SUPREME COURT OF NOVA SCOTIA

Citation: *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman*, 2018 NSSC 47

Date: 20180711
Docket: Hfx No. 270401
Registry: Halifax

Between:

Abbott and Haliburton Company Limited; A. W. Allen & Son Limited; Berwick Building Supplies Limited; Bishop's Falls Building Supplies Limited; Arthur Boudreau & Fils Ltée; Brennan Contractors & Supplies Ltd.; F. J. Brideau & Fils Limitee; Cabot Building Supplies Company (1988) Limited; Robert Churchill Building Supplies Limited; CDL Holdings Limited, Formerly Chester Dawe Limited; Fraser Supplies (1980) Ltd.; R. D. Gillis Building Supplies Limited; Yvon Godin Ltd.; Truro Wood Industries Limited/Home Care Properties Limited; Hann's Hardware and Sporting Goods Limited; Harbour Breton Building Supplies Limited; Hillier's Trades Limited; Hubcraft Building Supplies Limited; Lumbermart Limited; Maple Leaf Farm Supplies Limited; S. W. Mifflin Ltd.; Nauss Brothers Limited; O'Leary Farmers' Co-operative Ass'n., Ltd.; Pellerin Building Supplies Inc.; Pleasant Supplies Incorporated; J. I. Pritchett & Sons Limited; Centre Multi-Décor de Richibucto Ltée; U. J. Robichaud & Sons Woodworkers Limited; La Quincaillerie Saint-Louis Ltée; R & J Swinamer's Supplies Limited; 508686 N.B. Inc. Operating as T.N.T. Insulation and Building Supplies; Taylor Lumber and Building Supplies Limited; Two by Four Lumber Sales Ltd.; Walbourne Enterprises Ltd., Western Bay Hardware Limited; White's Construction Limited; D. J. Williams and Sons Limited; and Woodland Building Supplies Limited

Plaintiffs as Respondents

v.

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess

Defendants as Applicants

Judge: The Honourable Justice Ann E. Smith

Heard: November 15, 16, 17, 2017, in Halifax, Nova Scotia

Additional Written Submissions: Plaintiffs-January 11, 2018; Defendants-January 12, 2018

Counsel: Brian F. P. Murphy, Q.C., for Plaintiffs as Respondents
Alan L. W. D'Silva, Q.C.; Aaron Kreaden, for Defendants as Applicants

By the Court:

Introduction

[1] The Defendants move for summary judgment on evidence pursuant to *Civil Procedure Rule 13.04*.

[2] For the reasons which follow, I find that the Defendants shall be granted summary judgment and the Plaintiffs' action dismissed. The Plaintiffs led no evidence in support of three critical elements of their negligence claim; i.e., (1) that the Defendants owed them a duty of care, (2) that they suffered a loss as a result of the Defendants' breach of the applicable standard of care and (3) that their loss was caused in fact and in law by the Defendants' breach.

Background

[3] This action has been ongoing for over ten years. It has resulted in a decision of the Supreme Court of Canada which provides a framework for analyzing the admissibility of expert evidence.

[4] The claim against the Defendants is framed in professional negligence. The corporate Defendant, White Burgess Langille Inman (WBLI), is a public accounting firm. During the years 1980 to 2004, WBLI was the external auditor of a now defunct company, A.W.A.R.D. Wholesale Distributors Limited (AWARD). The individual Defendant, Mr. Burgess, was a partner of WBLI and its lead audit partner for AWARD starting in 1995. Mr. Burgess passed away in September, 2016.

[5] Each of the Plaintiffs was an Atlantic Canadian independently-owned building supply store and a shareholder of AWARD. AWARD was incorporated pursuant to the *Canadian Business Corporation Act* ("*CBCA*") in 1980 to act as a buying agent for its shareholders, with a mandate to centralize purchasing. AWARD was able to pass along rebates to the shareholders by volume purchasing. AWARD paid the suppliers and the shareholders would reimburse AWARD.

[6] In 2006 AWARD retained a new accounting firm, Grant Thornton LLP, to do a review of its 2005 financial statements. Grant Thornton identified what it said

were significant problems with the work of WBLI. AWARD's shareholders eventually alleged that between 1995 and 2004 rebate money had been misallocated by AWARD's management. They claimed that Mr. Burgess and WBLI were negligent in failing to recognize and report this in AWARD's financial statements.

[7] In 2006 the shareholder members of AWARD sued WBLI and Mr. Burgess for their alleged losses. They alleged that Mr. Burgess, as external auditor, breached duties they claim he owed to them. WBLI and Mr. Burgess defend the claim on the basis that they owed no duty in law to the shareholder members, and in any event did not breach the required standard of care in carrying out their work.

The History of the Proceeding

[8] The Defendants originally filed for summary judgment on evidence in August, 2010. They filed the affidavit of Mr. Burgess in support, which provided a detailed account of the work performed for AWARD and reasons why he said that work fully complied with accounting standards. The Defendants also sought summary judgment on an amended claim which the Plaintiffs were seeking leave to file. The amended claim would have, among other things, added AWARD as a plaintiff and/or reformulated the matter as a derivative action.

[9] The Plaintiffs chose not to proceed with the motion to add AWARD as a plaintiff or to reframe the claim as a derivative action.

[10] In response to the Defendants' motion, the Plaintiffs filed the affidavit of Mr. Fred O'Hearn, the principal of one of the shareholder members. They also filed the affidavit of Ms. Susan MacMillan. Ms. MacMillan was a forensic accountant at the time. In this affidavit, Ms. MacMillan gives expert evidence concerning the various ways she says Mr. Burgess failed to maintain independence from the management of AWARD and how, during the years 1993 to 2004, he allegedly departed from Generally Accepted Accounting Principles (GAAP) and Generally Accepted Auditing Standards (GAAS). The Defendants filed a responding expert's affidavit from Jim Muccilli, a partner with Soberman LLP, an accounting firm in Toronto.

[11] The summary judgment motion was eventually scheduled for hearing before the Honourable Justice Arthur Pickup of this court on March 26, 2012. However, the summary judgment motion on the merits was not completed. Rather, the Defendants moved to strike both the O'Hearn and MacMillan affidavits.

Ms. MacMillan was cross-examined on her qualifications, including the issue of independence. Justice Pickup reserved his decision and did not hear argument on the summary judgment motion.

[12] Ms. MacMillan is now retired, but in 2010 when she swore her affidavit, she was a partner with Grant Thornton. The Defendants claimed that Ms. MacMillan was in a conflict of interest since they saw Grant Thornton's advice to the Plaintiffs; i.e., that Mr. Burgess and WBLI failed them, as being central to the litigation.

[13] Pickup J. agreed and struck the MacMillan affidavit. He also struck the O'Hearn affidavit, but on a different basis. Justice Pickup found that the O'Hearn affidavit was "fundamentally defective", being replete with inadmissible hearsay, opinion and innuendo.

[14] On appeal to the Nova Scotia Court of Appeal, the majority held that Pickup J. erred in law in finding Ms. MacMillan's evidence inadmissible. Pickup J.'s decision to strike the O'Hearn affidavit was not overturned. The Defendants were granted leave to appeal the decision to the Supreme Court of Canada.

