CITATION: Manuel v. Lafarge et al., 2024 ONSC 3790
COURT FILE NO.: 27525/17
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
TERRENCE MANUEL Plaintiff	*R. Douglas Elliott/Timothy J.L. Phelan*, for the Plaintiff
– and –	
LAFARGE CANADA INC., The Canada Life Assurance Company and KEVIN CHRISTIANSON Defendants	*Dianne Jozefacki*, for the Defendant Lafarge Canada Inc.
	HEARD: December 12, 2023 and January 12, 2024

VARPIO J.

REASONS ON SUMMARY JUDGMENT MOTION

OVERVIEW

[1] The plaintiff, Mr. Terrence Manuel, was employed by the defendant, Lafarge Canada Inc. ("Lafarge"), between 2014 and 2016. During that time, Mr. Manuel alleges that he was the victim of sexual harassment perpetuated by the defendant, Mr. Kevin Christianson.[1] The plaintiff deposed that he took time off work as a result of medical issues flowing from the harassment. The plaintiff was on short-term disability during the summer of 2016.

[2] On August 2, 2016, Mr. Manuel was terminated because of a corporate reorganization. On August 16, 2016, he signed a release that covered all claims, including damages that ostensibly flowed from the sexual harassment.

[1] Mr. Christianson did not participate in this motion.

[3] On June 12, 2017, the plaintiff issued a statement of claim seeking damages as a result of the harassment. The plaintiff also filed an application seeking benefits from Great West Life Assurance Company ("GWL")[2].

[4] Lafarge brings a summary judgment motion seeking the following relief:

1. A declaration that the plaintiff and Lafarge entered into a binding settlement agreement, which agreement resolves all disputes including those described in the statement of claim;
2. An order dismissing the statement of claim; and
3. Costs.

[5] Mr. Manuel brings his own summary judgment motion seeking a declaration that the release is invalid because:

1. The plaintiff lacked capacity when he signed same;
2. The plaintiff signed the release while under duress; and/or
3. The release was signed under conditions of unconscionability.

[6] For the following reasons, I hereby grant Lafarge's summary judgment motion and dismiss that of Mr. Manuel.

FACTS

The Hiring

[7] The plaintiff was hired by Lafarge on October 2, 2014 as a Quality Control Technician. He was separated from his spouse with whom he had four children. At the time he was hired, the plaintiff had a dependant son who wished to pursue post-secondary education. The plaintiff earned approximately $50,000 per annum.

"The Incident"

[8] During his time at Lafarge, Mr. Manuel deposed that he had to deal with a workplace bully – Mr. Christianson - who would intimidate and otherwise harass the plaintiff. Mr. Christianson would call Mr. Manuel names like "pilates" or "pretty boy".

[9] This behaviour culminated in an incident whereby on June 12, 2015, the plaintiff bent over to perform a work function and Mr. Christianson grabbed the plaintiff by the hips and gyrated, thereby simulating intercourse. Mr. Christianson performed this act in front of other Lafarge employees. Mr. Christianson performed this act twice on that day.

[2] GWL did not participate in this motion.

[10] The plaintiff reported the incident to Lafarge management on June 18, 2015, and was told to ignore and avoid Mr. Christianson. Mr. Manuel continued working as normal.

The Plaintiff's Condition

[11] The plaintiff deposed that he began suffering from panic attacks and other such symptoms after the Incident. The plaintiff deposed that in May 2016 he was hospitalized. He attended the emergency room and an angiogram was performed. At that time, doctors discovered minor blockages and the plaintiff was prescribed Lipitor. Within a few days, the plaintiff changed medications due to an allergic reaction to the Lipitor. The plaintiff's family physician, Dr. Christopher Bruni, prescribed Ativan.

[12] In his cross-examination, the plaintiff testified that he was diagnosed with anxiety and/or PTSD at the time he went to hospital for his heart condition. In his second cross-examination following the production of documents, it was confirmed that the Sault Area Hospital documentation did not reference depression, anxiety or PTSD.

[13] The plaintiff was placed on short-term disability as a result of his condition. On July 13, 2016, Dr. Bruni cleared the plaintiff to return to work as tolerated. Dr. Bruni's notes corroborate the plaintiff's affidavit evidence that he was under doctor's care as a result of heart issues in July of 2016, which issues were controlled by various medications. Dr. Bruni's notes make no reference to PTSD or to the Incident. None of the documents forwarded to Lafarge prior to the signing of the release make any reference to depression, anxiety or PTSD.

[14] The plaintiff deposed that his medical condition was as a result of the Incident:

> About one week after the Sexual Assaults, I had my first panic attack. I felt like I was having a heart attack. Thereafter, I would have a panic attack about 2 or 3 times per month. This continued until I had a major panic attack in May of 2016, where I was hospitalized. I was put on heart medication to prevent damage to the heart and to normalize my blood pressure and breathing. On top of the panic attacks, I had flashbacks and nightmares, I developed trust issues and negative thoughts about myself. I had trouble sleeping.
>
> I did not recognize the panic attacks as panic attacks at the time. However, with the benefit of my diagnosis and subsequent therapy, I now understand them to have been panic attacks.
>
> These symptoms started immediately following the Sexual Assaults, and persist today. Ultimately, it was these symptoms that led to my being diagnosed with anxiety, depression, and Post-Traumatic Stress Disorder ("PTSD").

[15] The plaintiff returned to work on July 18, 2016.

The Termination

[16] On August 3, 2016, the plaintiff was unexpectedly terminated by Lafarge as the company underwent reorganization. Company representatives met with the plaintiff and provided him with a termination package.

[17] A Lafarge representative explained to Mr. Manuel that the termination package contained two options: a salary continuance or a lump sum payment. The monies offered represented two months salary. The package also contained a full and final release covering all possible claims made by the plaintiff, including any claims for damages flowing from the Incident. The plaintiff was given two weeks to accept the package and sign the release.

