Case Name:

Horner Estate v. Paramsothy

RE: Elizabeth Horner, The Estate Trustee of the Estate of John Horner and Elizabeth Horner, personally, Plaintiffs, and Rasiah Paramsothy, Roopa Paramsothy, Howell Inc. (Ontario Corporation Number 2017688), Justin Howell, Michael's Painting, Michael Colby and the Town of Aurora, Defendants

[2016] O.J. No. 4576

2016 ONSC 3624

Newmarket Court File No.: CV-10-0100578-00

Ontario Superior Court of Justice

P. Sutherland J.

Heard: May 12, 2016.
Judgment: June 3, 2016.

(53 paras.)

Counsel:

Darcy W. Romaine and Keenan Sprague, for the Plaintiffs.

Martin P. Forget and Jessica H.G. Harrison, for the Defendants.

ENDORSEMENT(Summary Judgment Motion)

1 P. SUTHERLAND J.:-- The plaintiffs bring a motion for:

(a) An Order precluding the defendants Howell Inc. and Justin Howell from adducing evidence contrary to the conviction of Howell Inc. and guilty plea Howell Inc., under section 23(l)(a) of the *Occupational Health and Safely Act*[1] (OHSA) and section 77(2)(f) of Ontario Regulation 231/91.

(b) Partial summary judgment on the issue of liability: affirming Justin Howell and Howell Inc. as negligently causing injury to the plaintiffs, but leaving open for the jury to contemplate contributory negligence of the plaintiff, John Horner and the comparative blameworthiness as between the two parties.

2 The defendants opposing this motion are Howell Inc. ("Howell") and Justin Howell ("Justin") (collectively referred to as "Howell defendants").

3 The defendants, Michael's Painting and Michael Colby were noted in default in 2011 and the remaining defendants have had the action discontinued against them.

Background

4 The action arises out of an incident on September 8, 2008 at the premises owned by the defendants, Rasiah and Roopa Paramsothy ("Paramsothy home"). While the Paramsothy home was under construction, the late Jack Horner was critically injured when he fell onto the concrete basement floor.

5 Approximately 18 months after the accident, Jack Horner past away from pneumonia.

6 Howell was hired to renovate the Paramsothy home following damage caused by a house fire.

7 Howell was charged under the OHSA for breaching its duty under the OHSA to ensure that stairwells had a guardrail on the open side of the landings.

8 Howell through Justin pled guilty to the charge and in so doing agreed to a statement of facts that supported the charge and was fined $15,000 to be paid over 12 months.

9 A brief history of the action is:

(a) The incident took place on September 15, 2008;

(b) Statement of Claim was served upon the Howell defendants on January 15, 2011;

(c) Statement of Defence and cross-claim of the Howell defendants was served on May 17, 2011;

(d) The guilty plea to the OHSA charge was on September 9, 2011;

(e) The plaintiffs filed their trial record on or about January 29, 2014;

(f) On April 15, 2014, during trial scheduling court, the parties agreed to set the action down on the May 2015 trial list;

(g) The matter was not reached in the May 2015 trial sittings and was adjourned from the November 2015 trial sittings on consent;

(h) On February 2, 2016, at trial scheduling court, Bird J. placed this action on the May 2016 trial list;

(i) The date of the Notice of Motion of the plaintiffs Notice of Motion is April 8, 2016 and further, responding affidavit filed on behalf of the plaintiffs is dated May 10, 2016; and

(j) The date of the Howell defendants' responding affidavit is May 6, 2016.

Issues

10 The issues that arise in this motion are:

(a) Does the guilty plea of Howell on the OHSA charge preclude the Howell defendants from disputing the issue of liability?

(b) Can partial summary judgment be awarded to the plaintiffs in that the Howell defendants were negligent and said negligence caused the injury to the plaintiffs?

Does the guilty plea ofHowell preclude the Howell defendants from disputing liability?

Facts

11 Howell pled guilty to breaching section 23(l)(a) of the OHSA and section 77(2)(f) of Ontario Regulation 231/91.

12 Sections 77(1) and (2)(f) read:

(1) No work shall be performed in a building or structure with stairs unless the stairs meet the requirements of this section. O. Reg 213/91,s.77(l)

(2) Stairs shall have,

(f) A guardrail on the open side of each landing.

13 Section 23(1) sets out the "Duties of constructor" and reads:

(1) A constructor shall ensure, on a project undertaken by the constructor that,

(a) The measurements and procedures prescribed by this Act and the regulations are carried out on the project;

(b) Every employer and every worker performing work on the project complies with this Act and the regulations; and

(c) The health and safety of workers on the project is protected.