[15] In April, 2015, the Supreme Court released its decision (*White Burgess Langille Inman v. Abbott and Haliburton*, 2015 SCC 23 (per Cromwell J.)). The Court's decision was unanimous. The Court held that the impartiality and independence of expert witnesses is but one factor for a court to consider when considering whether opinion evidence is admissible. The Court said that:

> …expert witnesses have a duty to the court to give fair, objective and non-partisan evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. (paragraph 10)

[16] A biased expert is not qualified to give opinion evidence. Bias not severe enough to disqualify the witness can be considered as a matter of weight. (paragraphs 10 and 53)

[17] After the release of this decision, the Defendants filed a motion with the Supreme Court of Canada seeking a rehearing on the issue, as they framed it, of "the extent to which Ms. MacMillan could offer an expert opinion on the work performed by her partners at Grant Thornton." In July, 2015 the Supreme Court of Canada dismissed the Defendants' motion for a rehearing.

The December 7, 2016 Decision of Duncan J.

[18] Justice Patrick Duncan of this Court was assigned to be the case management judge on this file. During a case management conference with Justice Duncan on June 25, 2015, the Plaintiffs' counsel, Mr. Murphy, advised that it was the Plaintiffs' intention to recall Ms. MacMillan for the purpose of giving expert opinion evidence in the Defendants' summary judgment motion when that motion continued.

[19] In August, 2015 the Plaintiffs advised that they intended to seek leave to file two further affidavits on the summary judgment motion, in essence to replace the O'Hearn affidavit which had been struck.

[20] In their reply brief on the motion, their counsel says,

> The Plaintiffs argue that it is necessary to include affidavit evidence from the individual Plaintiffs who relied upon the statements of the Defendants, to their detriment, in a Summary Judgment motion. By definition, this motion would be determinative, and it cannot be that an equitable decision be made without the statements of those being considered.

In their main brief on the motion, the Plaintiffs submitted that the two proposed affidavits "go a long way toward putting the Plaintiffs' 'best foot forward'."

[21] In correspondence to the Defendants' counsel dated October 3, 2015, the Plaintiffs' counsel, Mr. Murphy, advised that he had instructions not to proceed with a motion to amend the claim to add AWARD as a party and/or to have AWARD start a derivative action.

[22] On February 11, 2016 Justice Duncan heard the Plaintiffs' motion for leave to file two further affidavits on the summary judgment motion (*Abbott and Haliburton v. WBLI*, 2016 NSSC 335). He dismissed the motion. Because of the significance of his ruling and the impact on the Plaintiffs' position, it is important to set out key aspects of Justice Duncan's reasoning in his decision dated December 7, 2016.

[23] At paragraph 10 of his decision, Justice Duncan sets out the Plaintiffs' position:

> [10] The plaintiffs seek to admit the affidavit evidence of Lloyd Hillier and Tim Tomkins as part of their response to the summary judgement motion. The

> affidavits in question were sworn after the matter was returned from the Supreme Court of Canada. In support of this motion the plaintiffs rely upon Rules 2.03, 23.11 and 23.12.
>
> [11] The proposed evidence is presented to demonstrate that there are material facts in dispute which the court needs to be aware of in determining whether the matter should proceed to trial or conclude with the summary judgment motion. In short, the plaintiffs say that the affidavit evidence is reliable and necessary to fulfill the plaintiffs' responsibility to "put its best foot forward" in responding to the summary judgement motion.
>
> [12] The plaintiffs further submit that the court has jurisdiction and a discretion to grant leave to file the affidavits; that to do so causes no prejudice to the defendants and that to fail to permit the affidavits into evidence would deny the plaintiffs the opportunity to speak to their reliance on defendants' representations to the plaintiffs which are "vital" to the plaintiffs' case.
>
> (emphasis added)

[24] In his decision, Justice Duncan notes that in paragraphs 15 and 16 of the Further Amended Statement of Claim (December 8, 2006) ("the Claim") the Plaintiffs plead reliance on the accuracy of the Defendants' audited financial reports and that such reliance was reasonable. The Plaintiffs allege that a duty of care was owed to them by the Defendants, that the Defendants breached that duty and they suffered a monetary loss as a result.

[25] Duncan J. reviewed the chronology of the case in order to put the Plaintiffs' motion in context:

> [38] An important aspect of the opposition to this motion is found in the chronology of the case. The action was commenced in 2006 and since that time has had two amendments to the Statement of Claim and one further proposed amendment that has now been abandoned.
>
> [39] The claim is a significant one and the defendants complain that the plaintiff has consistently contributed to delay over the past 10 years by, among other things, missing court imposed timelines.
>
> [40] Arising from two case management conferences in June 2010 I directed, among other things, that the summary judgement motion hearing would be held November 8-10, 2010 and that the defendant's motion documents should be filed on or before August 6, 2010 with supporting affidavits. The defendants did file

the motion for summary judgment with the supporting affidavit of Brian Burgess, on August 13, 2010.

[41] The plaintiffs were required to file their reply affidavits by August 27, 2010. It was only on September 17, 2010 that the plaintiffs delivered to the defendant an affidavit of Susan MacMillan offering expert opinion evidence. There had been no prior notice that the plaintiffs were intending to adduce expert opinion evidence. The plaintiffs did not file affidavits from fact witnesses, such as those in issue now.

[42] As a result of this development a further case management conference was convened on October 21, 2010 at which time the summary judgment motion hearing was adjourned to January 24, 2011. There was still no mention by counsel for the plaintiffs that he intended to present fact witness affidavits.

[43] On January 14, 2011, just 10 days before the date set for hearing of the motion for summary judgment, counsel for the plaintiffs advised that they had "inadvertently failed to serve... the affidavit of Fred O'Hearn sworn in September 10, 2010". It is noteworthy that this took place after the plaintiffs had received all of the defendants' materials required in support of their motion, including their written brief of argument. Further, counsel for the plaintiffs indicated that Mr. O'Hearn would not be available for cross-examination at the hearing but that the plaintiffs wanted the hearing to proceed as scheduled, with the defendants' counsel conducting cross examination of Mr. O'Hearn at some later date.

[44] This was unacceptable to the defendants for obvious reasons. The affidavit of Mr. O'Hearn was filed months late and it was the first and only fact witness affidavit put forward by the plaintiffs. There was insufficient time in which to prepare a reply to the affidavit.

[45] As result of this development, a conference was convened with Justice Allan Boudreau on January 21, 2011. He was scheduled to hear the summary judgment motion. The parties agreed to enter into a Consent Order that included the following terms:

1. The motion is adjourned to mutually convenient dates, to be determined at a date assignment conference;
2. The plaintiffs are not permitted to file any further material or evidence in respect of the Motion, except that the plaintiffs may file an amended affidavit of Fred O'Hearn (the "Amended O'Hearn Affidavit"), provided that the same is filed and served by March 4, 2011.