[18] No one at Lafarge discussed the plaintiff's medical leave or the Incident with the plaintiff at the time of termination. Mr. Manuel deposed that Lafarge's Head of Human Resources told Mr. Manuel at the termination meeting that the package was non-negotiable and that if he did not sign the documents, the severance package would be revoked. Mr. Manuel deposed that his capacity was "so diminished that he did not even think to ask for an extension".

[19] The plaintiff understood that the release might have legal consequences and Mr. Manuel therefore tried to meet with a lawyer prior to signing same. He was unable to do so as a result of lawyer unavailability. At no time did he advise Lafarge of this problem.

[20] The plaintiff deposed that leading up to his signing of the release, his economic situation effectively eroded his ability to function:

> I kept thinking about my son… and how I was not going to be able to provide for him anymore. I worried that I might not be able to help him pay for college or university and worse, that I might lose my house. My anxiety, depression, and PTSD exacerbated these worries to the point where I was having chest pains, loss of appetite and sleep loss, among other symptoms.
>
> …
>
> I was afraid that I would be left with nothing. If I didn't sign the release, I would have had no money, no job, no income, and no way to support myself and my son.
>
> My anxiety, depression and PTSD made it extremely difficult, if not impossible, to appreciate the long-term consequences of this decision. My fears of not being able to provide for myself and my son, coupled with my feelings of hurt and shame and frustration at Lafarge also clouded my ability to make decisions.
>
> I was never asked for an extension because I didn't know that was an option. Lafarge set the deadline. There was no indication that they would entertain a request for extension. They held all the bargaining power.
>
> I truly felt like there was no other reasonable alternative to signing the Putative Release.

[21] He signed the release on August 16, 2016 without the benefit of legal advice.

[22] The plaintiff was cross-examined on his affidavit. He was taken to the termination letter. He testified that he could not recall his understanding of the termination letter at the time he signed same because he was under duress during that period.

[23] As regards the release, the plaintiff testified in cross-examination that he did not appreciate that the release and the termination letter were two separate documents. He agreed that at no point did he ask Lafarge to clarify the meaning of the release. He signed the release because he "wanted salary continuance, plain and simple". When asked whether he agreed that the choice as between salary continuance and a lump sum was a deliberate choice, Mr. Manuel stated that the continuance "was the right thing to do for my son". He further testified that he did not read the release before he signed same:

> Well, quite honestly, in my ignorance of my time and my state of mind at the time, I looked at the salary continuance as what I needed to do, and everything else was ignored.

[24] With respect to Mr. Manuel's claim of duress, I note that the plaintiff did not file any materials in support of his contention that his son wished to pursue post-secondary education. He filed no materials describing the cost associated with same, or any documentation suggesting that the plaintiff would lose his house if he did not accept Lafarge's termination package (i.e., mortgage statements, etc.). In his cross-examination, however, he testified that his son was an apprentice plumber. His son attended Sault College and financed his education through OSAP. The plaintiff co-signed the OSAP application.

Cambridge LLP

[25] Subsequent to signing the release, Mr. Manuel attended a birthday party in August of 2016 where an attendee suggested that the plaintiff meet with a relative who was a lawyer at Cambridge LLP. Mr. Manuel did so, and the plaintiff retained Cambridge LLP on September 15, 2016. The law firm helped the plaintiff meet with medical specialists.

[26] The plaintiff met with Dr. Frances Leung, a rheumatologist, regarding the plaintiff's alleged PTSD. The plaintiff also met a psychotherapist, Dr. Robert Ferrie. The plaintiff deposed as follows:

> Attached hereto and marked as EXHIBIT "A" is a copy of a letter from Dr. Frances Leung, MD, FRCPC my rheumatologist, dated November 15, 2016. Attached hereto and marked as EXHIBIT "B" is a copy of a letter [dated February 13, 2017] sent from Robert K. Ferrie, MD, EDMR my psychotherapist, to my lawyer, Mr. Elliott explaining my diagnosis. My anxiety, depression, and PTSD stem from the Sexual Assaults.

[27] The plaintiff began meeting with Ms. Shelley Colter, also a psychotherapist, in October 2019. Ms. Colter swore an affidavit wherein she described the plaintiff as having PTSD as

a result of the Incident. She attached her resume which indicates that she is a member in good standing of the College of Registered Psychotherapists of Ontario. She has a B.A. in administrative law and an M.A. in Counselling and Spirituality. Her affidavit materials contained documents that comply with rule 53.03 of the *Rules of Civil Procedure.*

POSITION OF THE PARTIES

[28] Lafarge submits that the release is binding upon the plaintiff such that the plaintiff cannot make a claim for damages as a result of the Incident.

[29] For his part, Mr. Manuel submits that the release should not be enforced because:

1. The plaintiff lacked legal capacity when he signed the release;
2. The plaintiff was under duress when he signed the release; and/or
3. The release is unconscionable and ought therefore be set aside.

ANALYSIS

Summary Judgment Motions

[30] Rule 20.04 of the *Rules of Civil Procedure* describes the test to be applied by the courts when considering a motion for summary judgment:

> 20.04 (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

[31] Rule 20.04 also permits the jurist hearing a summary judgment motion to use expanded fact-finding powers in an attempt to make litigation more efficient:

> Powers
>
> (2.1) 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. O. Reg. 438/08, s. 13 (3).
>
> Oral Evidence (Mini-Trial)
>
> (2.2) 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. O. Reg. 438/08, s. 13 (3).