14 At the time Howell pled guilty, the Howell defendants had retained counsel in this matter and delivered their pleading in this matter. Howell had made three court appearances on the OHSA charge on September 18, 2009, October 30, 2009 and January 8, 2010.

15 For the guilty plea, Howell through Justin agreed to a joint statement of facts. The joint statement of facts is found in the transcripts of September 9, 2011. In that joint statement, Howell admitted and agreed to facts essential to the conviction, which are:

(a) Howell was a constructor on the project located at the Paramsothy home;

(b) Howell is a general contractor and project management firm involved in construction;

(c) Howell had discussions with an interior painting subcontractor and that subcontractor had the injured worker, John Horner do interior painting on the project;

(d) On September 15, 2008, John Horner fell from the second floor landing vicinity;

(e) At the time of the fall, there were no guardrails on the open side of the second floor landing;

(f) John Horner fell to the basement floor hitting his head and sustaining critical injury; and

(g) Howell failed as a constructor to ensure that guardrails were present in the open side of the second floor landing vicinity.

16 In determining the appropriate sentence, joint submissions were made by the Crown and Howell to the presiding Justice of the Peace. In those submissions, the case of *R. v. Cotton Flets* was presented to set out the various considerations a court should take into account in determining the appropriate sentence. One of those considerations is "the gravity of the injuries sustained."

17 A fine of $15,000 exclusive of the victim fine surcharge was imposed upon Howell allowing 12 months to pay.

18 The investigating officers in the OHS A investigation are not compellable as witnesses in a civil suit "respecting any information, material, statement or test acquired, furnished, obtained made or received" under the OHSA or the its regulations.[2]

Position of the Parties

19 It is the position of the plaintiffs that the guilty plea entered into by Howell, through Justin, was voluntary and unequivocal. The guilty plea was based on a statement of facts that was agreed to by the Howell defendants. The statement of facts was a determination of the issue of liability in this action. The court made a determination that was accepted by the Howell defendants that Howell is a constructor, did not have any guardrails in place when John Horner fell and was injured. Further, the plaintiffs submit that the statement of facts and the joint submissions on sentencing was a judicial

determination that the breach of the duty to have guardrails installed was the cause of the fall and resulting injuries suffered by John Horner. Accordingly, the Howell defendants cannot lead any evidence on the issue of liability and to do so would be an abuse of process. The plaintiffs have agreed that the jury should be open to contemplate contributory negligence of John Horner and the comparative blameworthiness as between the John Horner and the Howell defendants.

20 The Howell defendants' position is that the guilty plea at best is a determination that Howell Inc. is a constructor and that no guardrails were installed at the time of the fall and injuries sustained by John Horner. The Howell defendants concede and admit that based on the guilty plea they cannot lead any evidence to contradict that no guardrails were installed and that Howell Inc. is not a constructor. However, the Howell defendants submit that there is no causation that the lack of guardrails caused the fall of John Horner and based on the guilty plea it cannot be concluded that but for the lack of guardrails John Horner would not have suffered the injuries as a result of the fall. The guilty plea is not a judicial determination of the issue of liability and there is no abuse of process if the Howell defendants are permitted to lead evidence on the issue of liability.

Analysis

21 In *City of Toronto* v. *Canadian Union of Public Employees, Local 79*[3] *(CUPE),* the Supreme Court of Canada held that relitigation of facts upon which a criminal conviction rests, after all avenues of appeal have been exhausted, is an abuse of process. In such a circumstance, the Court is more concerned in the integrity of the adjudicative functions of courts than the interests of the parties.[4]

22 The Ontario Court of Appeal in *Hanna* v. *Abbott*[5] and *Caci* v. *MacArthur*[6] had the opportunity to review the concept of abuse of process. The factual circumstance of each case is critical to the decision.

23 In *Hanna*, the factual situation was the defendant was sued by his daughter for damages based on childhood sexual abuse. At the criminal trial, the defendant was found guilty of sexually assaulting his daughter. At the criminal trial, the defendant did not testify and did not call any witnesses. In the civil suit, the defendant testified that he did not sexually assault his daughter and lead evidence through the testimony of his sons that his sons sexually assaulted his daughter. The trial judge heard the evidence and found at the civil trial that he was entitled to disregard the criminal trial findings because he heard different evidence. The Court of Appeal was critical of the trial judge and stated at paragraph 56:

> [56] Notwithstanding the erroneous opinions of both appellant's trial counsel and the trial judge, relitigation of this case should not have occurred. The trial judge should not have considered any of Abbott's evidence, including that of his two sons, for the issue of liability. Liability was proven upon Mr. Abbott's agreement that his criminal convictions are *prima facie* evidence of the underlying facts. The trial judge should have proceeded to hear evidence solely for the purpose of deciding the amount of damages to be awarded the appellant.

