

Factors in obtaining summary judgment

By **James R.G. Cook**

Law360 Canada (March 5, 2025, 1:21 PM EST) -- While motions for summary judgment may be unsuitable if there are contested issues involving credibility or significant facts, Rules 20.04(2.1) and (2.2) of the *Ontario Rules of Civil Procedure* provide a motion judge with the discretion to determine if the need for a trial can be avoided by weighing the evidence, evaluating the credibility of a deponent, or drawing any reasonable inference from the evidence. One additional factor that is often considered by the motion judge in such cases is whether all parties have agreed to have matter determined by summary judgment.

This situation was demonstrated by the summary judgment decision in *Longarini v. Llyod*, 2025 ONSC 974.



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The plaintiff in the case was a 50 per cent shareholder in a company which operated legal cannabis dispensaries. She had been embroiled in a dispute with the other 50 per cent shareholder which resulted in litigation, including an application under the *Ontario Business Corporations Act* (OBCA), a defamation action, and a Human Rights Tribunal application. The defendant lawyers acted for the plaintiff.

After their relationship broke down, the plaintiff sued the lawyers for breach of fiduciary duty and negligence, seeking to recover costs that had been awarded against her in the proceedings, legal fees and other damages she claimed to have suffered because of their conduct. She moved for summary judgment of her claim.

As the moving party, the plaintiff had the initial burden to prove there were no issues requiring a trial before the burden shifted to the responding defendants to establish whether there were any issues requiring a trial: *Sanzone v. Schechter*, 2016 ONCA 566, at paragraph 30.

Importantly, the defendants did not dispute that the claims could be decided by way of summary

judgment based on the evidentiary affidavit record filed by the parties. In fact, the defendants sought their own summary judgment by way of “boomerang” order to dismiss the plaintiff’s action against them.

The motion judge reviewed the affidavits filed for the motion and commented that all of them contained “hyperbole and overreach” and that the credibility of all parties was undermined by the documentary record. The plaintiff made assertions in her affidavit which were not factually true, and overstated or misstated facts. The defendants’ affidavits disguised argument as fact, vouched for their own credibility, and were filled with bald assertions and conclusory statements rather than facts.

Notwithstanding these issues, however, the motion judge determined that the necessary findings of fact and inferences could be drawn from the evidence which the parties had filed (or not filed). Any disputed facts that could not be determined on the record were not ones that went to the core of the dispute. As a result, summary judgment was an appropriate procedure to determine the action.

The motion judge determined that the plaintiff had not established any breaches of fiduciary duty. The hallmarks of such a claim, such as a lawyer failing to disclose material information to a client, misuse of client funds, or failing to disclose secret profits, were not present.

The motion judge therefore focused on the claim in negligence. Part of the defence raised by the lawyers involved the scope of their retainer, which they argued was not to provide legal services in the litigation but was instead to assist the plaintiff with the sale of her shares in the cannabis business.

The motion judge did not accept this position. The lawyers had represented the plaintiff in court, on court documents, and in communications with opposing counsel. In the motion judge’s view, virtually all the evidence filed on the motion demonstrated that the defendants were providing legal services in the context of litigation involving the plaintiff.

Further undermining the position of the defendants was that they submitted and relied upon the lower court decision of *Ristimaki v. Cooper*, [2004] O.J. No. 2699, which considered and dismissed a negligence claim against a lawyer. The defendants did not provide the motion judge with the decision of the Court of Appeal which overturned the decision: *Ristimaki v. Cooper*, [2006] O.J. No. 1559. In the motion judge’s view, the defendants had breached a duty to warn their client of risks of a course of action discussed by the court in that case.

The defendants’ breach of the standard of care exposed the plaintiff to costs that were directly related to their conduct of the litigation. Among other issues, the court in the OBCA proceeding awarded costs against the plaintiff on an elevated scale for:

- not putting forward evidence from the plaintiff and instead to relying on affidavits that resulted in additional work and additional time at the hearing;
- sending a threatening letter to a witness;
- refusing to produce the plaintiff to be examined in advance of a motion;
- vitriolic and improper communications sent to the other party’s lawyer;
- advancing irrelevant and unsustainable arguments;
- making submissions on issues that had already been determined, thereby lengthening the hearing; and
- late filing of materials, leading to wasted costs.

Overall, the costs were ordered to sanction inappropriate behaviour by litigants in their conduct of the proceedings. In the motion judge’s view, the above conduct was attributable to the lawyers since it exposed the plaintiff to the elevated costs award. This amounted to a breach of the standard of care for which the defendants were liable.

Further, the defendants’ breach of the standard of care concerning the evidence filed on behalf of the plaintiff also deprived her of the opportunity of successfully resisting a motion brought by the other shareholder that could have changed the course of the litigation. However, these costs could not be determined with precision. The motion judge ultimately fixed damages with respect to the costs

arising out of the OBCA proceedings at \$26,500.

The plaintiff's claim for the loss of her shareholder assets was otherwise dismissed as the defendants did not cause or create the conflict or the shareholder litigation.

With respect to the defamation action, the motion judge determined that there were no costs that were connected to the defendants' breach of the standard of care.

Lastly, the motion judge found that there was no medical evidence in the form of expert reports or otherwise connecting any psychological harm to the conduct of the defendants. If anything, the evidence was that if the plaintiff suffered any harm, it was because of the alleged improper conduct of the other shareholder.

In the result, the plaintiff's summary judgment motion was granted and her total damages were fixed at \$41,000, plus pre-judgment interest, for the defendants' breach of the standard of care.

The decision shows that even in cases where credibility or material facts may be in dispute, the court may determine the matter by way of summary judgment. A key factor is whether the court is satisfied that the parties had sufficient opportunity to "put their best foot forward" and file all the evidence they deemed to be required by way of affidavits and out-of-court examinations. In the motion judge's view, the court could make a decision to resolve the proceedings based on the record before it since neither side argued that there was additional relevant evidence that needed to be adduced at a full trial.

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