[32] The Supreme Court of Canada in *Hryniak v. Mauldin*, [2014] SCC 7 unanimously clarified the test for granting summary judgment at paras. 49 to 51:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.
>
> Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

[33] The Supreme Court of Canada described the process to be undertaken in summary judgment motions at paras. 66 to 68 of *Hryniak*:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

> Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution. As well, by first determining the consequences of using the new powers, the benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.
>
> While summary judgment must be granted if there is no genuine issue requiring a trial, the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary. The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

[34] Concomitant with the fact that summary judgment motions enable courts to impose final orders, the rules governing summary judgment have long required that a party "lead trump or risk losing". At para. 28 of *Clifton Blake Capital Corp. v. 10972827 Canada Inc*., [2024] O.J. No. 2951, Chalmers J. recently described the governing principles at para. 28:

> The party resisting the motion for summary judgment must "lead trump or risk losing" and must demonstrate that their case has a real chance of success at trial: *1061590 Ontario Ltd. v. Ontario Jockey Club*, (1995) 21 O.R. (3d) 547 (ON CA) at p. 557. The evidence put forward by the parties must be considered their best evidence: *Khabouth v. Nuko Investments Ltd*., 2013 ONCA 671, at para. 6.

[35] The Court of Appeal for Ontario described how the "genuine issue for trial" test is to be applied when considering competing evidence at paras. 30 and 31 of *Sanzone v. Schechter*, [2016] O.J. No. 3760:

> I would respectfully disagree with that conclusion. First, the evidentiary burden on a moving party defendant on a motion for summary judgment is that set out in rule 20.01(3) -- "a defendant may... move with supporting affidavit material or other evidence." As explained in *Connerty*, at para. 9, only after the moving party defendant has discharged its evidentiary burden of proving there is no genuine issue requiring a trial for its resolution does the burden shift to the responding party to prove that its claim has a real chance of success.
>
> Second, the decision in *Cassibo* stands outside the overwhelming weight of the case law that when medical practitioners move for summary judgment to dismiss a malpractice action, they file evidence on the merits of their defence, including expert reports. That general practice is consistent with the evidentiary obligation borne by moving parties on summary judgment motions.

Final Settlements

[36] Courts have recognized that there is a presumption in favour of upholding final releases however that presumption is subject to the normal rules of contract law. In *Deschenes v. Sylvestre Estate,* [2020] O.J. No. 2224, the Court of Appeal for Ontario stated at paras. 28 and 29:

> I begin by setting out the relevant legal principles. The point of departure is that there is a strong presumption in favour of the finality of settlements: *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 165 D.L.R. (4th) 268 (Ont. C.A.), at paras. 15-16, leave to appeal refused, [1998] S.C.C.A. No. 518; *Mohammed v. York Fire & Casualty Insurance Co.* (2006), 79 O.R. (3d) 354 (C.A.), at para. 34, leave to appeal refused, [2006] S.C.C.A. No. 269. A settlement agreement will not be rescinded on the basis of information that has come to light following the settlement that indicates that a party has entered into an improvident settlement. As the motion judge recognized here, "it is not enough to revisit a settlement decision based on the better vision of hindsight": at para. 2.
>
> A settlement agreement, as a contract, may be rescinded on the basis of misrepresentation. The interest in the finality of settlements will not "trump" the need to rescind a settlement agreement in such cases. In *Radhakrishnan v. University of Calgary Faculty Association*, 2002 ABCA 182, 215 D.L.R. (4th) 624, at paras. 30, 43, Côté J.A. stated that "[t]he recognized ways to upset a settlement contract are the same as those to upset any other contract", and that "[in a settlement] [i]nterests of finality prevail, unless there are contractual problems such as fraud, misrepresentation, duress, undue influence, unconscionability, or mutual or unilateral mistake". See also *Teitelbaum v. Dyson* (2000), 7 C.P.C. (5th) 356 (Ont. S.C.), at para. 38, aff'd (2001), 151 O.A.C. 399 (C.A.), leave to appeal refused, [2001] S.C.C.A. No. 532.

Capacity and Admissible Evidence

[37] Sections 2(1) and 2(3) of Substitute Decisions Act, 1992, S.O. 1992, c. 30 dictate that an adult is presumed to have capacity to enter into a binding contract unless there are reasonable grounds to question that capacity:

> Presumption of capacity
>
> 2 (1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract. 1992, c. 30, s. 2 (1).
>
> …
>
> Exception
>
> (3) A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent, as the case may be. 1992, c. 30, s. 2 (3).

[38] Within the context of medical care, the majority of the Supreme Court of Canada found in *Starson v. Swayze*, 2003 SCC 32 that capacity contained two constituent elements (at para. 78):

> Section 4(1) of the [Substitute Decisions] Act describes these elements as follows:
>
> > A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
>
> Capacity involves two criteria. First, a person must be able to understand the information that is relevant to making a treatment decision. This requires the cognitive ability to process, retain and understand the relevant information. There is no doubt that the respondent satisfied this criterion. Second, a person must be able to appreciate the reasonably foreseeable consequences of the decision or lack of one. This requires the patient to be able to apply the relevant information to his or her circumstances, and to be able to weigh the foreseeable risks and benefits of a decision or lack thereof. The Board's finding of incapacity was based on their perception of Professor Starson's failure in this regard.

[39] While, strictly speaking, the Supreme Court's decision applies to capacity to consent as it relates to medical treatment, I have not seen any jurisprudence that suggests that a different test ought to be imposed in other areas of the law.

[40] Lack of capacity may vitiate a contract and it may also inform unconscionability and duress: see *Hart v. O'Connor*, [1985] A. C. 1000, [1985] 2 All E.R. 880 (P.Q.).

[41] The plaintiff filed a number of documents in support of his contention that the effects of PTSD were such that he lacked the capacity to sign the release. The reality is, however, that none of the evidence is admissible to support such a conclusion.

[42] Rule 53.03 of the *Rules of Civil Procedure* governs the admissibility of expert evidence in civil litigation, including summary judgment motions:

> 53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48; O. Reg. 170/14, s. 17.
>
> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.

> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:
>
> …
>
> Sanction for Failure to Address Issue in Report or Supplementary Report
>
> (3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,
>
> (a) a report served under this rule;
>
> ...

