

*Case Name:*

**CEJ Poultry Inc. v. Intact Insurance Co.**

**RE: CEJ Poultry Inc., and  
Intact Insurance Company and The Dominion of Canada  
General Insurance Company**

[2012] O.J. No. 235

2012 ONSC 420

Court File No. 68523/10

Ontario Superior Court of Justice

**M.L. Lack J.**

Heard: December 13, 2011.

Judgment: January 17, 2012.

(37 paras.)

**Counsel:**

Martin P. **Forget**, for the Plaintiff/Responding Party, CEJ Poultry Inc.

William J. Jesseau, for the Defendant/Moving Party, Intact Insurance Company.

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ENDORSEMENT

**1 M.L. LACK J.:**-- The defendant Intact Insurance Company has brought a motion under Rule 20 for summary judgment.

Background

**2** On October 25, 2002, a farm house at 2815 Demara Road in Port Perry was damaged by fire. The farm house was owned by the plaintiff CEJ and rented to Laurie Walker whose sons occupied it. In an earlier action (Oshawa Action 32047/04SR), CEJ sued Deena Woodward-Calderone, the girlfriend of one of those sons alleging that the fire started due to her negligence. It obtained judgment against her. At the time of the fire, Deena was 16 years old. Deena has not paid the damages.

**3** This present action is a subrogated one. Under s. 132 of the Insurance Act<sup>1</sup>, the plaintiff, CEJ's insurer (Farmer's Mutual (Lindsay)), seeks to recover the damages awarded against Deena from either or both of the liability insurers of Deena's parents, who were divorced. The defendant Intact insured Deena's father, Frank Calderone. The defendant Dominion insured Deena's mother.

**4** Frank Calderone's policy with Intact defined an "Insured" as follows:

Insured means the person(s) named as Insured on the Coverage Summary page and, while living in the same household:

- His or her spouse
- The relatives of either; and
- Any person under 21 in their care.

In addition, a student who is enrolled in and actually attends school, college or university and who is dependent on the Named insured or his or her spouse for support and maintenance is also insured even if temporarily residing away from the principal residence stated on the Coverage Summary Page.

The Issue and the Onus in this Lawsuit

**5** To succeed in this lawsuit against Intact, the plaintiff has the onus of proving either that Deena was living in her father's household, or that Deena was a student enrolled in and attending school and dependant on her father for support and maintenance even if temporarily residing away from the principal residence - at the time of the fire, October 25, 2002.

The Issue and the Onus on this Motion

**6** This action is one under the Simplified Procedures set out in Rule 76<sup>2</sup>. The January 1, 2010 amendments to the Rules revoked the separate rule governing summary judgment under Rule 76 and provided that Rule 20, as amended, applies to the Simplified Procedure.

**7** Rule 20, as amended, provides that a court may grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. So, to succeed on this motion for summary judgment, the moving party, Intact, has the onus of demonstrating that there is no genuine issue requiring a trial.

Rule 20

**8** Rule 20 permits the court to grant summary judgment where the parties agree that it is appropriate to do so. It also permits the court to grant summary judgment where claims or defences are shown to be without merit. These types of cases were encompassed under the rule before amendment.

**9** In *Combined Air Mechanical Services Inc. v. Flesch*<sup>3</sup>, the Ontario Court of Appeal stated that, with the amendments to Rule 20 which included enhanced powers given to the motion judge, a third class of case was added to those where summary judgment may be granted. The motion judge may now weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inferences from the evidence in determining whether there is a genuine issue requiring a trial, unless it is in the

interest of justice for such powers to be exercised only at trial: rule 20.04. The Court of Appeal stated that the phrase "interest of justice" operates as limiting language that guides the determination whether a motion judge should exercise the expanded powers, or if those powers should be exercised only at a trial. It comes down to whether a trial is required for a fair and just resolution, The test for that determination is: 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? That determination must be made on a case by case basis in light of the evidence and the issues posed by the case.

The Evidence on the Motion

The Moving Party's Evidence

**10** On this motion, the moving party, Intact, filed an affidavit from David Cheifetz, a lawyer with the law firm representing Intact. In it, he detailed the history of the matter and made extensive reference to the first action. He provided as exhibits excerpts from evidence given at the examinations for discovery held in conjunction with the earlier action. He also provided a copy of the ruling made when summary judgment in the earlier action was granted.