> [46] The Consent Order was signed by Justice Allan Boudreau and was issued February 23, 2011. On March 3, 2011, Mr. O'Hearn swore an amended affidavit.
>
> [47] At an on the record case management conference of September 8, 2011, the summary judgment motion was rescheduled for hearing on March 26, 27 and 28, 2012. I gave a direction, which was later committed to writing in a letter dated September 9, 2011 (amended September 15, 2011), which stated:
>
> > The parties will not be permitted to file further affidavit evidence. The Defendant will be permitted to file an amended brief in support of its motion for summary judgment which brief must be filed on or before February 24, 2012.
> >
> > (emphasis added)

[26] Justice Duncan goes on to recount the motion to strike the MacMillan affidavit and the amended affidavit of Mr. O'Hearn before Justice Pickup in 2012 and the subsequent decisions of the Nova Scotia Court of Appeal and the Supreme Court of Canada which I have referred to earlier in this decision. Justice Duncan continues:

> [50] On August 5, 2015 a further case management conference was convened at which time counsel for the plaintiffs indicated that he intended to file new affidavits from five additional witnesses in response to the summary judgment motion. As the defendants would not consent it was determined that the current motion would be necessary. Ultimately, the plaintiffs elected to proceed with a motion seeking leave to admit the affidavits of Messrs. Hillier and Tompkins only.
>
> [51] Impliedly, I am being asked by the plaintiffs to vary my previous direction and the Order of Boudreau J., each of which mandated that no further affidavits would be permitted to be filed on the summary judgment motion.
>
> (emphasis added)

[27] Justice Duncan goes on to note that the Consent Order issued by Justice Boudreau was not appealed, that it remained in force, and the motion failed for that reason. However, Justice Duncan also considered, should he be wrong in his conclusion, whether he should nonetheless exercise his discretion to grant the motion. He concluded that he would refuse to do so. His reasons include the following:

> [69] The plaintiffs submit that they will suffer prejudice if the motion proceeds without these affidavits. That is not plainly apparent at this time. The plaintiffs intend to call Susan MacMillan as an expert witness whose report is based upon her review of business records and financial statements of the defendants. Her report has been in hand for both parties since September 17, 2010. The attempt by the defendants to strike her affidavit on the basis of partiality was ultimately unsuccessful.
>
> [70] The plaintiffs caused two hearings to be adjourned as a result of the late filing of affidavits. One of those, the O'Hearn affidavit, was so defective as to be struck.
>
> [71] The plaintiffs then waited for 2 years following the decision of the Court of Appeal ruling on the O'Hearn affidavit before seeking to introduce new fact witness affidavits. Those witnesses have been available to the plaintiffs from the commencement of this action. Nothing changed over the years except that the plaintiffs came to the view, after the O'Hearn affidavit was struck, that they should try again.
>
> [72] It should be remembered that the plaintiffs did not intend to put forward any fact witness affidavits for the hearing scheduled in November 2010. The Consent Order and this history all influenced my Direction made in September 2010. In short it was time to get this matter done and the parties had had more than ample time to identify and put forward their evidence on the summary judgement motion.
>
> …
>
> [80] As I will discuss later, the current motion - the third time the plaintiffs have attempted to add evidence belatedly- is obviously an attempt to substitute the rejected O'Hearn affidavit with almost identical evidence. The plaintiffs have twice changed and are attempting again to belatedly change the evidentiary basis upon which they intend to defend the motion. In having to adjourn the first two hearing dates it caused inconvenience to the court and to the defendants.
>
> (emphasis added)

[28] Justice Duncan noted that he was "mindful of the concern that a successful summary judgment motion can be determinative of the Plaintiffs' claim." However, he was satisfied in the circumstances that the proposed affidavits should not be admitted. The Plaintiffs did not appeal Justice Duncan's decision.

[29] Justice Duncan goes on to describe the affidavits sought to be admitted as containing inadmissible hearsay and evidence that had been previously ruled to be inadmissible, leading to the striking of the original O'Hearn affidavit.

[30] With that history of the proceeding, I turn to the merits of the motion before the Court.

The Defendants' Motion for Summary Judgment

[31] The Defendants' motion for summary judgment was heard by this Court on November 15-17, 2017. I received additional written submissions from counsel January 11 and 12, 2018 on the effect, if any, of the decision of the Supreme Court of Canada in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 ("*Livent*") on the issues before this Court. The SCC's decision in *Livent* was rendered after the completion of oral argument on this motion for summary judgment, but before the rendering of this Court's decision.

[32] Ms. MacMillan was cross-examined on her affidavit. A few weeks prior to the hearing of the motion, the Plaintiffs' counsel produced Ms. MacMillan's working file in relation to the preparation of her affidavit. The Plaintiffs relied on the affidavit of Ms. MacMillan and the solicitor's affidavit of Myer Rubin. The Defendants relied on the affidavit of Heaven-Leigh Sneddon (legal administrative assistant with Defence counsel's law firm), the affidavit of Jim Muccilli (accountant) and the affidavit of Mr. Burgess.

Issue:

[33] The issue before the Court is whether summary judgment on evidence should be granted to the Defendants.

[34] In the course of hearing the motion, the Defendants also moved to have all, or in the alternative, portions, of Ms. MacMillan's affidavit struck. They argued that newly-disclosed material in Ms. MacMillan's working file (which was not before any level of court previously) demonstrated that Ms. MacMillan was biased and therefore not qualified to be an expert witness.

<u>The Summary Judgment Framework</u>

[35] *Civil Procedure Rule 13.04(1)* requires a judge to grant summary judgment when satisfied of both of the following:

> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

[36] This *Rule* came into effect in February, 2016. Both parties cite the decision of the Nova Scotia Court of Appeal in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 ("*Shannex*") as the leading case interpreting *Rule* 13.04.

[37] Fichaud J.A. at paragraph 33 in *Shannex*, describes how the wording in the new *Rule* incorporates the same rationale that was set out by the Court of Appeal in *Coady v. Burton Canada Co.*, 2013 NSCA 95 (N.S.C.A.) ("*Burton*") and provides a framework as to how to apply the principles in *Burton*.

[38] At paragraph 34, Justice Fichaud sets out the first question which has to be answered: "Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?" Justice Fichaud says that a "material fact" is one that would affect the result. A dispute about an incidental fact; i.e., one that would not affect the outcome, will not derail a summary judgment motion. Accordingly, disputed facts do not necessarily put a stop to summary judgment.

[39] The moving party has the onus to show, by evidence, that there is no genuine issue of material fact, but the "judge's assessment is based on all the evidence from any source." "If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes." (paragraph 34)

[40] At paragraph 36 Justice Fichaud explains what it means for a party responding to a motion for summary judgment to "put his best foot forward":

> **36** "Best foot forward": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact",

> issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.
>
> (emphasis added)

[41] Before applying the analysis around the first question in *Shannex* to the facts before this Court, I return to the allegations set forth in the Statement of Claim.

The Allegations in the Claim

[42] The Plaintiffs' Claim is primarily framed in professional negligence.

[43] The Plaintiffs' allegation that the Defendants owed them a duty of care is set out in paragraph 15 of the Claim. It is as follows:

> The Plaintiffs state that their reliance on the accuracy of the Defendants' Audited Financial Reports during the material period of time was reasonable because the Defendants were paid to certify the accuracy of such reports in the course of their professional duties and were well aware who the Shareholders were and that the Shareholders would be relying on the Audit Reports. The Defendants therefore owed a Duty of Care to the Plaintiff Shareholders which was breached by the Defendants.

[44] In *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 Chief Justice McLachlin reiterated the elements essential to establishing negligence at paragraph 3:

> 3 A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. I shall examine each of these elements of negligence in turn.

[45] Accordingly, for the Plaintiffs to be successful at trial, they will need to establish each of those four elements which are essential to proving negligence.

The Position of the Parties

[46] The Plaintiffs' counsel says that there are genuine disputes over five separate material matters which require a trial:

1) The Defendants' Compliance with GAAS;

2) The Defendant's Compliance with GAAP;

3) The independence of Brian Burgess and WBLI;

4) The intended recipients of the audited financial statements;

5) Whether the audited financial statements properly disclosed the financial state of AWARD.