[43] In *Westerhof v. Gee Estate* (2015), 124 O.R. (3d) 721 (Ont. C.A.), the Court of Appeal for Ontario considered whether all expert opinions needed to comply with rule 53.03. The court considered the distinction between a "participant expert" and a "litigation expert" at paras 59 to 62:

> As I have said, I do not agree with the Divisional Court's conclusion that the type of evidence -- whether fact or opinion -- is the key factor in determining to whom rule 53.03 applies.
>
> Instead, I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where
>
> - the opinion to be given is based on the witness' observation of or participation in the events at issue; and
>
> - the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.
>
> Such witnesses have sometimes been referred to as "fact witnesses" because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as "fact witness" risks confusion because the term "fact witness" does not make clear whether the witness' evidence must relate solely to their observations of the underlying facts or whether they may give opinion evidence admissible for its truth. I have therefore referred to such witnesses as "participant experts".
>
> Similarly, I conclude that rule 53.03 does not apply to the opinion evidence of a non-party expert where the non-party expert has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.

[44] At paras. 63 and 64, the Court of Appeal also considered situations where a participant expert's evidence is not based upon personal observation and the like:

> If participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits.
>
> As with all evidence, and especially all opinion evidence, the court retains its gatekeeper function in relation to opinion evidence from participant experts and non-party experts. In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents. The court could also require that the participant expert or non-party expert comply with rule 53.03 if the participant or non-party expert's opinion went beyond the scope of an opinion formed in the course of treatment or observation for purposes other than the litigation.

[45] With respect to Dr. Leung, Dr. Bruni and Dr. Ferrie's documentation, the doctors did not swear affidavits. As a result, none of the doctors actually gave evidence. Lafarge was not able to cross-examine the doctors about the plaintiff's symptomology, his presentation, the limits of the respective doctor's professional accreditations, and other such issues. In order to make a determination that the plaintiff lacked capacity due to PTSD and/or other psychological disorders, a report from a properly qualified expert would normally need to form part of Mr. Manuel's evidential record (which finding is consistent with the court's *obiter dicta* in *Sanzone v. Schechter* as regards the general utility of expert medical reports). Effectively, by affixing doctors' notes and/or letters to his or Ms. Colter's affidavit, the plaintiff tried to turn said notes/letters into participant expert testimony.

[46] The plaintiff cannot do that.

[47] I also note the frailties within the doctors' materials. Dr. Bruni's notes make no mention of PTSD. Dr. Leung and Dr. Ferrie's letters describe the plaintiff's alleged PTSD but these letters post-date the commencement of litigation.

[48] Ergo, as per para. 64 of *Westerhof*, I will not consider the evidence of Dr. Leung and Dr. Ferrie because it does not comply with rule 53.03. I will only consider Dr. Bruni's notes as a source that corroborates Mr. Manuel's evidence about being hospitalized due to heart-related issues.

[49] The plaintiff also argues that certain medications were prescribed to treat the plaintiff's PTSD. Accordingly, Mr. Manuel submits that I can take judicial notice that the plaintiff must have had PTSD. I disagree. The healing properties of the plaintiff's medication has not reached the notoriety of, say, aspirin such that I can rely upon the plaintiff's prescriptions as evidence of a PTSD diagnosis: see *R. v. Find*, 2001 SCC 32. I therefore reject that submission.

[50] Finally, the plaintiff submits that I can rely upon Ms. Colter's affidavit to find that Mr. Manuel suffered from PTSD at the time he signed the release. With respect to Mr. Manuel, Ms. Colter deposed as follows:

> I was asked by Mr. Elliott, Terry's lawyer, to prepare a brief letter outlining Terry's condition, treatment, and prognosis and to comment on his decision-making ability at the time Terry was terminated from Lafarge Canada Inc. ("Lafarge") in August 2016. I was advised by Mr. Elliott's office that Lafarge had brought a motion for Summary Judgment to determine the validity of a release Terry is alleged to have signed after being terminated. I was also provided copies of the pleadings and motion materials in this matter for review. Attached hereto and marked as Exhibit "B" is a copy of that letter, dated June 11, 2021.
>
> As you can see from my letter, it is my opinion that Terry's ability to assess and understand the consequences of signing any documents in August 2016 would have been greatly reduced. His ability to weigh options and outcomes was highly impaired as a result of his Post-Traumatic Stress Disorder (a consequences [sic] of the sexual assaults by Mr. Christianson on him), and his resultant symptomatology, which included lack of sleep and inability to concentrate. Further explanation for this conclusion can be found in my letter of June 11, 2021.

[51] A deeper examination of her attached report, however, indicates that her putative PTSD diagnosis is actually based upon Dr. Ferrie's initial diagnosis:

> … [Mr. Manuel] has attended 35 bi-weekly sessions during which the primary focus has been the reduction and management of symptoms related to Post-traumatic Stress Disorder (PTSD), a diagnosis he had received from Dr. Robert Ferrie (MD), of Alton, Ontario.

[52] If Ms. Colton were properly qualified to make a PTSD diagnosis, I would consider her evidence going to both the nature of the diagnosis as well as the impact that PTSD had on the plaintiff.

[53] She is not an expert qualified to give such a diagnosis.

[54] A PTSD diagnosis can only be made by a qualified medical practitioner: see *Nijher v. Dhaliwal* 2024 ONSC 1591 at para. 207 and 208; the *Regulated Health Professions Act* 1991, S.O. 1991, Ch. 18; and the *Psychotherapy Act*, 2007, S.O. 2007, c. 10, Sched. R. Ergo, while Ms. Colter is entitled to rely upon a physician's diagnosis to treat someone for PTSD, she is not a properly qualified expert who is able to make the diagnosis: see *R. v. Mohan*, [1994] 2 SCR 9; *While Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. I will therefore not consider her opinion.

[55] Thus, I have no evidence from a properly qualified medical expert that would enable me to find that the plaintiff suffered from PTSD, or any other medical problem, other than the plaintiff's own self-diagnosis.

[56] This leaves me to consider the plaintiff's evidence that he lacked capacity at the time that he signed the release. If believed, that evidence may be sufficient to ground a finding of incapacity.

