obligations on Members of the Bar": "It is important to underscore the obligation that rests on members of the bar in formulating an appropriate litigation strategy. The expenditure of resources, regardless of quantum, in the compilation of a motion record and argument of the motion is not a valid consideration in determining whether summary judgment should be granted. It is not in the interest of justice to deprive litigants of a trial simply because of the costs incurred by the parties in preparing and responding to an ill-conceived motion for summary judgment" - See paragraph 68.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - Combined Air sued the defendants, ex-employees, for damages for alleged breaches of restrictive covenants because they did consulting work for a competitor, an IT company - The defendants moved for summary judgment - The motions judge, after considering oral evidence under Civil Procedure Rule 20.04(2.2), concluded that there was no evidence raising a genuine issue requiring a trial on any of the claims advanced by Combined Air and granted summary judgment dismissing the action - Combined Air appealed, arguing that the motions judge erred by finding that the IT company was not a "same or similar business" to, and that it did not "compete" with, Combined Air - The Ontario Court of Appeal dismissed the appeal - The defendants adduced evidence as to the nature of the IT company's business and their involvement in it to show that the IT company was not in competition with Combined Air - Combined Air failed to adduce any evidence showing that the IT company was a competitor and details emerged in the oral evidence hearing that supported the defendants - See paragraphs 95 to 100.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - The Mauldin Group and Bruno each sued Hryniak, his lawyer and the lawyer's firm (defendants), alleging fraud after they lost investment moneys - The Mauldin Group and Bruno moved for summary judgment - The motions judge, utilizing the expanded powers under the amended Civil Procedure Rule 20.04(2.1), held that it was in the interest of justice to grant summary judgment against Hryniak but dismissed the motions respecting the other two defendants - Hryniak appealed, arguing that the motions judge erred in concluding that a trial was not required to determine his liability - The Ontario Court of Appeal agreed - The motion record was voluminous - Many witnesses gave evidence - 18 filed affidavits - Different theories were advanced against each defendant - Numerous findings of fact were required - Credibility was in issue - The partial resolution of these actions by way of summary judgment did not promote the values underlying the amended rule 20 - The court concluded that, going forward, cases such as this required a trial - They should not be decided by summary judgment - However, for purposes of determining this appeal, the court upheld that summary judgment against Hryniak in the Mauldin Group action, but not in the Bruno action - See paragraphs 113 to 181.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - The plaintiff (Lakeshore) owned a parcel of land with shoreline - The defendant (Misek), a neighbour, claimed an easement over the plaintiff's property based on usage - The plaintiff sued the defendant, seeking injunctive relief and moved for summary judgment - A motions judge, exercising the enhanced powers under Civil Procedure Rule 20.04(2.1) (as amended in 2010) to weigh evidence, evaluate credibility and draw inferences from the evidence, ruled that the defendant did not have a prescriptive easement and granted summary judgment in favour of the plaintiff - The defendant appealed, arguing that the motions judge should not have decided the easement issue on a rule 20 motion - The Ontario Court of Appeal rejected the defendant's suggestion that there were certain categories of claims that should not be decided on a summary judgment motion - "As we have said, the test for exercising the powers conferred by rule 20.04(2.1) is whether the full appreciation of the evidence and issues that is required to make dispositive findings is possible on a motion for summary judgment. This case is a good example of the type of case that is amenable to summary judgment based on the application of the full appreciation test. The documentary evidence was limited and not contentious. There were a limited number of relevant witnesses. The governing legal principles were not in dispute. It was thus entirely appropriate for the motion judge to decide the action on a Rule 20 motion" - See paragraphs 182 to 219.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - The plaintiffs (Parker et al.) sued the defendant under the simplified procedure in rule 76 of the Rules of Civil Procedure, claiming that the defendant damaged their properties while constructing new homes in the area - The plaintiffs moved for summary judgment (Civil Procedure Rule 20 as amended in 2010) - The motions

judge dismissed the motion and refused to grant summary judgment because of numerous conflicts in the evidence that could only be justly resolved after trial - The Divisional Court affirmed the decision - The plaintiffs appealed again - The Ontario Court of Appeal dismissed the appeal - The court stated that considering the nature of the issues in dispute, the absence of any cross-examinations of the key witnesses, the lack of a detailed damages assessment in the plaintiffs' expert report, and the absence of any appreciable efficiency gain that would be accomplished by the motion, there was no error in the Divisional Court's conclusion that a trial was required - See paragraphs 227 to 266.