The Defendants, however, say that each of these matters relate to an issue going solely to standard of care. They say that the Plaintiffs have not led any evidence on essential elements of a negligence claim; i.e., i) that the Defendants owed the Plaintiffs a duty of care, ii) that a breach of the standard of care caused the Plaintiffs to suffer damages and iii) that such damages were caused in fact and law by the Defendants' breach. As such, the Defendants say that this Court should grant summary judgment.

Law and Analysis

[47] Much of the Defendants' argument before this Court focused on the fact that the Plaintiffs are individual shareholders suing a third party auditor in negligence. A key part of their argument as to why the Defendants should be granted summary judgment are the decisions of the Supreme Court of Canada in *Hercules Management Ltd. v. Ernst &* Young, [1997] 2 S.C.R. 165 ("*Hercules*") and *Livent*.

[48] In *Hercules*, the Supreme Court of Canada confirmed that generally auditors do not owe a duty of care to shareholders as individuals and that a claim for auditor's negligence causing harm to the corporation rests with the corporation. Such a claim must be pursued either by the corporation or by way of a derivative action on behalf of the corporation.

[49] *Hercules* started as a summary judgment motion in Manitoba. The first paragraph of the judgment of the Supreme Court, delivered by LaForest J., summarizes the key issues before the Court:

> This appeal arises by way of motion for summary judgment. It concerns the issue of whether and when accountants who perform an audit of a corporation's financial statements owe a duty of care in tort to shareholders of the corporation who claim to have suffered losses in reliance on the audited statements. It also raises the question of whether certain types of claims against auditors may

> properly be brought by shareholders as individuals or whether they must be brought by the corporation in the form of a derivative action.
>
> (emphasis added)

[50] This is the same issue raised by the Plaintiffs in this action – shareholders claiming that external auditors owed them a duty of care and claiming personal losses in reliance on audited statements prepared for the company.

[51] In *Hercules*, shareholders of two companies, Northguard Acceptance Ltd., (NGA) and Northguard Holdings Ltd., (NGH) sued the companies' external auditors, Ernst & Young, in negligence for their personal losses.

[52] When NGA and NGH went into receivership, Mr. Hercules and other shareholders sued Ernst & Young in tort to recover losses in their personal shareholdings. They alleged they would have made different investment decisions had they known the true state of the companies' financial affairs.

[53] A review of paragraph 18 of the Supreme Court of Canada's decision clearly shows that there were disputed facts as to whether the shareholders actually relied on the statements. However, because the Court ultimately determined that no duty of care was owed to the plaintiffs, it did not need to decide whether there was actual reliance or not.

[54] At paragraphs 19 through 21 of the Supreme Court's decision, Justice LaForest describes the appropriate framework for establishing a duty of care in this context.

[55] At paragraph 41 Justice LaForest says that a *prima facie* duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said (a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation and (b) that reliance by the plaintiff, in the circumstances, would be reasonable.

[56] On the facts in *Hercules*, the Court found that a *prima facie* duty of care arose.

[57] The second part of the Court's analysis was to determine whether the *prima facie* duty of care should be negated for any reason.

[58] Justice LaForest discusses this part of the analysis at paragraph 37:

> As discussed earlier, looking to factors such as "knowledge of the plaintiff (or an identifiable class of plaintiffs) on the part of the defendant" and "use of the statements at issue for the precise purpose or transaction for which they were prepared" really amount to an attempt to limit or constrain the scope of the duty of care owed by defendants. If the purpose of the *Anns/Kamloops* test is to determine (a) whether or not a prima facie duty of care exists and (b) whether or not that duty ought to be negated or limited, then factors such as these ought properly to be considered in the second branch of the test once the first branch concerning "proximity" has been found to be satisfied. To my mind, the presence of such factors in a given situation will mean that worries stemming from indeterminacy should not arise, since the scope of potential liability is sufficiently delimited. In other words, in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed.

[59] At paragraph 45 the Court acknowledges that it is reasonably foreseeable that shareholders will rely on statements for a "wide variety" of purposes. On the facts of the case, the auditors knew the identity of all of the shareholders. However, at paragraph 46 Justice LaForest states:

> To arrive at this conclusion without further analysis, however, would be to move too quickly. <u>While knowledge of the plaintiff (or of a limited class of plaintiffs) is undoubtedly a significant factor serving to obviate concerns over indeterminate liability, it is not, alone, sufficient to do so</u>. In my discussion of *Glanzer, Hedley Byrne, and Haig*, supra, I explained that indeterminate liability did not inhere on the specific facts of those cases not only because the defendant knew the identity of the plaintiff (or the class of plaintiffs) who would rely on the statement at issue, but also because the statement itself was used by the plaintiff *for precisely the purpose or transaction for which it was prepared.* <u>The crucial importance of this additional criterion can clearly be seen when one considers that even if the specific identity or class of potential plaintiffs is known to a defendant, use of the defendant's statement for a purpose or transaction other than that for which it was prepared could still lead to indeterminate liability</u>.
>
> (emphasis of the Supreme Court in italics, of this Court by underlining)

[60] The Court then turned to the purpose of the audits and the purposes for which the shareholders relied on them. At paragraph 49 the Court considered the purpose of audited statements in relation to the Manitoba *Corporations Act*:

> <u>To my mind, the standard purpose of providing audit reports to the shareholders of a corporation should be regarded no differently under the analogous provisions</u>

> of the Manitoba *Corporations Act*. Thus, the directors of a corporation are required to place the auditors' report before the shareholders at the annual general meeting in order to permit the shareholders, as a body, to make decisions as to the manner in which they want the corporation to be managed, to assess the performance of the directors and officers, and to decide whether or not they wish to retain the existing management or to have them replaced. On this basis, it may be said that the respondent auditors' purpose in preparing the reports at issue in this was, precisely, to assist the collectivity of shareholders of the audited companies in their task of overseeing management.
>
> (emphasis added)

[61] In the within case, the Claim makes it clear that the audit work was completed pursuant to the provisions of the *Canadian Business Corporations Act*.

[62] In *Hercules*, the Court considered that there were potentially other purposes for which the audit reports were prepared at paragraph 50:

> The appellants, however, submit that, in addition to this statutorily mandated purpose, the respondents further agreed to perform their audits for the purpose of providing the appellants with information on the basis of which they could make personal investment decisions.
>
> (emphasis added)

[63] Similar personal financial losses are claimed in this case at paragraph 16 of the Claim.

[64] In *Hercules*, the Supreme Court concluded that there was no evidence to show that the audit reports were prepared for the purpose of assisting the appellant shareholders to make personal investment decisions. There was no evidence that the reports were prepared for "any purpose other than the standard statutory one." (paragraph 50)

[65] In the within case there is no evidence of any purpose, other than a statutory purpose, for the preparation of the financial reports. Nothing in Ms. MacMillan's affidavit or her oral evidence provides proof that the reports were not prepared in fulfillment of the standard statutory purpose of a *CBCA* audit.