**11** Intact also filed an affidavit from Deena's father, Frank Calderone, sworn November 1, 2011. In that affidavit, Mr. Calderone swore that Deena moved into his home in Port Perry in January 2002, attended Port Perry High School from January until June 2002 and lived under his supervision. She moved out of his home in July 2002. She moved in with her mother in Oshawa. He paid child support for Deena to her mother. He was unaware of Deena's attendance records at the Port Perry school because that information was provided to the mother. In September 2002 he discovered that Deena was residing at the Demara Road property, In September 2002 he offered Deena the opportunity to move back with him, she refused and continued to live at the Demara Road property. He was still paying child support to the mother at the time of the fire.

**12** Intact also filed an affidavit from Deena, sworn December 12, 2011 (the day before the motion was heard). In it, Deena stated that at the time of the fire she resided at the Demara Road property with her boyfriend Jason because her mother had kicked her out of her home. She said that she had no intention of returning to live at her father's home. She said that she was being supported by Jason who was on social assistance. She stated that she was registered at Port Perry High School at the time, but rarely attended classes.

The Responding Party's Evidence Preliminary Objection

**13** On this motion, the responding party, CEJ, filed an affidavit from Juliana Stone, a lawyer with the law firm representing CEJ. In it, she detailed the history of the matter and made extensive reference to the earlier action.

**14** Counsel for Intact took issue with part of the contents of Ms Stone's affidavit, asking that paragraphs 13 through 15 be struck out. His position is that to the extent that Ms Stone purports in those paragraphs to give evidence on material facts she does not state the source of her information and belief, and moreover, where she makes assertions of facts, which purport to be summaries of the contents of exhibits to her affidavit, some of them are not accurate. He also submitted that the first sentence of paragraph 12 and paragraphs 13 to 15 are nothing more than legal argument and should be struck out on that basis.

**15** I accept Intact's position. However, I will consider the substance of the exhibits referred to in the paragraphs, as I am permitted to do. In *Carevest Capital Inc. v. North Tech Electronics Ltd.*<sup>4</sup>, the Divisional Court, in setting out the principles governing the sufficiency of affidavit material before the motion judge, noted that where an affidavit relied upon in support of a motion for summary judgment does not state the source of the information and the fact of the deponent's belief, the court may nevertheless rely upon the substance of the exhibits to the affidavit in evaluating the case. It is particularly appropriate for me to do so here because in one of the affidavits filed by the other side extensive references are made to parts of the same examinations for discovery exhibited in Ms Stone's affidavit. As well, at that discovery Deena was asked about statements exhibited in Ms Stone's affidavit.

**16** Exhibit G to Ms Stone's affidavit is a statement signed by Deena dated October 21, 2003. In that statement, Deena wrote that she lived with her mother in Oshawa until the end of September 2002. Her mother drove her to and from Port Perry High School. Then she moved into her father's house in Port Perry in October 2002. In October she got bronchitis and ended up in hospital. She was living with Jay on the weekends in October 2002. She had pretty much been living with him on weekends since they started going out in June or July 2002. Her stepmother dropped her off at Jay's house [the Demara Road property] at 4:30 on October 25, 2002. She did not have a key. The door was always unlocked. The fire took place shortly afterwards. After the fire, Deena stayed with her friend Miranda, spent one night at a hotel and then moved in with her mother in Oshawa.

**17** Exhibit M to Ms Stone's affidavit is a statement signed by Deena dated February 18, 2008. In it, Deena wrote that she was attending school in Port Perry in September 2002. She had moved to the Demara Road property in Port Perry with her boyfriend at the end of September 2002. She was staying at the house with a number of others at the time of the fire. She left the house on October 25 to go to school. Her step-mother drove her back to the Demara Road house at about 4:30 and dropped her off. It was shortly after then that the fire took place. She did not pay any rent to Jason, only stayed with him at the time. After the fire, she moved back to Oshawa to stay with her mother.

