Original
2010 ONCA 230
Ontario Court of Appeal

Van de Vrande v. Butkowsky

2010 CarswellOnt 1777, 2010 ONCA 230, [2010] O.J. No. 1239, 187 A.C.W.S. (3d) 716, 260 O.A.C. 323, 319 D.L.R. (4th) 132, 85 C.P.C. (6th) 205, 99 O.R. (3d) 641, 99 O.R. (3d) 648

Robertus (Bob) Van de Vrande (Plaintiff / Respondent) and Dr. Irwin Butkowsky (Defendant / Appellant)

Karen M. Weiler, R.A. Blair, Paul Rouleau JJ.A.

Heard: January 13, 2010
Judgment: March 30, 2010*
Docket: CA C51074

Counsel: Lisa E. Hamilton, Jay A. Skukowski for Appellant
Walter R. Wellenreiter for Respondent

Subject: Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Civil practice and procedure --- Summary judgment — Miscellaneous

Plaintiff brought action against defendant in Small Claims Court, alleging defendant acted as mediator, breaching contract as assessor — Defendant brought successful motion for summary judgment — Motion judge found that defendant, as court appointed assessor, was immune from suit and that action was brought beyond applicable limitation period — Divisional Court set aside order, finding motion judge had erred in making findings of fact on motion — Defendant appealed — Appeal allowed — Motion judge found that immunity issue was such that claim had virtually no chance of success and ought to be struck — Motion judge went on to find that even if she had erred in her conclusion on immunity issue, claim had no chance of success because it was instituted after applicable limitation period had expired — Based on material presented before her, there was no basis to interfere with her findings and conclusions on both of these issues.

Table of Authorities

Statutes considered:

Children's Law Reform Act, R.S.O. 1990, c. C.12
s. 30 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 25 — considered

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B
Generally — referred to

Rules considered:

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

R. 20 — referred to

R. 21 — referred to

R. 21.01 — referred to

R. 21.01(1)(b) — considered

R. 21.01(2) — referred to

R. 21.01(2)(b) — considered

R. 21.01(3) — referred to

R. 21.01(3)(d) — considered

R. 76 — referred to

R. 76.07 — referred to

Small Claims Court Rules, O. Reg. 258/98
Generally — referred to

R. 1.03(1) — considered

R. 1.03(2) — considered

R. 12.02 — considered

R. 12.02(1) — referred to

R. 12.02(1)(c) — considered

APPEAL by defendant from order setting aside order for summary judgment.

***Paul Rouleau J.A.*:**

1 Rule 12.02 of the *Small Claims Court Rules*, O. Reg. 258/98 allows a party to bring a motion to strike out or amend a document. Pursuant to this rule, the appellant, Dr. Irwin Butkowsky, brought a motion for summary judgment in an action brought against him by the respondent, Robertus Van de Vrande. The trial judge granted the motion, finding that the appellant was immune from suit and that the action was brought beyond the applicable limitation period. The Divisional Court set aside the order, finding that the trial judge had erred by making findings of fact on the motion.

2 The appellant appeals from the order of the Divisional Court. In so doing, he raises the question of the availability of a motion for summary judgment under the *Small Claims Court Rules*. For the reasons that follow, I have concluded that the procedure of a motion for summary judgment is not available under the Small Claims Court Rules but that the motion judge's decision is nonetheless sustainable under r. 12.02.

Facts

3 The appellant was retained pursuant to s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 to perform an assessment in the context of a custody dispute between the respondent and his spouse. The appellant's report was released on July 14, 2004. The respondent alleges that on May 5, 2004 the appellant shared an interim oral report together with a written parenting plan with the respondent and his spouse. He alleges that the contents of this interim oral and written report were substantially different from the final report released on July 14, 2004. The respondent alleges that, instead of simply conducting and submitting an assessment as per his retainer, the appellant took on the additional role of mediator in the dispute. The respondent alleges that the appellant advised him that court proceedings were ineffective and that he settled 95%

of the cases referred to him.