24 The Court of Appeal also reviewed the three examples set out in *CUPE*[7] where relitigation would enhance, rather than impeach the integrity of the judicial system and found that:

> [58] None of the evidence heard by the trial judge on the issue of Mr. Abbott's liability is capable of establishing that Mr. Abbott's previous criminal trial was

> tainted by fraud or dishonesty. None of the evidence, as I have shown above, establishes that there is any fresh evidence that was not available at the criminal trial. And, none of the evidence dictates that the result in the criminal trial was unfair. The abuse of process doctrine applies to preclude relitigation of the criminal convictions.

25 The factual basis of *Caci* is that a defendant, Mac Arthur, in a criminal proceeding was convicted of dangerous driving causing bodily harm following a motor vehicle accident. The plaintiff was seriously injured in that accident. The trial judge in the civil action held that the verdict in the criminal case and the findings essential to that verdict were conclusive in the civil proceedings. The co-defendant, the insurer for MacArthur appealed the decision. The Court of Appeal agreed with the trial judge. Rosenberg J.A. speaking for the Court stated:

> [15] In my view, the trial judge properly applied the principles from C.U.P.E. in holding that the verdict in the criminal case and the findings essential to that verdict were conclusive in the civil proceedings. To permit MacArthur or the appellant, **whose interest is identical to MacArthur,** to relitigate the issue of negligence and the findings essential to that verdict would undermine the integrity of the adjudicative process. MacArthur had been found to have committed dangerous driving, an offence of negligence at least as high if not higher than civil negligence. Further, that negligence had been proven to the criminal standard of proof beyond a reasonable doubt. Finally, MacArthur had a full opportunity to defend the allegation.[8] (emphasis added)

26 Courts have utilized the doctrine of abuse of process and have found that the defendant party is not permitted to lead evidence contrary to findings of essential facts in a previous judicial proceeding that are findings essential to the issue of negligence in the civil proceeding. The findings essential could be conclusive of the issue of liability or elements within the issue of liability.

27 D. Brown J, as he then was, in the case of *Andreadis v. Pinto*[9] reviewed whether the defendant in a civil action for damages following a motor vehicle action should be permitted to relitigate findings of facts essential to her conviction. D. Brown J. found that the defendant should not be permitted to do so. In arriving at his decision, Brown J. examined "the facts essential to the conviction" and found that it was "not open to Ms. Pinto to adduce any evidence to the contrary of these essential facts."[10]

28 In respect to this case, there is no issue that Howell was convicted on the offence charged. There is also no issue that the guilty plea was voluntary and that the first two exceptions in *CUPE* are not applicable, namely, that the first proceeding was "tainted by fraud or dishonesty" or there is fresh new evidence previously unavailable.

29 In the context of this case, I do not see nor do I find that the third test of fairness dictates that the original result should not be binding as against Howell and defendant's counsel did not make such a submission.

30 The plaintiffs submit that the facts essential to the conviction completely prove negligence on the part of the Howell defendants. If I understand plaintiffs' argument, the facts essential to the conviction along with the joint submissions on sentence translates to Howell admitting and agreeing that

the injuries sustained by John Horner was caused by the negligence of the Howell defendants (i.e. the lack of a guardrail installed in the open landing vicinity).

31 I do not accept this argument. First, joint submission on sentencing is not a judicial finding of facts essential to the conviction.[11] Joint submission on sentencing is simply that, submissions to the judicial body on what should be the appropriate penalty. I do not find that the joint submissions in this case constitute a judicial finding of facts essential to the conviction.

32 The statement of facts that was the basis of the conviction, in my opinion, does not find that the failure to install a guardrail, in itself, caused the injuries sustained by John Horner. The failure of the guardrail and the findings of facts essential to the conviction, as set out in paragraph 15 herein, do provide facts that may prove, on the balance of probabilities, that Howell was negligent and that negligence caused the injuries sustained by John Horner. The facts in this case are different than the facts in *CUPE, Caci*, or *Hanna.* In *CUPE, Caci*, or *Hanna*, the facts essential to the conviction directly related to the substance of the negligence in the civil action, which caused the damages plead in that action. This is not the situation in this action. On the evidence provided on this motion, I cannot find that the facts essential to the conviction, failure of Howell to install a guardrail on the open landing vicinity was the substance of its negligence that caused the injuries suffered by John Horner.