[66] Based on its conclusion that the purpose of the audit reports in *Hercules* were prepared only for the standard statutory purpose, the Supreme Court went on to discuss whether a duty of care was owed personally to the shareholders:

> It follows from the foregoing discussion that the only purpose for which the 1980-82 reports could have been used in such a manner as to give rise to a duty of care on the part of the respondents is as a guide for the shareholders, as a group, in supervising or overseeing management. In assessing whether this was, in fact, the purpose to which the appellants purport to have put the audited reports, it will be useful to take each of the appellants' claims in turn. First, the appellant Hercules seeks compensation for its $600,000 injection of capital into NGA over January and February of 1983 and the appellant Freed seeks damages commensurate with the amount of money he contributed in 1982 to his investment account in NGH. Secondly, all the appellants seek damages for the losses they suffered in the value of their existing shareholdings. (para. 3)
>
> (emphasis added)

[67] In addition to the argument that they relied on the financial reports to make personal financial decisions, the appellants in *Hercules* also argued that they relied on the financial reports in deciding whether or not to make further investments in the audited corporations.

[68] The Supreme Court summarily disposed of this basis for finding a duty of care at paragraph 54:

> To my mind, the first of these submissions suffers from the same difficulties as those regarding the injection of fresh capital by Hercules and Mr. Freed. Whether the reports were relied upon in assessing the prospect of further investments or in evaluating existing investments, the fact remains that the purpose to which the respondents' reports were put, on this claim, concerned individual or personal investment decisions. Given that the reports were not prepared for that purpose, I find for the same reasons as those earlier set out that policy considerations regarding indeterminate liability inhere here and, consequently, that no duty of care is owed in respect of this claim.
>
> (emphasis added)

[69] The *Hercules* appellants also argued that had they received accurate financial reports, they would have been in a better position to supervise management, and avoid the losses which occurred.

[70] This is essentially the same claim set forth by the Plaintiff shareholders in the within case at paragraph 16 of the Claim:

> The Plaintiffs claim against the Defendants for the Defendants' negligence and breach of their Duty of Care to the Plaintiffs in the preparation and issuance of AWARD Audit Reports for the financial years ending December 31, 1995 to and including December 31, 2004. As a direct result of the Defendants' negligence

> and breach of Duty of Care, the Plaintiffs each suffered personal economic losses including the loss of payments of rebates properly owing to them, and the monies that they each had to pay for AWARD's indebtedness when it ceased its business operations. The Plaintiffs each also lost the opportunity to exercise informed and timely control respecting AWARD and the opportunity to assess their continued participation as a Shareholder of AWARD.
>
> (emphasis added)

[71] Justice LaForest in *Hercules*, in the last sentence of paragraph 55, rejects this basis for finding a legal duty of care owed to the shareholder plaintiffs, saying:

> In my view, however, this line of reasoning suffers from a subtle but fundamental flaw.

[72] He goes on to explain:

> As I have already explained, the purpose for which the audit reports were prepared in this case was the standard statutory one of allowing shareholders, *as a group*, to supervise management and to take decisions with respect to matters concerning the proper overall administration *of the corporations*. In other words, it was, as Lord Oliver and Farley J. found in the cases cited above, to permit the shareholders to exercise their role, *as a class*, of overseeing the *corporations'* affairs at their annual general meetings. The purpose of providing the auditor's reports to the appellants, then, may ultimately be said to have been a "collective" one; that is, it was aimed not at protecting the interests of individual shareholders but rather at enabling the shareholders, acting as a group, to safeguard the interests of the corporations themselves. In the appellants' argument, however, the purpose to which the 1980-82 reports were ostensibly put was not that of allowing the shareholders as a class to take decisions in respect of the overall running of the corporation, but rather to allow them, as *individuals*, to monitor management so as to oversee and protect their own personal investments. Indeed, the nature of the appellants' claims (i.e. personal tort claims) *requires* that they assert reliance on the auditors' reports *qua* individual shareholders if they are to recover any personal damages. In so far as it must concern the interests of each individual shareholder, the appellants claim in this regard can really be no different from the other "investment purposes" discussed above, in respect of which the respondents owe no duty of care.
>
> (emphasis that of LaForest, J.)

[73] The Court in *Hercules* also dealt with the argument that the appellants' claims ought to have been brought as a derivative action in accordance with the Rule in *Foss v. Harbottle*, [1843] 67 E.R. 189.

[74] That Rule establishes that it is not the shareholders who have a cause of action for any wrongs done to a corporation, but rather the corporation itself (through management) or by way of a derivative action.

Overview of *Livent*

[75] I accept as accurate, and cite from the Defendants' January 12, 2018 submissions, their description of the decision of the Supreme Court of Canada in *Livent*.

> Livent Inc. ("*Livent*") was the live theatre empire that was run by Garth Drabinsky and Myron Gottlieb throughout much of the 1990's. As determined by the Trial Judge, throughout that period, Drabinsky and Gottlieb (and their accomplices) fraudulently manipulated Livent's books and records to inflate the earnings and profitability of Livent's operations so they could attract hundreds of millions of dollars through the capital markets. Deloitte & Touche ("*Deloitte*") acted as Livent's auditor, and in each year provided its clean audit opinion on Livent's financial statements. In 1998, the fraud was discovered and Livent filed for insolvency protection in Canada and the United States.
>
> Livent, through its special receiver and manager, subsequently commenced an action against Deloitte for damages in breach of contract and negligence arising out of Deloitte's failure to properly apply generally accepted auditing standards and thereby discover the material misstatements in Livent's books, records and financial reporting. After a 68-day trial, The Honourable Mr. Justice Gans of the Ontario Superior Court of Justice awarded Livent damages in the amount of $84,750,000 (excluding interest and costs). The Ontario Court of Appeal upheld the decision, as did a 4-3 majority of the judges of the SCC, with the exception that the SCC accepted the trial judge's alternative date for liability, the effect of which was to reduce Livent's damages to $40,425,000 (excluding interest and costs).
>
> Turning to the reasoning in *Livent*, both sets of opinions of the SCC "agree[d] on the general analytical framework governing negligent misrepresentation." They also each agreed that *Hercules* remained the leading authority on the purpose of a statutory audit, which is "to allow shareholders to collectively supervise management and to take decisions with respect to matters concerning the proper overall administration of the corporation, which permits the shareholders, acting as a group, to safeguard the interests of the corporation." However, in *Livent*, the plaintiff was able to overcome the arguments that defeated the plaintiffs in *Hercules* – and should defeat the plaintiffs in this case. Unlike in *Hercules* and on the *WBLI* Motion where the actions were brought by shareholders to recover for personal losses, the action in *Livent* was brought by the company itself to recover losses that the parties agreed were properly suffered by the corporation. Even then, *Livent* requires plaintiffs go to further – i.e., the more "demanding hurdle" –

> and also establish a sufficient connection between the nature of the auditor's breach and the type of injury for which the plaintiff seeks to recover.
>
> It was on this more onerous step where the majority and minority reasons parted ways. On the facts and evidence before the Court, the majority found that Livent did establish that its losses were sufficiently connected to the types of losses that *Hercules* says are recoverable. On the majority's view:
>
> > In *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, this Court recognized that a statutory audit is prepared to allow shareholders to collectively 'supervise management and to take decisions with respect to matters concerning the proper overall administration of the corporation[n]', which permits 'the shareholders, acting as a group, to safeguard the interests of the corporation[n]'. This describes precisely the function which Livent's shareholders were unable to discharge by reason of Deloitte's negligence. As a consequence, Livent's corporate life was artificially prolonged, resulting in the interim deterioration of its finances. There was a sufficient evidentiary basis for liability based on impaired shareholder supervision. Application of the *Anns/Cooper* framework, coupled with the basis for auditor liability specifically identified by this Court in *Hercules*, would lead us to uphold the trial judge's finding of liability in relation to the negligently prepared statutory audit.
>
> On the other hand, the minority opinion held that Livent failed "to prove that any of the loss it suffered can be attributed to its shareholders' reliance on the negligent 1997 year-end audit report for the purpose of corporate oversight" and would have allowed the appeal on this basis.
>
> [emphasis added]

[76] Both sets of reasons in *Livent* make clear that the proper entity to pursue a claim in negligence against a company's auditor is the company itself and not the shareholders. (paragraphs 58-62)

[77] In my view, *Livent* does not alter the principle from *Hercules* that the duty of care owed by an auditor in preparing a statutory audit of its corporate client is to that client, and does not extend to that company's shareholders, particularly where they seek to recover personal business losses.