[57] Mr. Manuel's evidence does not rise to that level.

[58] I do not need to engage the expanded fact-finding powers described in the *Rules* and *Hryniak* to draw this conclusion. First, the plaintiff was capable of making an informed choice regarding salary continuation. This alone demands that he had cognitive ability to process relevant information and make a considered selection. The plaintiff's evidence on cross-examination is that he chose not to read the release because he ignored same. While the plaintiff blamed his ostensible mental state for this action, he nonetheless effectively agreed that he specifically undertook that course of action (i.e., actively choosing to ignore the release). Mr. Manuel understood that he was signing a legally binding document. Wilful blindness does not obviate Mr. Manuel from accepting any responsibility for that action.

[59] Second, Mr. Manuel testified that he was diagnosed with PTSD and/or other depression-like diagnoses when he was hospitalized in May 2016. The hospital records belie that position in so far as they make no reference to same.

[60] Accordingly, Mr. Manuel's evidence regarding capacity in incapable of raising a genuine issue for trial because:

a. He effectively testified that he was capable; and

b. His evidence regarding the alleged May 2016 diagnosis is contradicted by hospital records.

[61] It must also be noted that at the time the release was signed, Lafarge had no basis to believe that Mr. Manuel lacked capacity. The Incident occurred over a year prior to termination. Mr. Manuel's medical documentation did not describe any mental illness prior to termination. Lafarge was not informed that Mr. Manuel could not understand the release. Mr. Manuel did not ask for any clarification. In other words, Lafarge was entitled to rely upon the presumption in s. 2(1) of the *Substitute Decisions Act* because there was no basis to be concerned about Mr. Manuel's capacity as per s. 2(3) of the same Act.

[62] Thus, while Mr. Christianson's actions undoubtedly harmed the plaintiff at some level, and while the plaintiff was certainly hospitalized and was on short-term disability as a result of heart-related issues prior to signing the release, I have no evidence that the plaintiff's alleged symptomology was debilitating or was as a result of PTSD. I also have no evidence that Mr. Manuel was unable to make informed choices or that Lafarge had reasonable grounds to believe that Mr. Manuel lacked capacity.

[63] I therefore have insufficient evidence on the record before me to find that the plaintiff lacked capacity to sign the release.

[64] There is no genuine issue for trial.

Duress

[65] The plaintiff argues that he was under duress when he signed the release and that the release should therefore be vitiated. He deposed that he felt as though he had no choice but to sign the impugned release.

[66] The Court of Appeal for Ontario described duress at paras. 8 and 9 of Taber v. *Paris Boutique & Bridal Inc. (c.o.b. Paris Boutique)*, [2010] O.J. No. 859:

> There is no doubt that economic duress can serve to make an agreement unenforceable against a party who was compelled by the duress to enter into it. Nor is there any doubt that the party can have the agreement declared void on this basis.
>
> However, not all pressure, economic or otherwise, can constitute duress sufficient to carry these legal consequences. It must have two elements: it must be pressure that the law regards as illegitimate; and it must be applied to such a degree as to amount to "a coercion of the will" of the party relying on the concept. See*: Stott v. Merit Investment Corp*., 63 O.R. (2nd) 545 (Ont. C.A.), at para. 89.

[67] Mr. Manuel submits that the "illegitimate pressure" described in the jurisprudence does not pertain to pressure applied by Lafarge. Rather, he submits that the concept describes the impact of the pressure felt by Mr. Manuel. In support of this proposition, counsel for Mr. Manuel relies upon *Greater Fredericton Airport Authority v. NAV Canada*, 2008 NBCA 28 at paras. 7. A review of that paragraph, however, suggests that the New Brunswick Court of Appeal was not definitive in that regard:

> In the reasons that follow, I conclude that the arbitrator erred in finding that the variation was supported by fresh consideration. As a matter of law, however, I am prepared to recognize and adopt an "incremental" change in the traditional rules by holding that a variation unsupported by consideration remains enforceable provided it was not procured under economic duress. This refined approach leads us to consider how the contractual variation in issue was procured. In my view, the Airport Authority had no "practical alternative" but to agree to pay money that it was not legally bound to pay. Nav Canada implicitly threatened to withhold performance of its own obligation until the Airport Authority capitulated to the demand that it pay the cost of the navigational aid. However, the absence of practical alternatives is merely evidence of economic duress, not conclusive proof of its existence. The true cornerstone of the doctrine is the lack of "consent". In that regard, the uncontroverted fact is that the Airport Authority never "consented to" nor "acquiesced in" the variation, as is evident from the letter agreeing to payment "under protest". But this is not the end of the matter. **There is jurisprudence that holds that the exercise of "illegitimate pressure" is a condition precedent to a finding of economic duress. I respectfully decline the invitation to recognize such pressure as an essential component of the duress doctrine, at least in cases involving the enforceability of variations to an existing contract. It is not the legitimacy of the pressure that**

> **is important but rather its impact on the victim, unless, perhaps, one is attempting to establish that a finding of economic duress qualifies as an independent tort.** [emphasis added]

[68] I do not accept Mr. Manuel's position. The unwillingness by the New Brunswick Court of Appeal to recognize "illegitimate pressure" as a necessary component of duress (at least as regards the enforcement of contract variations) runs afoul of binding jurisprudence from the Court of Appeal for Ontario: see *Stott, supra.* The New Brunswick Court of Appeal's view that "illegitimate pressure" is unrelated to the respondent's actions must thus be viewed with some caution.

[69] I also note that the Ontario jurisprudence has been mixed in its treatment of *NAV Canada*: see *Intermarket Cam Limited v. Weiss*, 2021 ONSC 4445; *RT Twenty-Sixth Pension Properties Limited v. Precise Parklink Inc*., 2023 ONSC 1199; *Kinsella v. Mills*, 2020 ONSC 4785, etc. Accordingly, while much of the law regarding economic duress is settled,[3], *NAV Canada's* non-binding and opaque statement regarding the nature of "illegitimate pressure" is not the law in Ontario as I understand it to be.