**18** Exhibit L to Ms Stone's affidavit is a copy of an affidavit Deena swore on July 7, 2008 in connection with the earlier action. In it, Deena swore that at the time of the fire she was staying with her boyfriend at the Demara Road property. She said: "I have no knowledge as to what rent was being paid as I was only a guest of my boyfriend ... "

#### The Examinations for Discovery in the First Action

**19** As noted, parts of the examinations for discovery in the earlier action were referenced as exhibits in affidavits filed on this motion by each side, I will refer to that material collectively.

**20** The excerpted portions show that Frank Calderone was examined for discovery on October 2, 2006. He testified that he enrolled Deena in the Port Perry High School in January 2002. He said that he had obtained the mother's permission to do so because she had custody of Deena. Deena had been living with her mother, they had a tiff and Deena was out on the street. That is why he asked Deena if she wanted to come to live with him. She was using his address to get on the school bus on Demara Road but he received a call from the school around the second week in September that she was not attending school. She wasn't living with him. That is when he clued in that she wasn't living at her mother's if she was getting on the bus.

**21** The excerpted portions show that Deena was examined for discovery on October 2, 2006. She testified that her mother took her to the Demara residence a few times on the weekends. She

also believed that her father had taken her there. She said that she got sick when she was living at her Dad's house in 2002. It was around school time because she missed a month of school. It was before the fire. She had things at both her dad and mom's house. She said when her stepmother dropped her off at the Demara Road property they just thought that she was there for the weekend. She said that she was supposed to be at her mom's.

**22** Deena also testified that in September she was registered to go to Port Perry High School but she never went. Before the summer, she went to the school. She moved back with her mother after the fire and returned to school in Oshawa. She said that around the time of the fire, 5 or 6 of them lived at the Demara Road house. She was asked when she started living at the Demara Road property and she said it was when her mom found out that she wasn't going to school, so late September - almost the end of September. She said that a month before the fire she was living there. From January to May 2002 she was going to Port Perry High School and living with her dad. In the summer of 2002 she made amends with her mom and moved back with her. She did not remember the month. By the end of September she had moved into the Demara Road property. She did not have a key. She did not know how long she was planning on staying there. She did not pay rent. She could have moved back with her mom or dad. She did not think her parents knew where she was. She had clothes and makeup at the Demara Road property. In September 2002, she had a fight with her mother and told her mother that she was going to live with her father. After she left her mom's, she barely spoke to her dad.

**23** Deena was asked about her statement of October 21, 2003. Concerning that, she said that she did not want her mother to know. She knew but she did not know everything. She was asked if she told her mother after the fire that she had been at Jay's for the last month and a half, and she said no.

#### The Ruling on the Summary Judgment Motion in the Earlier Action

**24** Each side referenced the ruling on the summary judgment motion in the earlier case. On January 9, 2009 Justice Salmers gave summary judgment against Deena. He noted that many facts were undisputed. He found that around 4:20 p.m. on the day of the fire Deena went to her boyfriend's residence. That residence was a house rented by an adult, but lived in by various young people including Deena's boyfriend. In considering whether Deena owed a duty of care to the plaintiff, Salmers J. found that although Deena did not directly pay any money to the plaintiff she was using the premises "albeit temporarily". When considering the issue of causation, Salmers J. found that Deena was only "a temporary guest" at the premises. In considering the duty of care, Salmers J. found that Deena admitted that she was using the premises "albeit temporarily".

#### The Moving Party's (Defendant's) Position on this Motion

**25** The moving party takes the position it is not necessary for me to exercise the powers granted under rule 20.04(2.1) on this motion because on the record here the plaintiff simply has no chance of success at trial. There is no evidence that Deena was an Intact insured. The plaintiff is simply relying on a bald assertion to that effect and hoping that something might turn up on the evidence at trial to assist it in meeting its onus of proof. Since there is no genuine issue for trial, the action should be dismissed.

**26** Alternatively, the moving party takes the position that even if it is necessary for me to exercise the enhanced powers under rule 20.04(2.1), the present case is one where there is either no contested evidence, or there is limited contested evidence so that both the full appreciation test and

the efficiency rationale of the Simplified Procedure may be served by granting summary judgment. I should find on the evidence that Deena was not an Intact insured and the action should be dismissed,

#### The Responding Party's (Plaintiff's) Position on this Motion

**27** The responding party's position is that this motion should be dismissed because there is evidence to conclude that Deena was an insured under the Intact policy and therefore there is a genuine issue for trial. The moving party seeks multiple findings of fact in the face of conflicting evidence. It is not possible to obtain a full appreciation of the salient evidence without the benefit of cross-examination, observation of Deena and Mr. Calderone and evidence presented by way of trial narrative.