4 On April 11, 2007, the respondent commenced an action in Small Claims Court, alleging that by acting as a mediator, the appellant had breached his contract as an assessor and acted negligently. The appellant brought a motion seeking summary judgment on May 14, 2008. The motion judge granted the motion pursuant to rr. 1.03(2) and 12.02 of the *Small Claims Court Rules*. In so doing, she found that the appellant, in his capacity as a court appointed assessor, was immune from suit pursuant to the doctrine of expert witness immunity. In the alternative, she found that the action had been commenced outside of the applicable limitation period. She found that the applicable limitation period was two years, pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch.B as the cause of action arose when a motion to compel the appellant to discuss his report with a second expert was denied on February 9, 2005.

5 The Divisional Court set aside the motion judge's order. Applying the jurisprudence emanating from Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, it found that, on a motion for summary judgment, the motion judge was not entitled to make findings of fact. She therefore erred in granting summary judgment pursuant to the doctrine of expert witness immunity, as doing so required rejecting the respondent's argument that the appellant had gone beyond his role as assessor and was therefore not entitled to such immunity. Similarly, in granting summary judgment because the action was commenced after the applicable limitation period, the motion judge erred in finding that the cause of action had not become discoverable prior to the coming into force of the *Limitations Act, 2002* on January 1, 2002.

Issues

6 The appellant raises the following two grounds of appeal:

> 1) Whether a motion for summary judgment is available under the *Small Claims Court Rules*;
>
> 2) Whether the trial judge erred in finding that the two year limitation period in the *Limitations Act, 2002* was applicable and that the appellant was immune from suit as an expert witness;

7 For the reasons that follow, I would allow the appeal.

Analysis

1) Availability of a Motion for Summary Judgment

8 With respect to the availability of a motion for summary judgment, the appellant argues that such a motion can be read into the *Small Claims Court Rules*. He argues that the absence of explicit reference to such a motion in the *Small Claim Court Rules* is a gap. In attempting to fill this gap, he refers to r. 1.03(2), which reads as follows:

> If these rules do not cover a matter adequately, the court may give directions and make any order that is just, and the practice shall be decided by analogy to these rules, by reference to the *Courts of Justice Act* and the Act governing the action and, if the court considers it appropriate, by reference to the *Rules of Civil Procedure.*

9 In arguing for the availability of a motion for summary judgment, the appellant emphasizes s. 25 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that Small Claims Court should proceed in a summary manner. He therefore argues that, pursuant to r. 1.03(2) of the *Small Claims Court Rules* and s. 25 of the *Courts of Justice Act*, r. 12.02 should be read broadly, as allowing a motion for summary judgment. With respect to the applicable test, he argues that reference should be had to r. 76.07 (since repealed on January 1, 2010) of the *Rules of Civil Procedure*, which governs motions for summary judgment under the simplified procedure, and allows a motion judge to make findings of fact.

10 The respondent argues that such motions are not available under the *Small Claims Court Rules*. He submits that the silence of the *Small Claims Court Rules* is a deliberate omission, not a gap to be filled. In the respondent's view, a motion for summary judgment is as foreign to the proceedings of the Small Claims Court as examinations for discovery and not to be read into the *Small Claims Court Rules*. In the respondent's view, both the motion judge and Divisional Court erred in applying tests for motions for summary judgment to a r. 12.02 motion.

11 In my view, the Divisional Court erred in applying the jurisprudence and principles emanating from r. 20 of the *Rules of Civil Procedure*. This rule deals with a summary judgment motion in an action that is brought in Superior Court pursuant to the rules that apply to that court. I do not view the failure to provide for summary judgment motions as a gap in the *Small Claims Court Rules*, but rather a deliberate omission. It is not up to the court to read in such a provision, particularly in light of the fact that r. 12.02 specifically addresses the ability to bring a motion in the nature of those contemplated by rr. 20, 21 and 76 *Rules of civil Procedure.* If a motion for summary judgment of the kind provided for in r. 20 is to be created, it is a matter for the Rules Committee and not the courts.

12 The error may in part result from the appellant's motion having been framed as seeking an order for "summary judgment" rather than an order to "strike out" the respondents claim pursuant to r. 12.02.

13 In my view it is neither useful nor appropriate to apply the jurisprudence emanating from the application of rr. 20 and 76 of the *Rules of Civil Procedure* to assist in the interpretation of r. 12.02 of the *Small Claims Court Rules*.

14 Rule 12.02 of the *Small Claims Court Rules* allows a party to bring a motion to strike a document, including a claim, before trial. It is therefore more akin to a r. 21 motion than a r. 20 motion. It is, however, worded differently than any of rr. 20, 21, or 76 of the *Rules of Civil Procedure*.