[70] Irrespective of my view of *NAV Canada*, three issues demonstrate that the doctrine of duress is inapplicable in the circumstances of this case.

[71] First, there is no evidence to support a finding that Lafarge applied illegitimate pressure to Mr. Manuel. The plaintiff did not depose that Lafarge's representatives undertook overt coercive action or that they improperly applied pressure. Rather, they presented the plaintiff with options and gave him the chance to seek legal counsel in order to inform his decision. The evidence is that Lafarge made representations that one would typically expect at a termination meeting, and nothing more. In other words, Lafarge imposed no "illegitimate pressure" upon Mr. Manuel.

[72] Second, as noted above, there is no admissible evidence to support a finding that the plaintiff lacked capacity at the time he signed the release. As such, while I accept Mr. Manuel's evidence that he felt stressed at the time he signed the release, I have no admissible evidence to find that the plaintiff's stress:

a. Denied him the capacity to understand his decisions and their implications;

b. Was caused by PTSD; and

c. Went beyond that which is normally felt by an employee being terminated, even giving appropriate weight to the fact that Mr. Manuel was recently on short-term disability for heart-related issues.[4]

---

[3] See*: Pao On v. Lau Yiu*, [1979] 3 All E.R. 65; *Gordon v. Roebuck* (1992), 9 OR (3d) 1.

[4] I accept that most employees will invariably feel stress when they are terminated. However, if the courts give too much weight to the impact of stress upon a recently terminated employee, the net effect of that weighting will be such that all releases signed at termination will be presumptively unenforceable due to economic duress. Such a result

[73] There is thus no evidence capable of suggesting that a lack of capacity contributed to an alleged "coercion of will".

[74] Third, even taking Mr. Manuel's evidence at its highest, there is no evidence filed to prove that *ipso facto* Mr. Manuel suffered a coercion of will as a result of economic duress.

[75] Mr. Manuel deposed that he was under duress such that he had no choice but to sign the release, and yet this supposed duress was not so great as to render him incapable of choosing as between salary continuance or lump sum payment. The claim of duress appears at best selective.

[76] The plaintiff's claim of economic duress is interwoven with his evidence that his dependant son's educational concerns were overwhelming and that he might lose his house. Mr. Manuel's affidavit contained no bank records, no post-secondary cost breakdowns, no particulars of his son's grades, and no mortgage and/or bank statements which might substantiate the plaintiff's claim that the stress flowing from his termination rose to the level of "coercion of will" based upon economic duress. Given Mr. Manuel's aforementioned ability to make informed choices regarding salary continuance, Mr. Manuel's claim of duress is internally inconsistent, lacking substantiation and fatally flawed.

[77] Therefore, I recognize that the plaintiff was in a stressful state and that he did not receive legal advice prior to signing the release. Nonetheless, I am satisfied upon the evidence before me that the release was not signed under duress. There is insufficient admissible evidence capable of proving that Mr. Manuel's capacity was diminished at the time he signed the lease. There is no evidence that Lafarge illegitimately pressured the plaintiff. There is no evidence that the plaintiff suffered a coercion of will.

[78] There is no genuine issue for trial.

<u>Unconscionability</u>

[79] Mr. Manuel seeks a declaration that the release was unconscionable. A finding of unconscionability used to require several findings including:

a. Unequal bargaining power;

b. An improvident bargain; and

---

would run afoul of the principle governing the presumptive enforceability of settlements as described in *Deschenes v. Sylvestre Estate.*

c. A finding that the stronger party was aware of said imbalance and effectively took advantage of same: see *Titus v. William F. Cooke Enterprises Ltd.* (2007), 284 D.L.R.(4th) 734 (Ont. C.A.).

[80] Recently, however, the Supreme Court of Canada pronounced upon the doctrine of unconscionability in *Uber Technologies v. Heller*, 2020 S.C.C. 16. In that case the Supreme Court effectively "broadened the scope of equity's and the common law's capability to intervene on the grounds of unconscionability": *Zaidi v. Syed Estate,* [2023] O.J. No. 810 (Ont. S.C.); affirmed 2024 ONCA 406. Specifically, the majority in *Uber* only required that two prongs of unconscionability be met in order to apply the doctrine:

a. An inequality of bargaining power; and

b. A resulting improvident contract.

[81] At paras. 62 to 65 of *Uber*, Abella J. and Rowe J.J., writing for the majority, outlined the test for unconscionability:

> Most scholars appear to agree that the Canadian doctrine of unconscionability has two elements: "... an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and ... an improvident transaction" (*McInnes*, at p. 524 (emphasis deleted); see also *Swan, Adamski and Na*, at p. 986; *McCamus*, at pp. 424 and 426-27; *Benson*, at p. 167; *Waddams* (2017), at p. 379; *Stephanie Ben-Ishai and David R. Percy*, eds., *Contracts: Cases and Commentaries* (10th ed. 2018), at p. 719).
>
> This Court has long endorsed this duality. In *Hunter*, Wilson J. observed that
>
> > [t]he availability of a plea of unconscionability in circumstances where the contractual term is *per se* unreasonable *and* the unreasonableness stems from inequality of bargaining power was confirmed in Canada over a century [page162] ago ... . [Emphasis in original; p. 512; see also p. 462, per Dickson C.J.]
>
> In *Norberg*, La Forest J. described proving the elements of unconscionability as "a two-step process", involving "(1) proof of inequality in the positions of the parties, and (2) proof of an improvident bargain" (p. 256). The concurring judgment in *Douez v. Facebook Inc.*, [2017] 1 S.C.R. 751, followed a similar approach in a case involving a standard form consumer contract:
>
> > Two elements are required for the doctrine of unconscionability to apply: inequality of bargaining powers and unfairness. Prof. McCamus describes them as follows:
> >
> > > ... one must establish both inequality of bargaining power in the sense that one party is incapable of adequately protecting his or her interests and undue advantage or benefit secured as a result of that inequality by the stronger party. [Emphasis deleted; para. 115.]