#### Analysis

**28** As noted, to succeed at trial against Intact, the plaintiff must prove that on October 25, 2002 Deena was an insured under the Intact policy. It can do that either by proving that Deena was living in her father's household at the time or by proving that Deena was enrolled and attending school while dependant on him and residing away from his residence.

**29** The affidavit evidence from both Deena and Mr. Calderone presented by the moving party on the motion was that Deena was not living at her father's house at the time of the fire. Those statements, however, are conclusory and must be viewed in the context of all of the circumstances.

**30** Deena was only 16 years old at the time of the fire. Her parents were divorced. She was the subject of some kind of agreement or court order with a provision for her support, which was operating at the time. She seems to have had a history of deceiving her parents, squabbling with them and moving from one household to the other, as well as staying with her boyfriend. She was enrolled in school in her father's community and had given his address as her home address. In one statement (October 21, 2003) she said that she moved in with her father in October 2002 and lived with her boyfriend on weekends. She consistently said that her step-mother (Mr. Calderone's wife) dropped her off at the Demara Road property on October 25 (a Friday). There was evidence she kept some of her things at her father's house, her mother's house and the Demara Road property. In one statement she said that she did not know how long she intended to stay at the Demara Road property. In another, she said that she did not intend to return to her father's home. She did not work. She did not pay rent for the Demara Road property. She did not have a key. In one statement, she said that she was a guest of her boyfriend at the Demara Road property.

**31** Membership in a household can be transitory, temporary or cyclical<sup>5</sup>. It appears to me that there is evidence here on which I could conclude that Deena was a member of father's household at the time of the fire. There is also evidence on which I could conclude that she was not.

**32** At her examination for discovery (October 2, 2006) Deena testified that she was enrolled in high school in October 2002 but never went. In her affidavit filed on the motion, Deena swore that she was enrolled in school in Port Perry at the time of the fire, but rarely attended classes. In a prior statement (October 21, 2003) she said that while she lived with her mother in Oshawa, her mother drove her to and from Port Perry High School until the end of September 2002. In another statement (February 18, 2008) she said that she left the Demara Road house on October 25 to go to school and her step-mother drove her back to the premises at 4:30. In one statement (October 21, 2003) Deena said that in October 2002 she got bronchitis while living at her father's and ended up in hospital. In

her examination for discovery (October 2, 2006) she said that she missed time at school while she was sick. Mr. Calderone consistently maintained that he was paying support for Deena to her mother at the time of the fire.

**33** It appears to me that there is evidence here on which I could conclude that Deena was enrolled and attending school while being supported by her father and living away from the principal residence at the time of the fire. There is also evidence on which I could conclude that she was not.

**34** There are numerous inconsistencies here in the various versions of events that Deena has related over time. I am left feeling that I would need to see and hear all of the witnesses testify in their own words before I could fairly make credibility findings, weigh the evidence and draw inferences in this case.

**35** In my view, full appreciation of the evidence of Deena's home life and school life that is required to make dispositive findings in this case can only be achieved at trial.

**36** I should add that the parties agreed that presentation of oral evidence before me under rule 20.03(2.2) was not an appropriate option in this case because of the defendant Dominion's interest.

#### Conclusion

**37** For these reasons, the motion is dismissed. If the parties are unable to agree on costs they may take out an appointment through the trial co-ordinator.

M.L. LACK J.

cp/s/qlcct/qlvxw

1 Insurance Act, R.S.O. 1990, c.I.8, s. 132.

2 Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

3 Combined Air Mechanical Services Inc. v. Flesch, 2011 ONCA 764, [2011] O.J. No. 5431 (Ont. C.A.).

4 Carevest Capital Inc. v. North Tech Electronics Ltd., 2010 ONSC 1290 at para. 19 (Div. Ct.).

5 Arsenault v. Fitzgerald, [1985] N.B.J. No. 89; Canadian Universities Reciprocal Insurance v. Halwell Mutual Insurance Company, [2002] O.J. 3306 (C.A.).

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