33 I do find, however, that there are facts essential to the conviction that Howell cannot relitigate. Howell may not adduce any evidence contrary to the essential facts to attempt to displace the effect of the conviction. The facts essential to the conviction are those facts that I have set out in paragraph 15 above.

34 The question I must answer now is: does this order apply to Justin? The plaintiffs argue that Justin is a "privy" and as such is bound by any order made by this court against Howell. The defendant submits that Justin was not charged. He was not a party to the OHSA proceeding and that it would be unfair and unjust to saddle Justin with any order prohibiting Howell to relitigate the facts essential to the conviction.

35 I do not find Justin's submission compelling; nor do I agree with that submission. I find the facts in this case similar on this issue as in *Caci.* To repeat, in *Caci* the appellant was the insurer of the defendant, MacArthur, convicted of the criminal offence of dangerous driving causing bodily harm. In *Caci*, the insurer was not a party to the criminal proceeding, as Justin was not here. The insurer was a party in the civil proceeding, as Justin is in this proceeding. Rosenberg J.A. found that the insurer's interest was identical to that of MacArthur. Utilizing that same line of reasoning, I do not see that Justin is different than that of the insurer in *Caci.* Justin is the director and owner of Howell. He was present at the OHSA proceeding. He is the one that agreed to the joint statement of facts. He is the directing mind of Howell. His interest is identical to that of Howell in this proceeding. He does not have separate counsel, unlike the insurer in *Caci.*

36 Moreover, the interest that the court must take into consideration over that of any of the parties is the administration of justice. I do find to permit Justin to lead evidence that attempts to dispel the essential facts of the conviction would "undermine the credibility" of the judicial process. To permit Justin but not his company will permit an abuse of process through Justin. This is what the Supreme Court of Canada in CUPE intended to discourage.

37 I therefore find that Justin is subject to the same limitation as Howell as set out in paragraph 31 above.

Can partial summary judgment be awarded to the plaintiffs?

Legal Principles - *Summary Judgment*

38 Pursuant to Rule 20.01 of the *Rules of Civil Procedure*[12], the court must grant summary judgment if it is satisfied there is no genuine issue requiring a trial. In response to a summary judgment motion, one is not permitted to solely rely on allegations or denials in their statement of defence but must provide affidavit material with the specific facts showing that there is a genuine issue requiring a trial.

39 There will be no genuine issue requiring a trial when a court is able to reach a fair and just determination on the merits. A fair and just determination on the merits is achieved when:

(a) The process allows the judge to make necessary findings of facts;

(b) The process allows the judge to apply the law to the facts; and

(c) It is a proportionate and more expeditious and less expensive means to achieve a just result.[13]

40 On a motion of summaiy judgment, the court must first determine if there is a genuine issue requiring a trial based on the evidence given on the motion. If there appears to be a genuine issue requiring a trial, the court would then determine if the need for a trial can be avoided using the new powers under Rule 20.04(2.1) of the *Rules of Civil Procedure* by weighing the evidence, and evaluating the credibility of the deponents in drawing any reasonable inference of the evidence. These powers are presumptively available to the judge to give effect to the goals of timeliness, affordability and proportionality in review of the litigation as a whole.[14]

41 In contrast, the responding party must put their "best foot forward" or risk summary judgment being awarded against them. The evidentiary burden is on the responding party to present affidavit material or other evidence to support the allegations or denials in their pleading. Absent of this evidence, an adverse inference can be drawn.15

The Position of the Parties

42 The plaintiffs take the position that a trial is not required for the court which is in possession of uncontested evidence that satisfies a finding that the Howell defendants were negligent and their negligence caused the injury to John Horner. The plaintiffs submit at paragraph 52 of their Reply Factum that:

(a) Sections 3(1) of the *Occupiers Liability Act*, (OLA) section 22 of the OHS A and regulation 213/91 imposes various duties and obligation on the Howell defendants and that said defendants breached or failed to comply with these duties or obligations;

(b) A guardrail along the landing and ramp was absent;

(c) Howell plead guilty to failing as a constructor to comply with regulation 231/91 and section 23(l)(a) of the OHS A;

(d) Absent the required guardrail, there was nothing to prevent John Horner's fall from the second floor vicinity;

(e) John Horner did fall from the second floor landing vicinity;

(f) Howell did not raise a due diligence at the OHSA proceeding; and

(g) Justin had not been to the construction site since Thursday March 11, 2008 and admits that he knew that workers would be at the construction site on March 15, 2008.