> (See also *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, 347 D.L.R. (4th) 591, at paras. 29-31; *Roy v. 1216393 Ontario Inc.*, 2011 BCCA 500, 345 D.L.R. (4th) 323, at para. 29; *McNeill v. Vandenberg*, 2010 BCCA 583, at para. 15 (CanLII); *Kreutziger*, at p. 173; *Morrison*, at p. 713.)

We see no reason to depart from the approach to unconscionability endorsed in *Hunter*, *Norberg* and in *Douez*. That approach requires both an inequality of bargaining power and a resulting improvident bargain.

[82] At paras. 66 and 67, the majority defined "inequality of bargaining power" as follows:

> An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process (see *McCamus*, at pp. 426-27 and 429; *Crawford*, at p. 143; *Chen-Wishart* (1989), at p. 31; *Morrison*, at p. 713; *Gustafson*, at para. 45; *Hess v. Thomas Estate*, 2019 SKCA 26, 433 D.L.R (4th) 60, at para. 77; *Blomley v. Ryan* (1956), 99 C.L.R. 362 (H.C.A.), at p. 392; *Commercial Bank of Australia*, at pp. 462-63 and 477-78; [page163] *Bartle v. GE Custodians*, [2010] NZCA 174, [2010] 3 N.Z.L.R. 601, at para. 166).
>
> There are no "rigid limitations" on the types of inequality that fit this description (*McCamus*, at p. 429). Differences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes (*McInnes*, at pp. 524-25). Professor McInnes describes the diversity of possible disadvantages as follows:
>
> > Equity is prepared to act on a wide variety of transactional weaknesses. Those weaknesses may be personal (i.e., characteristics of the claimant generally) or circumstantial (i.e., vulnerabilities peculiar to certain situations). The relevant disability may stem from the claimant's "purely cognitive, deliberative or informational capabilities and opportunities", so as to preclude "a worthwhile judgment as to what is in his best interest". Alternatively, the disability may consist of the fact that, in the circumstances, the claimant was "a seriously volitionally impaired or desperately needy person", and therefore was specially disadvantaged because of "the contingencies of the moment". [Emphasis in original; footnotes omitted; p. 525.]
> >
> > (See also *Chen-Wishart* (2018), at p. 363.)
>
> These disadvantages need not be so serious as to negate the capacity to enter a technically valid contract (*Chen-Wishart* (2018), at p. 340; see also *McInnes*, at pp. 525-26).

[83] At paras. 74 to 78 of *Uber*, the majority discussed improvident bargains:

> A bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable (see *McCamus*, at pp. 426-27; *Chen-Wishart* (1989), at p. 51; *Benson*, at p. 187; see also Waddams (2017), at p. 303; Stephen Waddams, Principle and Policy in Contract Law: Competing or Complementary

> Concepts? (2011), at pp. 87 and [page166] 121-22). Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to "escape from a contract when their circumstances are such that the agreement now works a hardship upon them" (John-Paul F. Bogden, "On the 'Agreement Most Foul': A Reconsideration of the Doctrine of Unconscionability" (1997), 25 Man. L.J. 187, at p. 202 (emphasis in original)).
>
> Improvidence must be assessed contextually (*McInnes*, at p. 528). In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties (see *Chen-Wishart* (1989), at pp. 51-56; *McInnes*, at pp. 528-29; *Reiter*, at pp. 417-18).
>
> For a person who is in desperate circumstances, for example, almost any agreement will be an improvement over the status quo. In these circumstances, the emphasis in assessing improvidence should be on whether the stronger party has been unduly enriched. This could occur where the price of goods or services departs significantly from the usual market price.
>
> Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or appreciate. These terms are unfair when, given the context, they flout the "reasonable expectation" of the weaker party (see *Swan, Adamski and Na*, at pp. 993-94) or cause an "unfair surprise" (American Law Institute and National Conference of Commissioners on Uniform State Laws, Proposed Amendments to Uniform Commercial Code Article 2 - Sales: With Prefatory Note and Proposed Comments (2002), at p. 40). This is an objective standard, albeit one that has regard to the context.
>
> Because improvidence can take so many forms, this exercise cannot be reduced to an exact science. When judges apply equitable concepts, they are trusted to "mete out situationally and doctrinally appropriate justice" (*Rotman*, at p. 535). Fairness, the foundational premise and goal of equity, is inherently contextual, not easily framed by formulae or enhanced by adjectives, and necessarily dependent on the circumstances.

[84] At paras. 84 and 85, the majority in *Uber* explained why unconscionability did not require that the stronger party knowingly take advantage of the weaker one:

> Unconscionability, moreover, can be established without proof that the stronger party knowingly took advantage of the weaker. Such a requirement is closely associated with theories of unconscionability that focus on wrongdoing by the defendant (see *Boustany*, at p. 6). But unconscionability can be triggered without wrongdoing. As Professor Waddams compellingly argues:
>
> > The phrases 'unconscionable conduct', 'unconscionable behaviour' and 'unconscionable dealing' lack clarity, are unhistorical insofar as they

> imply the need for proof of wrongdoing, and have been unduly restrictive.
>
> (*Waddams* (2019), at pp. 118-19; see also *Benson*, at p. 188; Smith, at pp. 360-62.)

> We agree. One party knowingly or deliberately taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, but it is not essential for a finding of unconscionability. Such a requirement improperly emphasizes the state of mind of the stronger party, rather than the protection of the more vulnerable. This Court's decisions leave no doubt that unconscionability focuses on the latter purpose. Parties cannot expect courts to enforce improvident bargains formed in situations of inequality of bargaining power; a weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation. A rigid requirement based on the stronger party's state of mind would also erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate.