Practice - Topic 5702

Judgments and orders - Summary judgments - Jurisdiction or when available or when appropriate - On January 1, 2010, rule 20 of the Rules of Civil Procedure (summary judgment) was amended - The Ontario Court of Appeal discussed how rule 20 should be applied in the context of a simplified procedure action under rule 76 - The court stated that the test for summary judgment in simplified procedure actions was now governed by rule 20 - The court stated further that no doubt, in appropriate cases, a motion for summary judgment in a rule 76 action could be a useful tool to promote the efficient disposition of cases - However, it will often be the case that bringing a motion for summary judgment will conflict with the efficiency that can be achieved by simply following the abridged procedures in rule 76 - "When a judge is faced with a contested motion for summary judgment in a simplified procedure action that requires exercising the powers in rule 20.04(2.1), the judge will not only have to apply the full appreciation test, but will also need to assess whether entertaining the motion is consistent with the efficiency rationale reflected in the simplified procedures under Rule 76" - See paragraphs 252 to 257.

Practice - Topic 5710

Judgments and orders - Summary judgments - Evidence - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended including rule 20.04(2.2) which provided that "A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation" - The Ontario Court of Appeal discussed the use of this power to order oral evidence on a summary judgment motion - The court noted that a summary judgment motion under the new rule did not constitute a trial - The discretion to order oral evidence pursuant to rule 20.04(2.2) was circumscribed and could not be used to convert a summary judgment motion into a trial - The power to direct the calling of oral evidence under rule 20.04(2.2) was not intended to permit the parties to supplement the motion record - See paragraphs 59 to 63.

Practice - Topic 5710

Judgments and orders - Summary judgments - Evidence - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended including rule 20.04(2.2) which provided that "A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation" - The Ontario Court of Appeal stated that "... the power to direct the calling of oral evidence under rule 20.04(2.2) is not

intended to permit the parties to supplement the motion record. Nor can the parties anticipate the motion judge directing the calling of oral evidence on the motion. The latter point requires that we address a practice issue in the Toronto Region. As a case management matter, parties to a summary judgment motion in Toronto are required to complete a summary judgment form, which includes questions about whether the parties intend to call viva voce evidence on an issue in dispute, and estimating the time required for such evidence. Although no doubt well-intentioned, these questions are misplaced in that they create the misconception that a summary judgment motion is in fact a summary trial" - See paragraph 62.

Practice - Topic 5710

Judgments and orders - Summary judgments - Evidence - Civil Procedure Rule 20.04(2.2), as amended in 2010, provided that "A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation" - The Ontario Court of Appeal stated that "Generally speaking, a rule 20.04(2.2) order will be appropriate where the motions judge concludes that the exercise of the powers conferred by rule 20.04(2.1) will be facilitated by hearing the oral evidence of a limited number of witnesses on one or more specific, discrete and likely determinative issues ... While we do not wish to be taken as establishing an exhaustive list of when a judge may choose to make a rule 20.04(2.2) order, such an order would be appropriate where: (1) Oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) Any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and (3) Any such issue is narrow and discrete - i.e., the issue can be separately decided and is not enmeshed with other issues on the motion" - See paragraphs 101 to 103.

Practice - Topic 5710

Judgments and orders - Summary judgments - Evidence - Combined Air sued the defendants, ex-employees, for damages for breaches of restrictive covenants - The defendants moved for summary judgment - The motions judge directed defendants to present oral evidence to explain a document advanced by Combined Air (Civil Procedure Rule 20.04(2.2)) - The motions judge held that the document actually supported the defendants' position, found that there was no evidence raising a genuine issue requiring a trial on any of the claims advanced by Combined Air and granted summary judgment dismissing the action - Combined Air appealed, arguing that the motions judge erred and in exercising his power to order the presentation of oral evidence under rule 20.04(2.2) - The Ontario Court of Appeal dismissed the appeal - The motions judge had amply grounds to make a rule 20.04(2.2) order in this case - The document was at best ambiguous and required some explanation - The issue was narrow and discrete - Determination of the issue required a limited number of witnesses (in this case one) - The explanation was likely to have a significant impact on whether the summary judgment motion was granted - See paragraphs 101 to 112.