[78] Accordingly, shareholders, like the Plaintiffs in this case, can only recover if they fall within an exception to *Hercules*, which requires, among other things, evidence of actual reliance. As the Court stated in *Livent*:

> As a matter of first principles, it must be borne in mind that an injury to the plaintiff in this sort of case flows from the fact that he or she detrimentally relied on the defendant's undertaking, whether it took the form of a representation or the performance of a service (para. 35).

[79] The Plaintiffs' counsel says that "the majority in *Livent* sets out the two determinative factors in the proximity analysis: the defendant's undertaking and the plaintiff's reliance … ." If the Plaintiffs are correct in saying that *Livent* establishes that "the plaintiffs had a right to rely on the defendants to act with reasonable care", the Plaintiffs must still discharge their evidentiary burden to establish that they actually did rely. As I outline later in this decision, the Plaintiffs have failed to discharge that evidentiary burden.

The Evidence Before the Court

[80] I now turn to the evidence before this Court on this motion. I start with the affidavit of R. Brian Burgess, sworn August 13, 2010.

[81] At paragraph 1, Mr. Burgess says that he is a named individual defendant in the action and was at all material times a partner of the defendant WBLI. He says that WBLI served as the external auditor for the corporation, AWARD, for the years ending in 1980 to and including 2004. He swears that he was the partner in charge of the AWARD account for the duration of WBLI's engagement.

[82] At paragraphs 7 and 9, Mr. Burgess says that WBLI was hired on an annual basis by AWARD to "express an opinion on whether the financial statements of AWARD fairly presented the financial position of the company, including the results of its operations, all in accordance with Canadian generally accepted accounting principles ("GAAP")."

[83] Excerpts from the Engagement Letters for the years 1983, 1995, 1999 and 2004 are set out in paragraphs 10 through 13 of Mr. Burgess' affidavit. The 1995 and 2004 refer, respectively, to the opinions being requested on "the company's annual financial statements" and to the auditors being those of "your organization."

[84] Paragraphs 18 through 23 of Mr. Burgess' affidavit provides further evidence that, according to Mr. Burgess, the engagement of WBLI was with AWARD and not the member shareholders.

[85] The evidence adduced by the Plaintiffs through Ms. MacMillan's affidavit confirms that the WBLI audits were not conducted for the individual shareholders, but rather for AWARD. At paragraph 38, Ms. MacMillan's evidence is as follows:

> In the case of the AWARD audit, the terms of the WBLI audit engagement letter were noted as being between the company and WBLI (affidavit of Brian Burgess, paragraph 8). The *Canada Business Corporations Act*, under which AWARD is incorporated, calls for appointment of the auditor by the "Shareholders" at the annual meeting. In the context of AWARD, the "Members" are the "Shareholders". Mr. Burgess confirms this to have been the case for AWARD in paragraph 27 of his affidavit where he states, "At the 2005 AGM, WBLI was, as in previous years, appointed by the Member/Shareholders as independent external auditors to AWARD for the year ending December 31, 2005…".

[86] Ms. MacMillan thereby confirms that the audits at issue were, in the words of LaForest J. in *Hercules*, standard statutory audits. The purpose for which they were prepared was to fulfill the company's *CBCA* requirements.

[87] Turning back to the affidavit of Mr. Burgess, he gives evidence on the issue of reliance. He says at paragraph 24, in part, as follows:

> …I do not know which of AWARD's Member/Shareholders, if any, actually received the Audited Financial Statements. <u>At no time did an AWARD Member/shareholder ever ask me questions about the Audited Financial Statements or to my knowledge, rely on them for personal financial decisions</u>.
>
> (emphasis added)

[88] At paragraph 28 of his affidavit, Mr. Burgess swears:

> To the best of my recollection, none of the Member/Shareholders ever contacted me directly regarding any of the Audited Financial Statements of AWARD, and certainly not in the last 10 years that we were auditors. Similarly, I have no knowledge of any of WBLI's representatives having been contacted by any of AWARD's Member/Shareholders regarding the Audited Financial Statements, or otherwise.

[89] At paragraphs 88 to 90 of his affidavit, Mr. Burgess says why reliance by the Plaintiffs of the financial statements would, in his view, have been "unfounded." His evidence at paragraph 89 and 90 is as follows:

> Although the Audited Financial Statements may have been provided to the Member/Shareholders by Management and/or the Board from time to time, neither I nor anyone else at WBLI was ever advised or told, prior to the

> commencement of the within litigation, that AWARD's Member/Shareholders intended to or did, in fact, rely on the Audited Financial Statements. As the Member/Shareholders were not our clients they should not have been relying on the Audited Financial Statements for their personal financial decisions.
>
> With respect to the particular allegations about the rebates, the Audited Financial Statements were audited by WBLI for AWARD and as such provided only an aggregate report of the Supplier Rebates (defined above herein) owing to the company. They do not contain any individual breakdown with respect to the amount of Supplier Rebates owing to each individual Member/Shareholder. As such, the Audited Financial Statements would not provide individual Member/Shareholders with sufficient information on which to assess the accuracy of their individual rebate amounts. To the extent that any Member/Shareholder relied on the Audited Financial Statements for that purpose, I believe that such reliance was unreasonable.

[90] At this point, I note that the Plaintiffs rely solely on the affidavit of Ms. MacMillan in terms of evidence to defeat this motion for summary judgment. Despite the fact that this motion for summary judgment was filed over ten years ago, the Plaintiffs have not adduced the affidavit of a single one of the 38 Plaintiffs. They have led no evidence as to reliance by any one of those Plaintiffs on the financial statements prepared by WBLI. They have led no evidence on causation; that is, how they say they were harmed by their alleged reliance on statements; or what, if any, damages they suffered as a result.

[91] There was no evidence before the Court to rebut Mr. Burgess' evidence as to whom the reports were prepared for (AWARD), Mr. Burgess' evidence that he had no knowledge of the shareholders relying on them, or his evidence that it would not have been reasonable for them to do so since the shareholders were not WBLI's client.

[92] The Plaintiffs presented no evidence that they received, reviewed and relied upon the financial statements.

[93] I agree with the Defendants' counsel, that the Plaintiffs at this stage in the analysis have, in the words of Bryson J.A. of the Nova Scotia Court of Appeal in *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50, "an obligation to put their 'best foot forward' and tender evidence on all live issues." (paragraph 14)

[94] In *Amirault*, Justice Bryon referred to the decision of the Supreme Court of Canada in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008

SCC 14 (S.C.C.) for the principle that, assuming there has been adequate time for disclosure, "an absence of evidence cannot be overcome by arguing that something might turn up in the future." Bryson J.A. quoted from *Papaschase* as follows at paragraph 15 of the Court of Appeal's decision:

> [19] We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.
>
> (emphasis of Bryson, JA)

[95] To go back to the decision of the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, to be successful in their negligence action, the Plaintiffs must prove: (1) that the Defendants owed them a duty of care; (2) that the Defendants' behavior breached the standard of care; (3) that the Plaintiffs sustained damages; and (4) that the damages were caused in fact and in law by the Defendants' breach.