15 Rule 12.02 of the *Small Claims Court Rules* reads as follows:

> 12.02(1) The court may, on motion, strike out or amend all or part of any document that,
>
> (a) discloses no reasonable cause of action or defence;
>
> (b) may delay or make it difficult to have a fair trial; or

> (c) is inflammatory, a waste of time, a nuisance or an abuse of the court's process.
>
> (2) In connection with an order striking out or amending a document under subrule (1), the court may do one or more of the following:
>
> 1. In the case of a claim, order that the action be stayed or dismissed,
>
> 2. In the case of a defence, strike out the defence and grant judgment.
>
> 3. Impose such terms as are just.

16 In contrast, r. 21 of the *Rules of Civil Procedure* reads in relevant part as follows:

> 21.01(1) A party may move before a judge,
>
> . . . . .
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> (2) No evidence is admissible on a motion,
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> . . . . .
>
> (b) under clause (1)(b).
>
> (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
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> . . . . .
>
> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly.

17 There are several important differences between r. 21.01 of the *Rules of Civil Procedure* and r. 12.02 of the *Small Claims Court Rules*. First, where a rule 21 motion can be brought to strike a pleading, a r. 12.02 motion can be brought to strike any document. Second, the prohibition on admitting evidence contained in r. 21.01(2) is absent from r. 12.02. Third, where r. 21.01(3) allows an action to be struck on the very narrow grounds of its being frivolous, vexatious, or an abuse of process, r. 12.02(1)(c) adds the criteria of inflammatory, waste of time, and nuisance.

18 Further, r. 12.02 applies in a somewhat different context than the *Rules of Civil Procedure.* Section 25 of the *Courts of Justice Act*, provides that in Small Claims Court proceedings the court is to "hear and determine in a summary way all questions of law and fact." The court can make "such order as is considered just and agreeable to good conscience". In addition, r. 1.03(1) of the *Small Claims Court Rules*, provides that the rules shall be "liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merit in accordance with s. 25 of the *Courts of Justice Act.*"

19 Conceptually, I view r. 12.02 as being situated somewhere between the rules 20 and 21 of the *Rules of Civil Procedure*. It is not a summary judgment motion involving extensive affidavits and a requirement such as contemplated in r. 20 of the *Rules of Civil Procedure* where the responding party must put his "best foot forward". It is more akin to a r. 21 motion, although it is worded more broadly and does not have the same prohibition on the filing of affidavit evidence. It is a motion that is brought in the spirit of the summary nature of Small Claims Court proceedings and involves an analysis of whether a reasonable cause of action has been disclosed or whether the proceeding should be ended at an early stage because its continuation would be "inflammatory", a "waste of time" or a "nuisance."

20 In my view, the references to actions that are inflammatory, a waste of time, or a nuisance was intended to lower the very high threshold set by r. 21.01(3)(d)'s reference to actions that are frivolous, vexatious, or an abuse of process.

21 It bears remembering that r. 12.02 motions will often be brought and responded to by self-represented litigants who lack the extensive training of counsel. The test to be applied on such a motion ought to reflect this, and avoid the somewhat complex case law that has fleshed out the *Rules of Civil Procedure*.

2) Did the motion judge err in holding that the appellant was immune from suit and that the action was filed outside the applicable limitation period?

22 In the matter before us, the motion judge correctly referred to and applied r. 12.02 in deciding the issue before her. Unfortunately, at one point she erroneously referred to the motion as one for summary judgment. This is likely due to the appellant having mislabeled his motion in this way. I do not, however, consider this error as undermining her analysis and conclusion.

23 The respondent's argument with respect to immunity turns on his assertion that at some point the appellant ceased to act as a psychiatrist, and instead took on the role of mediator. The respondent bases this argument primarily on the appellant's issuing of the "interim" report and his statement to the respondent that he "settles" the vast majority of cases referred to him. The motion judge rejected this argument. She reviewed the material before her, including the affidavit material and it was clear from her reasons that she felt able to determine the relevant issues based on the evidence presented to her. Applying r. 12.02(1), the motion judge was satisfied that the claims asserted by the respondent all arose in the course of the appellant's work as a court-appointed assessor. She found, therefore, that the immunity issue was such that the claim had virtually no chance of success and ought to be struck.