[85] In this case, there can be no doubt that the plaintiff suffered from unequal bargaining power relative to Lafarge at the time the release was signed. The plaintiff had just returned from short-term disability, and was in a position where his income was going to be lost as a result of his termination. Lafarge is a large and presumably profitable corporation. There is no realistic possibility, therefore, that the bargaining power was anything but unequal in this situation.

[86] As regards the allegedly improvident bargain, there appears to be nothing improper with the consideration afforded the plaintiff as a bargain for signing the release. He received two months salary which, as a two-year employee in a non-senior role, is not inherently inappropriate compensation upon termination: see s. 57 *Employment Standards Act* 2000, S.O. 2000, c. 41.

[87] The plaintiff argues, however, that since the release covers damages suffered as a result of workplace harassment, the bargain was unconscionable as the plaintiff forwent a considerable quantum of money in a potential damages claim. This opportunity lost thus represents an improvident bargain.

[88] The plaintiff's argument assumes that:

a. There was workplace harassment;

b. That the plaintiff suffered damages as a result of same; and

c. That releasing Lafarge from this damage claim was disproportionate to two-months salary.

[89] As was conceded by Lafarge, the existence of the harassment is made out for the purposes of these motions. However, Lafarge contends that the plaintiff's damage claim is

questionable at best based on the evidence filed by Mr. Manuel. First, there is no admissible medical evidence that Mr. Manuel in fact suffered from PTSD. Second, Lafarge submits that Mr. Manuel's alleged PTSD symptoms – assuming they existed - may not flow from the Incident. Without evidence of causation, there is no claim for damages and there is thus no improvident bargain. In order to bridge the causation gap, Lafarge submits that the plaintiff would have had to have filed expert evidence upon which I could rely to find that the plaintiff's alleged symptoms were caused by the Incident. As noted earlier in these reasons, the plaintiff filed no such evidence.

[90] I agree with Lafarge.

[91] The nexus between Mr. Manuel's alleged symptoms and the Incident are too remote to ground a claim for damages based upon the evidence filed. As noted earlier, the plaintiff's gave inconsistent evidence regarding his capacity and his evidence about a May 2016 diagnosis was contradicted by hospital records. I will not therefore accept the plaintiff's evidence in the absence of corroboration. Further, the Incident occurred over a year prior to termination. The lack of admissible evidence linking the plaintiff's alleged PTSD symptomology to the Incident is such that I cannot find that Mr. Manuel's apparent condition was caused by the Incident. There is thus no evidence that the release improvidently thwarted Mr. Manuel's claim for damages. In the absence of sufficient evidence linking Mr. Manuel's alleged symptomology to the Incident, the plaintiff has no case other than his bald statements.

[92] There is no genuine issue for trial.

The Use of Expanded Powers Under Rule 20

[93] In this case, there would be no benefit to the parties or to the court were I to engage the additional fact-finding powers as described in Rule 20.04, and as explained in *Hryniak v. Mauldin*. First, and as noted earlier in these reasons, the plaintiff must "lead trump or risk losing". In this case, the plaintiff failed to file sufficient admissible evidence to support the contention that he has PTSD caused by the Incident. This evidential failure thwarts his claims of incapacity, duress and unconscionability. There is thus no evidential basis upon which I can draw inferences as per rule 20.04(2.1) of the *Rules of Civil Procedure* and no basis to order a mini-trial as per rule 20.04(2.2).

The Lafarge Motion

[94] Lafarge further submits that the release is enforceable and that its summary judgment motion should be granted because there is no evidence that the release can be set aside.

[95] I agree.

[96] The plaintiff deposed that he suffered from panic attacks, nightmares, and flashbacks but did not file any evidence that these symptoms were such that he was incapable of signing the release but for his bald statement. Given his inconsistent evidence, I do not afford his statements much weight. The plaintiff's contemporaneous medical file makes no reference

of PTSD or the Incident. While the plaintiff was on short-term disability, was hospitalized for heart issues, and suffered Mr. Christianson's conduct more than a year prior, nothing in the evidence filed suggests that plaintiff lacked capacity when he signed the release. Indeed, Mr. Manuel effectively admitted that he was capable of informed choice as evidenced by his decision to accept a salary continuation as opposed to a lump sum payment.

[97] Further, there is also no evidence that the plaintiff suffered a coercion of will such that the doctrine of duress applies.

[98] Finally, the plaintiff failed to furnish sufficient admissible evidence that his hospitalization and short-term disability were in any way related to the Incident, other than the plaintiff's conclusory statements which were informed by inadmissible evidence. As such, the release cannot be seen as being unconscionable because the plaintiff has not furnished sufficient evidence capable of suggesting that there is a genuine issue for trial that he suffered damages as a result of the Incident.

[99] The plaintiff's evidence therefore does not reach the levels described in *Sanzone v. Schechter* whereby the plaintiff has shown that there is a genuine issue for trial in the face of a presumptively enforceable settlement as described in *Deschenes v. Sylvestre Estate*.

[100] In other words, the plaintiff "lead trump" and failed to provide an evidentiary basis to establish that there is a genuine issue for trial that:

a. He lacked capacity to sign the release;

b. He signed the release under duress; or

c. The release was unconscionable.

CONCLUSION

[101] Mr. Manuel's summary judgment motion is dismissed.

[102] Lafarge's summary judgment is granted. The release signed by the plaintiff and Lafarge is binding.

[103] The statement of claim is hereby dismissed.

COSTS

[104] The parties will provide me with cost submissions no longer than 5 pages (excluding attachments) within 30 days of today's date.

Varpio J.

Released: July 10, 2024

CITATION: Manuel v. Lafarge et al., 2024 ONSC 3790
COURT FILE NO.: 27525/17
DATE: 2024-07-09

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TERRENCE MANUEL

- And –

LAFARGE CANADA INC., The Canada Life Assurance Company and KEVIN CHRISTIANSON

REASONS ON SUMMARY JUDGMENT MOTION

Varpio J.

Released: July 10, 2024