What is the evidence that a duty of care was owed by the Defendants?

[96] Based on *Hercules* and *Livent* and based on the evidence of Mr. Burgess, the Plaintiffs have not led evidence to show why a duty of care was owed on the facts. They filed no evidence to rebut that of Mr. Burgess and show that they have a real chance of success at trial. They did not lead affidavit evidence to show that the WBLI audits were not standard *CBCA* audits and that the relevant circumstances differ from the facts before the Court in *Hercules*. They did not lead affidavit evidence that the auditors knew the specific purposes for which the shareholders were using the financial statements. That kind of evidence might have rebutted the Burgess evidence and would have gone towards showing a real chance of success at trial.

[97] In the absence of evidence of a duty of care owed, a claim in negligence cannot be made out and is doomed to fail at trial. That was the basis upon which summary judgment was granted in *Hercules*.

What evidence is there that anything the Defendants did, or failed to do, caused a loss to the Plaintiffs?

[98] The Defendants say that there can be no causation because there is no reliance. The Supreme Court of Canada in *Hercules* said that there must be "actual reliance" to make out a claim in negligent misrepresentation or the negligent performance of a service.

[99] In *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32 (S.C.C.) the Supreme Court of Canada set forth the test for causation as follows (paragraph 8):

> The test for showing causation is the "but for" test. The plaintiffs must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.
>
> Whether the test is "reasonable reliance" as in negligent misrepresentation cases, or the "but for" of negligence cases, there must be an evidentiary link between the impugned action and the claimed loss.
>
> (emphasis added)

[100] The Plaintiffs argue that the evidence of Ms. MacMillan establishes that they relied upon the audit reports. I find that her evidence is not a substitute for evidence from the Plaintiffs of actual reliance. Ms. MacMillan's evidence at paragraph 11 of her affidavit is as follows:

> From my review of the information and documents listed in paragraph 3, I have identified a number of matters which cause me to believe certain of the WBLI audits failed to meet Generally Accepted Auditing Standards (GAAS), and the related financial statements to contain material errors resulting from departures from Generally Accepted Accounting Principles (GAAP). I firmly believe, as a result of these failures, both AWARD and its shareholders/members, who should have been able to rely on the subject financial statements in making resource allocation decisions and assessment of management stewardship, were provided instead with financial reporting that did not represent the substance of the entity's financial position or results of its operations.
>
> (emphasis added)

[101] As noted earlier in this decision, Ms. MacMillan's working file in relation to the preparation of her affidavit was provided to the Defendants a few weeks before the hearing of this motion. The file contains a first draft of Ms. MacMillan's affidavit with 'September 13, 2010' handwritten on the top by Ms. MacMillan. The file also contains an email from Ms. MacMillan to Mr. Murphy, the Plaintiffs' counsel, dated September 13, 2010 stating, "Hi Brian, Please find attached for your review a draft of my affidavit. I will be out of the office most of the day tomorrow, but will be checking emails periodically. Thanks, Sue MacMillan."

[102] In Ms. MacMillan's September 13, 2010 draft affidavit, the underlined portions of paragraph 11 are absent. The sentence asserting Ms. MacMillan's belief that the shareholder/members should have been able to rely on the financial statements was added later.

[103] The Defendants say that this "reliance" evidence was added as a result of the email Mr. Murphy sent to Ms. MacMillan on September 14, 2010, the day after she sent him her first draft. A copy of that email was in Ms. MacMillan's working file.

[104] The email with the subject line "Aff", sent from a BlackBerry, reads as follows:

> Thanks for same. Some points:
>
> - needs overall, to be "punchier"
> - need to include that U read the affs refereed (sic) to
> - you were hired by the 38 plaintiffs NOT AWARD
> - after para 7 a general statement that shareholders rely on outside auditors and so do corps…need to repeat the gold standard and why such reliance
> - at each section end, repeat gold standard, "breach" and, reliance and loss, putting in estimated lasses (sic)
> - para 16 "appropriate resource allocation" is good but better it was "breach-reliance-deceit-loss", also if truth had been known the co wd not have attracted new mbrs, lost old ones and maybe have been wound up
> - the restatement of 2004 that GT did went from prof of 30m 6to loss of 5.1mil!
> - no mention of Burgess and the "huddle" where they bought out Macdougall

- ends abruptly…
- will need "flourish" at end…

Happy to discuss with you tomorrow.

(emphasis added)

[105] Ms. MacMillan repeats her assertion that the "shareholders/members… should have been able to rely on the financial statements in making decisions" at paragraph 76 of her Affidavit. The entirety of paragraph 76 was newly added after the draft sent to Mr. Murphy.

[106] I find that Ms. MacMillan's evidence that the shareholders "should have been able to rely on the audits" is not evidence of actual reliance. They failed, in this regard, to put their best foot forward by presenting evidence of actual reliance.

[107] I note that in cross-examination on her affidavit, Ms. MacMillan was unable to identify a single shareholder whom she says relied on the audits. Of course, if she had identified such a person, that evidence would have arguably been inadmissible hearsay.

[108] In addition, I was referred to the transcript of Ms. MacMillan's evidence on cross-examination at the hearing before Justice Pickup on March 26, 2012. Ms. MacMillan was taken to paragraph 5 of her affidavit where she lists "Documents Reviewed and Relied On" and asked:

> Q. Now I take from Paragraph 5 of your affidavit, if you still have it, that you relied on all of this information but there's nothing in here, in your list, which says that you spoke to or relied on any of the thirty-eight plaintiffs. Is that – that's correct, right?
>
> A. In completing this affidavit, that's correct.
>
> …
>
> Q. Well you didn't speak to any of the thirty-eight plaintiffs prior to swearing your affidavit?
>
> A. Ehm, yes.

[109] Further in the cross-examination Ms. MacMillan was again asked about contact she might have had with the Plaintiffs prior to completing her affidavit:

> Q. Okay. And I take it and this, I'm sorry if it sounds like a silly question, but nobody told you it would be a good idea to talk to the plaintiffs in order to

> prepare your affidavit for this motion? Nobody – nobody – nobody counseled you on that one way or the other?
>
> A. Actually, and I should say that, I – we – I had spoken to a couple of the plaintiffs and I was trying to think of one, was I had spoken to Fred O'Hearn and I've spoken to, I can't remember the other individuals but when I stated in here what I was relying on in order to state my – state my opinions, it was at this point in time and what I'm relying on is the information within – within the handbooks, CICA Handbook and within what was presented in WBLI files.
>
> (emphasis added)

[110] Neither this evidence, nor her evidence in cross-examination before this Court, shows that Ms. MacMillan had any personal knowledge of actual reliance by the Plaintiffs on the financial statements.