24 The motion judge went on to find that, even if she had erred in her conclusion on the immunity issue, the claim had no chance of success because it was instituted after the applicable limitation period had expired. In reaching this conclusion she addressed and rejected the respondent's submission that the transitional rules of the *Limitations Act* 2002 applied to the respondent's claim.

25 Based on the materials properly before her, I see no basis to interfere with her findings and conclusions on both of these issues.

26 Although the motion judge did not indicate the specific provision of r. 12.02(1) that she was applying, it is apparent

that, after making her findings, the claim could properly be viewed as a "waste of time" and struck pursuant to r. 12.02(1)(c).

Conclusion

27 In conclusion, I would allow the appeal and reinstate the motion judge's dismissal of the claim. If the parties are unable to agree on costs, the appellant is to provide brief written submissions within 20 days hereof and the respondent is to provide brief written submissions within 10 days thereafter.

***Karen M. Weiler J.A.*:**

I agree.

***R.A. Blair J.A.*:**

I agree.

Appeal allowed.

Footnotes

[*] Additional reasons at *Van de Vrande v. Butkowsky* (2010), 85 C.P.C. (6th) 212, 2010 ONCA 400, 2010 CarswellOnt 3629 (Ont. C.A.).

Citing References (38)

Treatment	Title	Date	Type	Depth
Followed in	1. **Fisher v. Ontario (Minister of Community and Social Services)** 2014 QCCS 5682 (Ont. S.C.J.) **Judicially considered 2 times**	Oct. 23, 2014	Cases and Decisions	
Followed in	2. **Korb v. McCeachran** 2014 CarswellOnt 7060 (Ont. S.C.J.)	May 16, 2014	Cases and Decisions	
Followed in	3. **Doerr v. Sterling Paralegal** 2014 ONSC 2335 (Ont. Div. Ct.) **Judicially considered 3 times**	Apr. 14, 2014	Cases and Decisions	
Followed in	4. **Onwuachu v. Trans Union of Canada Inc.** 2013 CarswellOnt 2275 (Ont. S.C.J.)	Mar. 04, 2013	Cases and Decisions	
Followed in	5. **1528590 Ontario Ltd. v. Ferrera Concrete Ltd.** 2011 CarswellOnt 15745 (Ont. S.C.J.)	Sep. 14, 2011	Cases and Decisions	
Considered in	6. **Hervieux v. Huronia Optical** 2015 ONSC 1810 (Ont. S.C.J.)	Mar. 19, 2015	Cases and Decisions	
Considered in	7. **Henry v. Greig** 2015 ONSC 168 (Ont. S.C.J.)	Jan. 08, 2015	Cases and Decisions	
Considered in	8. **Garg v. Raywal Limited Partnership** 2014 CarswellOnt 10789 (Ont. S.C.J.) **Judicially considered 1 time**	Aug. 10, 2014	Cases and Decisions	
Considered in	9. **Tuka v. Butt** 2014 CarswellOnt 2035 (Ont. S.C.J.)	Feb. 25, 2014	Cases and Decisions	
Considered in	10. **National Service Dog Training Centre Inc. v. Hall** 2013 CarswellOnt 9429 (Ont. S.C.J.) **Judicially considered 2 times**	June 17, 2013	Cases and Decisions	
Considered in	11. **Gunn v. Gunn** 2013 CarswellOnt 235 (Ont. S.C.J.)	Jan. 07, 2013	Cases and Decisions	
Considered in	12. **Tucker v. Vuteq Canada Inc.** 2012 CarswellOnt 9790 (Ont. S.C.J.)	Aug. 10, 2012	Cases and Decisions	
Considered in	13. **Venneri v. Streetpro Roadside Assistance Inc.** 2012 CarswellOnt 10557 (Ont. S.C.J.)	Mar. 12, 2012	Cases and Decisions	
Considered in	14. **Lemont v. State Farm Mutual Automobile Insurance Co.** 2011 CarswellOnt 15743 (Ont. S.C.J.) **Judicially considered 2 times**	Oct. 19, 2011	Cases and Decisions	
Considered in	15. **Dougherty v. Goad & Goad Barristers & Solicitors** 2011 CarswellOnt 15742 (Ont. S.C.J.)	June 01, 2011	Cases and Decisions	