Practice - Topic 5710

Judgments and orders - Summary judgments - Evidence - On a summary judgment

motion, the motions judge, acting under Civil Procedure Rule 20.04(2.2) directed the moving party (Flesh) to present oral evidence from one witness to explain a document advanced by the responding party (Combined Air) - The motions judge limited the questions that could be asked of the witness and refused to allow the responding party's counsel to cross-examine the witness on other matters - The motions judge concluded that there was no evidence raising a genuine issue requiring a trial and granted summary judgment dismissing the action - The responding party appealed, arguing that a motions judge could only impose a temporal restriction on the presentation of oral evidence under rule 20.04(2.2) and that the judge had no power to restrict the type of questions that could be asked of a witness under cross-examination - The Ontario Court of Appeal rejected the responding party's argument, holding that the motions judge did not deny the responding party procedural fairness by limiting the scope of cross-examination - The responding party had been given a full opportunity to present its evidence - The court stated that the motions judge had the power under rule 20.04(2.2) to limit cross-examination - See paragraphs 105 to 106.

Practice - Topic 5720

Judgments and orders - Summary judgments - Order to proceed to trial - Terms - Civil Procedure Rule 20.05 (as amended in 2010) provided that where summary judgment was refused or was granted only in part, the court could make an order specifying what material facts were not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously - The Ontario Court of Appeal stated that "While the court may make use of the provisions in rule 20.05 to salvage the resources that went into the summary judgment motion, the court should keep in mind that the rule should not be applied so as to effectively order a trial that resembles the motion that was previously dismissed ... Any trial management order flowing from a failed summary judgment motion must facilitate the conduct of a genuine trial that will permit the full appreciation of the evidence and issues required to make dispositive findings. In other words, the trial ought not to be simply a reconfiguration of the dismissed motion. Further, litigants must not look to rule 20.05 as a reason for bringing a motion for summary judgment or as a substitute for effective case management of the trial of an action. The newly-introduced rule 50 permits parties to obtain orders and directions that will assist in ensuring that a trial proceeds efficiently" - See paragraphs 64 to 66.

Practice - Topic 5725

Judgments and orders - Summary judgments - Costs - Civil Procedure Rule 20.06 (as amended in 2010) provided that "the court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if, (a) the party acted unreasonably by making or responding to the motion; or (b) the party acted in bad faith for the purpose of delay" - The Ontario Court of Appeal stated that "As a result of the amendments to rule 20.06, the onus is now on the party seeking substantial indemnity costs to convince the court that the other side acted unreasonably or in bad faith for the purpose of delay in bringing or responding to a motion for summary judgment. This amendment removes a disincentive to litigants from using rule 20 by eliminating the presumption that they will face substantial indemnity costs for bringing an unsuccessful motion for summary judgment. However, as the jurisprudence becomes more settled on

when it is appropriate to move for summary judgment, the reasonableness of the decision to move for summary judgment or to resist such a motion will be more closely scrutinized by the court in imposing cost orders under rule 20.06" - See paragraph 67.

Practice - Topic 8825.6

Appeals - General principles - Duty of appellate court on reviewing summary judgment decisions - On January 1, 2010, rule 20 of the Rules of Civil Procedure (the summary judgment rule) was amended - The Ontario Court of Appeal noted that under the former rule 20, courts reviewed the question whether the motions judge applied the appropriate test of a "genuine issue for trial" on a standard of correctness - The court stated that there was no reason to depart from that standard under the new rule - The determination of whether there was a "genuine issue requiring a trial" under the amended rule was a legal determination attracting the correctness standard of review - The court stated that "Where the appellate court determines that the motion judge correctly applied the legal test for determining whether to grant summary judgment, any factual determinations by the motion judge in deciding the motion will attract review on the deferential standard of palpable and overriding error" - See paragraphs 69 to 71.

Cases Noticed:

Manulife Bank of Canada v. Conlin et al., [1996] 3 S.C.R. 415; 203 N.R. 81; 94 O.A.C. 161, reld to. [para. 12, footnote 1].

Ungerman (Irving) Ltd. et al. v. Galanis and Haut (1991), 50 O.A.C. 176; 4 O.R.(3d) 545 (C.A.), reld to. [para. 13].

Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R.(2d) 225 (Gen. Div.), reld to. [para. 15].

Aguonie v. Galion Solid Waste Material Inc. et al. (1998), 107 O.A.C. 114; 38 O.R.(3d) 161 (C.A.), reld to. [para. 17].

Dawson et al. v. Rexcraft Storage and Warehouse Inc. et al. (1998), 111 O.A.C. 201; 164 D.L.R.(4th) 257 (C.A.), reld to. [para. 18].

Aronowicz et al. v. Emtwo Properties Inc. et al. (2010), 258 O.A.C. 222; 2010 ONCA 96, reld to. [para. 19].