[111] The Plaintiffs' counsel argued that this was a company where everyone knew each other – that Mr. Burgess knew all of the shareholders, and not a large corporation where the auditors are in a location remote from the business and its shareholders. In *Hercules* on this point, the Court, in engaging with the issue of indeterminate liability of auditors, says, "After all, the respondents knew the very identity of all the appellant shareholders who claim to have relied on the audited financial statements through having acted as NGA's and NGH's auditors for nearly 10 years by the time the first of the audit reports at issue in this appeal was prepared." (paragraph 46)

[112] In *Hercules*, as detailed earlier in this decision, that factor alone (knowledge on the part of the auditors) was not enough to establish a duty of care without more. Although the Plaintiffs offered no evidence on this point, even if Mr. Burgess knew the identity of each of the 38 Plaintiff shareholders, that alone is not enough to defeat this summary judgment motion.

[113] The Applicants moved to strike Ms. MacMillan's affidavit on the basis of bias. They claim that her working file, in particular the September 14, 2010 email received from the Plaintiffs' counsel and the subsequent revisions to her affidavit demonstrate lack of independence on her behalf.

[114] Based on the decision of the Supreme Court of Canada in *WBLI v. Abbott and Haliburton* (*supra*) the Defendants say that Ms. MacMillan's evidence is not impartial, and does not meet the threshold requirement that expert evidence must be fair, objective and non-partisan.

[115] I decline to strike Ms. MacMillan's affidavit. In cross-examination she maintained that she independently reached the opinions she expressed. As noted previously, in my view Ms. MacMillan's evidence only goes to the question of whether the Defendants satisfied the standard of care. Even if Ms. MacMillan's evidence were to be accepted at trial in its entirety, it would have no impact on the other necessary elements of the negligence claim.

What evidence is there that the Plaintiffs suffered damages as a result of the alleged negligence of the Defendants?

[116] There is no evidence before the Court that the Plaintiffs suffered a loss, leaving aside the fact that *Hercules* and *Livent* preclude shareholders from recovering for personal losses, except in limited circumstances, of which, once again, there is no evidence.

[117] The only potential evidence as to loss is found in Ms. MacMillan's affidavit at paragraph 76 where she says:

> ….
>
> The reporting of certain supplier rebates as a reduction of the former member accounts and not recognizing them as revenue, I believe is not in accordance with GAAP. This resulted in an understatement of revenue and net earnings from 1995 to 2005 in the amount of $4,202,228.
>
> (emphasis added)

[118] However, in cross-examination, Ms. MacMillan admitted that she had not calculated the alleged loss at $4,202,228. She did not analyze the effect of her opinion about the understatement of revenue and net earnings to reach the figure of $4,202,228. Rather, she merely inserted that figure from a "Specified Procedures Performed" report prepared by Grant Thornton dated July 17, 2006. Ms. McMillan described this "SPP" report as not providing an opinion on anything, but rather merely taking AWARD's working papers, obtaining the source data and putting it in a schedule. She described the tallying of figures to total "4,202,228" as a "mathematical exercise."

[119] Her evidence on cross examination was that she could give no opinion relating to the calculation of the $4,202,228 amount that she refers to in paragraph 76 of her affidavit.

[120] Accordingly, the Plaintiffs have not led any evidence of loss suffered as a result of the alleged negligence of the Defendants.

[121] If I am wrong, and Ms. MacMillan's evidence is sufficient to show the Plaintiffs suffered a loss, that alone would not defeat the summary judgment motion, given my finding that the Plaintiffs led no evidence that the Defendants owed them a duty of care or that they relied to their detriment on the Defendants' work.

What is the evidence that the Defendants breached the requisite standard of care in preparing the financial statements?

[122] The Plaintiffs have the evidence of Ms. MacMillan. The Defendants have the competing opinion evidence of Mr. Mucelli. There is a dispute as to whether the Defendants met the standard of care. However, that alone does not defeat the Defendants' summary judgment motion.

The Alleged "Breach of Independence Claim"

[123] In his oral submissions, the Plaintiffs' counsel says that the Claim alleges not just negligence on the part of the Defendants, but also a cause of action in "breach of independence" arising from the actions of Mr. Burgess. Plaintiffs' counsel did not provide this Court with any legal or academic support for such a cause of action or case law supporting it.

[124] However, counsel for the Defendants referred me in their submissions to the decision of the Supreme Court of Canada in *Hercules*. The Supreme Court of Canada addressed an argument of the appellants similar to that propounded by the Plaintiffs' counsel; i.e., that a breach of the independence requirements of the Manitoba *Corporations Act* gave rise to a duty of care and an independent right of action in tort. The Court disposed of these arguments: (paragraph 17):

> Thirdly, the appellants allege that the respondent Cox's investments in certain syndicated mortgages administered by NGA and NGH constituted a breach of the statutory independence requirements set out in s. 155 of the Manitoba *Corporations Act* and that such a breach either gives rise to a private cause of action or, alternatively, that it provides an independent basis for finding a duty of care in a tort action. Assuming without deciding that the respondent Cox was in breach of the independence requirements set out in that section, I would agree with Helper J.A. in finding that the section does not, in and of itself give rise to a cause of action in negligence; see *Saskatchewan Wheat Pool v. R.*, [1983] 1

> S.C.R. 205 (S.C.C.). Similarly, I cannot see how breach of the independence requirements could establish a duty of care in tort. This does not mean, of course, that the statutory audit requirements set out in the Manitoba *Corporations Act* are entirely irrelevant to the appellants' claim. Rather, it simply means that a breach of the independence provisions does not, by itself give rise to an independent right of action or to a duty of care.
>
> (emphasis added)

[125] The Plaintiffs' allegations that Mr. Burgess breached statutory duties owed to them does not found an independent action in tort. The Defendants' summary judgment motion cannot be defeated on this basis.

Answers to the "Shannex" Questions

[126] I now return to the four questions which Fichaud J.A. in *Shannex* articulated as governing the summary judgment analysis.

[127] The answer to the first question is that the Defendants have met the onus of establishing that the Claim does not disclose a "genuine issue of material fact, either pure or mixed with a question of law."

[128] The answers to the second, third and fourth questions are that the Claim does not raise an issue of law that this Court should determine or permit to go to trial. The Plaintiffs have not shown that they fall within the limited exceptions established in *Hercules* and *Livent* which allow shareholders to recover from auditors for negligent performance of services because they have not led any evidence of actual reliance; nor, have they led evidence on each of the constituent elements of a claim for professional negligence.

[129] As such, the Plaintiffs have not met their burden of providing evidence to demonstrate that there is "an issue of law with a real chance of success."

Conclusion

[130] The Plaintiffs rely solely on the affidavit of Ms. MacMillan to defeat the Defendants' motion for summary judgment on evidence.

[131] The Plaintiffs were obliged to put their best foot forward by leading evidence to demonstrate that there are material issues of fact and law which require a trial. They provided the evidence of Ms. MacMillan as to standard of care, but

led no evidence on duty of care, causation or loss – all necessary elements to succeed at trial in a negligence claim.

[132] Although the Plaintiffs argued that they be given an opportunity to marshal additional evidence in support of their claim pursuant to Rule *13.04(6)(b)*, I decline to adjourn the hearing for that purpose. This Court cannot assume that there will be additional evidence on the necessary elements to prove negligence at trial if the matter was adjourned. Rather, I must assume that the evidence before me constitutes the Plaintiffs' best evidence on the constituent elements of their claim in negligence.

[133] The Defendants' motion for summary judgment is granted pursuant to *Civil Procedure Rule 13.04* and the Plaintiffs' Claim dismissed, with costs to the Defendants.

[134] If the parties are unable to agree on costs, I will receive written submissions on costs within 30 calendar days of this decision.

Smith, J.