43 The plaintiffs accordingly submit that a trial is not required given that all the necessary findings of facts are present to find the Howell defendants negligent and their negligence caused the injuries to John Horner. Moreover, based on the findings of facts, there is no defence of *volenti non fit injuria* or willing assumption of risk pursuant to the OLA.

44 The Howell defendants submit that partial summary judgment cannot be granted to the plaintiffs because:

(a) Leave was not requested to bring this motion pursuant to Rule 48.04(1) of the *Rules of Civil Procedure* and leave should not be granted;

(b) The plaintiffs are attempting to bifurcate the proceeding contrary to Rule 20.04(2) and 6.1.01 of the *Rules of Civil Procedure;*

(c) A jury notice has been filed; and

(d) All the necessary findings of fact necessary to find the Howell defendants negligent are not present and further, on the evidence provided on this summary judgment motion, the court is not able to determine that the Howell defendants negligence caused the injuries suffered by John Horner.

Analysis

45 For the purposes of this motion, I will not deal with the issues raised by the Howell defendants of the requirement for leave, bifurcation and the affect a jury notice has on the ability to bring a summary judgment motion.

46 I will deal with the summary judgment motion. I am not satisfied on the evidence before me that I can determine the issue of liability. The court cannot determine, on this motion, the reason for the fall of John Horner. There is conflicting evidence. There is a genuine issue requiring a trial. The weight of this contracting evidence cannot be assessed utilizing the powers the court has been given under Rule 20.04(2.1).

47 Furthermore, the material before me does not adequately deal with the issue of wilful assumption of risk or *volenti non fit injuria.* Even though the Agreed Statement of the OHSA proceeding and the facts underlying that guilty plea do indicate that John Horner was permitted on the premises to do painting and the Howell defendants were aware of that fact, this in itself does not provide the court with the factual basis to determine if John Horner willingly assumed a risk, the

specific detail of the risk he allegedly assumed and whether wilful assumption of risk or *volenti non fit injuria*, even applies in these circumstances.

48 To determine wilful assumption of risk or *volenti non fit injuria*, the facts underlying the risk assumed or accepted, the facts underling the liability as it relates to the risk assumed or accepted will have to be determined after hearing all the evidence at trial. Moreover, the issue of contributory negligence, as conceded by the plaintiffs, will still need to be adjudicated at a trial and determined by the hier of fact, the jury.

49 Thus, it seems to me that to grant summary judgment in the circumstances of this case would not give effect to the goals of timeliness, affordability and proportionality in review of this litigation as a whole.

50 I therefore do find that there are issues requiring a trial and I am unable to grant the plaintiffs partial summary judgment, as requested.

Disposition

51 The Howell defendants are precluded from adducing any evidence contrary to the conviction of Howell in breaching section 23(l)(a) of the OHSA and section 77(2)(f) of Ontario Regulation 231/91., and the facts essential to the conviction of Howell as set out in paragraph 15 above.

52 Partial summary judgment on the issue of liability is dismissed.

Costs

53 Costs of this motion in the cause.

P. SUTHERLAND J.

1 R.S.O. 1990 c. O.1

2 Section 63(3) and (3.1)

3 2003 SCC 63, 2003 CarswellOnt 4328, [2003] 3 S.C.R. 77

4 Supra, paras. 43, 51 and 52

5 82 O.R. (3d) 215

6 93 O.R. (3d) 701

7 *CUPE*, supra, para. 52

8 *Caci*, supra, para 15

9 98 O.R. (3d) 701 (SCJ)

10 Supra, para. 42. Also see *Polgrain Estate v. Toronto East Hospital* (2008), 90 O.R. (3d) 630 (Ont. C.A.), *Mallory v. Werkmamm Estate, [2014] O.J. No. 673 (SCJ)*

11 *Groia v. The Law Society of Upper Canada* (2015), 124 O.R. (3d) 1, 2015 ONSC 686 (Ont. Div. Ct)

12 R.R.O. 1990, Reg. 194

13 *Hryniak v. Mauldin*, [2014] SCJ No. 7 (SCC)

14 *Hrnyiak* supra