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Considered in	**16. Polymer Distribution Inc. v. Rasmussen** 2011 CarswellOnt 15744 (Ont. S.C.J.) **Judicially considered 2 times**	Mar. 25, 2011	Cases and Decisions	
Considered in	**17. 1690422 Ontario Inc. v. Altagas Holdings No. 2** 2011 CarswellOnt 1792 (Ont. S.C.J.)	Mar. 17, 2011	Cases and Decisions	
Considered in	**18. O'Brien v. Ottawa Hospital** 2011 ONSC 231 (Ont. Div. Ct.) **Judicially considered 6 times**	Jan. 11, 2011	Cases and Decisions	
Considered in	**19. Toronto Dominion Bank v. Thind** 2010 ONSC 6974 (Ont. S.C.J.) **Judicially considered 1 time**	Dec. 15, 2010	Cases and Decisions	
Considered in	**20. Vuong v. Toronto East General & Orthopaedic Hospital** 2010 ONSC 6827 (Ont. Div. Ct.) **Judicially considered 1 time**	Dec. 14, 2010	Cases and Decisions	
Considered in	**21. Tarlo v. Boyer** 2010 ONSC 4687 (Ont. S.C.J.) **Judicially considered 1 time**	Aug. 27, 2010	Cases and Decisions	
Considered in	**22. Starr v. Gordon** 2010 ONSC 4167 (Ont. S.C.J.) **Judicially considered 22 times**	July 23, 2010	Cases and Decisions	
Referred to in	**23. Danby v. Michaud** 2014 CarswellOnt 3390 (Ont. S.C.J.)	Feb. 06, 2014	Cases and Decisions	
Referred to in	**24. Billion v. Vaillancourt** 2012 CarswellOnt 6249 (Ont. S.C.J.)	May 22, 2012	Cases and Decisions	
Referred to in	**25. Metcalfe v. Khanna** 2012 CarswellOnt 4737 (Ont. S.C.J.)	Jan. 08, 2012	Cases and Decisions	
Referred to in	**26. Kusnierz v. Economical Mutual Insurance Co.** 2010 ONSC 5749 (Ont. S.C.J.) **Judicially considered 8 times**	Oct. 19, 2010	Cases and Decisions	
Referred to in	**27. Bear v. Pitvor** 2010 CarswellOnt 11081 (Ont. S.C.J.) **Judicially considered 1 time**	Sep. 02, 2010	Cases and Decisions	
—	**28. Onwuachu v. Trans Union of Canada Inc.** 2013 CarswellOnt 2272 (Ont. S.C.J.)	Feb. 25, 2013	Cases and Decisions	
—	**29. 2014 Annual Review of Civil Litigation [H], [H] I. INTRODUCTION The Supreme Court's...**	2014	Secondary Sources	—
—	**30. Law of Dismissal in Canada, Third Edition (Howard Levitt), The 15:270, — SUMMARY JUDGMENT TO RECOVER EMPLOYER'S PROPERTY**	2015	Secondary Sources	—

Treatment	Title	Date	Type	Depth
—	**31.** **Zuker, Ontario Small Claims Court Practice Case Law 23(2), Case Law**	2005	Secondary Sources	—
—	**32.** **Zuker, Ontario Small Claims Court Practice Case Law RSmCC 1.04, Case Law**	2010	Secondary Sources	—
—	**33.** **Zuker, Ontario Small Claims Court Practice Case Law RSmCC 1.03(2), Case Law**	2005	Secondary Sources	—
—	**34.** **Zuker, Ontario Small Claims Court Practice Case Law RSmCC 12.02(2), Case Law**	2005	Secondary Sources	—
—	**35.** **Zuker, Ontario Small Claims Court Practice Case Law RSmCC 13.05(2), Case Law**	2014	Secondary Sources	—
—	**36.** **Zuker, Ontario Small Claims Court Practice Commentary RSmCC 1.03(2), Commentary**	2005	Secondary Sources	—
—	**37.** **Zuker, Ontario Small Claims Court Practice Commentary RSmCC 12.02(2), Commentary**	2009	Secondary Sources	—
—	**38.** **Zuker, Ontario Small Claims Court Practice Commentary RSmCC 15.02(2), Commentary**	2005	Secondary Sources	—