Healey v. Lakeridge Health Corp. et al., [2010] O.T.C. Uned. 725; 72 C.C.L.T.(3d) 261; 2010 ONSC 725, reld to. [para. 35].

Cuthbert v. TD Canada Trust et al., [2010] O.T.C. Uned. 830; 88 C.P.C.(6th) 359; 2010 ONSC 830, reld to. [para. 35].

New Solutions Extrusion Corp. v. Gauthier et al., [2010] O.T.C. Uned. 1037; 2010 ONSC 1037, reld to. [para. 35].

Hino Motors Canada Ltd. v. Kell, [2010] O.T.C. Uned. 1329; 2010 ONSC 1329, reld to. [para. 35].

Lawless v. Anderson et al., [2010] O.T.C. Uned. 2723; 2010 ONSC 2723, reld to. [para. 35].

Canadian Premier Life Insurance Co. v. Sears Canada Inc., [2010] O.T.C. Uned. 3834; 2010 ONSC 3834, reld to. [para. 35].

Enbridge Gas Distribution Inc. v. Marinaccio et al., [2011] O.T.C. Uned. 2313; 2011 ONSC 2313, reld to. [para. 35].

Optech Inc. v. Sharma et al., [2011] O.T.C. Uned. 680; 2011 ONSC 680, supplementary reasons [2011] O.T.C. Uned. 1081; 2011 ONSC 1081, reld to. [para. 35].

Lameman et al. v. Canada (Attorney General) et al., [2008] 1 S.C.R. 372; 372 N.R. 239; 429 A.R. 26; 421 W.A.C. 26; 2008 SCC 14, refd to. [para. 42].

Housen v. Nikolaisen et al., [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 211 D.L.R.(4th) 577; 2002 SCC 33, refd to. [para. 46].

Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. et al. (1996), 2 O.T.C. 146; 28 O.R.(3d) 423 (Gen. Div.), refd to. [para. 56].

Whalen et al. v. Hillier et al. (2001), 143 O.A.C. 320; 53 O.R.(3d) 550 (C.A.), refd to. [para. 69].

Canadian Imperial Bank of Commerce v. F-1 Holdings & Investments Inc., 2007 CarswellOnt 8012 (Div. Ct.), refd to. [para. 69].

Plan Group et al. v. Bell Canada (2009), 252 O.A.C. 71; 96 O.R.(3d) 81; 2009 ONCA 548, refd to. [para. 70].

Esses v. Friedberg & Co. et al. (2008), 241 O.A.C. 134; 2008 ONCA 646, refd to. [para. 100].

Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP et al. (2011), 274 O.A.C. 353; 2011 ONCA 67, refd to. [para. 179].

Mauldin et al. v. Cassels Brock & Blackwell LLP et al., [2011] O.A.C. Uned. 94; 2011 ONCA 126, refd to. [para. 179].

Ellenborough Park, Re, [1956] 1 Ch. 131 (Eng. C.A.), refd to. [para. 204].

Kaminskas v. Storm (2009), 248 O.A.C. 297; 95 O.R.(3d) 387; 2009 ONCA 318, refd to. [para. 207].

Longo v. Lager (C.H.) Ltd. (1998), 20 R.P.R.(3d) 128 (Gen. Div.), refd to. [para. 217].

Schwark et al. v. Cutting, [2008] O.T.C. Uned. R03; 77 R.P.R.(4th) 219, revsd. (2010), 261 O.A.C. 262; 316 D.L.R.(4th) 105; 2010 ONCA 61, refd to. [para. 228].

Barber v. Leo Contracting Co., [1970] 2 O.R. 197 (C.A.), refd to. [para. 250].

Newcourt Credit Group Inc. v. Hummel Pharmacy Ltd. et al. (1998), 113 O.A.C. 389; 38 O.R.(3d) 82 (Div. Ct.), refd to. [para. 252].

Statutes Noticed:

Rules of Civil Procedure (Ont.), rule 20 [para. 2]; rule 20.04(2), rule 20.04(2.1), rule 20.04(2.2) [para. 29]; rule 20.05 [para. 64]; rule 20.06 [para. 67].

Authors and Works Noticed:

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These appeals were heard on June 21, 22 and 23, 2011, before Winkler, C.J.O., Laskin, Sharpe, Armstrong and Rouleau, J.J.A., of the Ontario Court of Appeal. The following decision was delivered by the court on December 5, 2011.

Order accordingly.

Editor: Elizabeth M.A. Turgeon