CITATION: **CAMPEAU V. HMTK, 2024 ONSC 1796**
COURT FILE NO.: CV-18-00007782-0000
DATE: 2024 03 26

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FAYE CAMPEAU, administrator of the estate of Raymond Campeau, deceased, FAYE CAMPEAU, personally, JAMIE CAMPEAU and KEVIN CAMPEAU,
Plaintiffs

AND:

HIS MAJESTY THE KING IN RIGHT OF ONTARIO (Ministry of Labour Ontario and its agents or servants Dan Beaulieu, Electrical/Mechanical Inspector, Jill Bennett, Manager, Bart Albanese, Manager, Candys Ballanger-Michaud, Director, Northern Region, Sophie Dennis, Deputy Minister of Labour, and Tim Merla, Professional Engineer, Regional Engineer Professional and Specialized Services, Ontario Ministry of Labour) as represented by the Attorney General of Ontario,
Defendant

BEFORE: P.J. Boucher, R.S.J.

COUNSEL: Fay Smith (aka Faye Campeau), on her own behalf

Andrew Parley & Caroline H. Humphrey, for the Defendant

Charles Sinclair, for Stephen Moreau

HEARD: March 19, 2024

ENDORSEMENT

[1] Fay Smith moves for an order setting aside minutes of settlement and a full and final release. She argues her then counsel, Stephen Moreau, and counsel for the Crown jointly forced her, under duress, to sign the minutes and the full and final release, which the Crown denies.[1]

[2] The parties agree the law I must apply to decide this motion is set out in *Kawartha Capital Corp. v. 1723766 Ontario Limited* 2020 ONCA 763. To succeed, the plaintiff must establish first,

[1] Although the style of cause lists the plaintiff as Faye Campeau, she refers to herself as Fay Smith in the new pleadings, which I follow in this decision. In addition, Fay Smith filed two motions dated January 03, 2023 and March 21, 2023. The latter asks for relief that can only be claimed if the minutes are set aside and accordingly it was not argued.

that she was subjected to pressure that left her with no choice but to submit, and second, that the pressure was illegitimate: *Kawartha Capital*, at para 11.

[3] In determining whether the pressure exerted was such as to leave a party with no choice, the *Kawartha Capital* court set out the following factors to consider, at para. 11:

a) Did the party protest at the time the contract was entered into?

b) Was there an effective alternative course open to the party alleging coercion?

c) Did the party receive independent legal advice?

d) After entering into the contract, did the party take steps to avoid it?

Background

[4] The action was brought in 2018 by Fay Smith and two of her children because of the tragic 2006 workplace death of her husband, Raymond Campeau.

[5] The Crown did not deliver a statement of defence and it was noted in default in January 2020. Default judgment was granted on January 06, 2021. Although the plaintiffs were self-represented when the claim was issued, they subsequently retained Mr. Moreau's firm. He prepared and argued their motion for default judgment.

[6] In February 2021 the Crown delivered a motion to set aside the default judgment. On February 19, 2021, a case conference was held before Thomas R.S.J. The Crown's motion was set for hearing on June 28, 2021.

[7] On June 06, 2021, prior to conducting cross-examinations, the parties consented to an order setting aside the default judgment and agreed to attend a mediation in September 2021. As a condition of setting aside the default judgment, the Crown agreed to pay the plaintiffs' full indemnity costs up to January 06, 2021 (fixed at $105,726.26) as well as partial indemnity costs from January 06, 2021, to May 31, 2021 (fixed at $43,744.74). The record reflects these costs were paid by October 28, 2021.

[8] The mediation took place on September 20, 2021. Minutes of settlement were signed by the parties on September 21, 2021. A full and final release was signed on October 07, 2021 (though only witnessed later that month). The settlement funds were received by Stephen Moreau on November 03, 2021, and the order dismissing the action without costs was issued and entered on November 10, 2021.

[9] Fay Smith, though not her children, moved to set aside the minutes, release and order on January 03, 2023.

Positions of the Parties

[10] Fay Smith submits her counsel and Crown counsel are jointly responsible for coercing her, under duress, into signing the minutes and the full and final release. She denies she received independent legal advice about the resolution. She argues the pressure that was placed upon her at the mediation and thereafter caused her to have 'a major meltdown'.

[11] Evidence of this duress, she submits, includes the following:

a. She was told by her lawyer not to speak or to ask any questions during the mediation;

b. The mediator, the Honourable Justice Dennis O'Connor, worked at a law firm that represents senior Ministry staff. Despite her belief this was a conflict of interest, her counsel and Crown counsel agreed to this mediator;

c. Her counsel normally sent her documents well in advance so that she could consider them carefully. For example, she was provided a month to consider the draft agreement to set aside the default judgment. With respect to the minutes of settlement, she felt she had no time to consider her position;

d. Although she had a week to provide her input for their mediation brief, she was not provided with the Crown's brief in advance;

e. At the mediation, they pressured her to 'throw out numbers' and she did not understand that doing so could lead to a binding agreement;

f. The mediation ended at 5 p.m. without an agreement in place;

g. At 6:10 p.m. the Crown sent draft minutes to her counsel, saying they needed them finalized that day;

h. At 6:30 p.m. her counsel emailed her the proposed agreement, and at 7:15 p.m. he emailed her the draft minutes. She briefly reviewed them but had concerns about a non-disparagement clause which she believed would impact the criminal investigation into her husband's death;

i. At 8:54 p.m. she emailed her counsel reminding him she was travelling back to Sudbury and needed time to respond;

j. The next day her counsel emailed her saying he expected her to sign and that the Crown was pressuring him to respond to the draft minutes. She did not immediately respond to his email because she was preparing to return to

Sudbury from Toronto. She felt pressured by urgency that she believed was manufactured by the lawyers;

k. At 10:45 a.m. she spoke with a lawyer in her counsel's firm and told her she was not comfortable with the non-disparagement clause and had other concerns she wished to discuss with Mr. Moreau, but she was travelling;

l. At 12:21 p.m. her lawyer emailed her saying that he believed she had a binding settlement and that if she did not sign the minutes he would be forced to remove himself from the case. He told her that her claim had zero chance of succeeding and if she chose not to sign the minutes, she would be on her own;

m. Later that day Crown counsel sent an email saying they required the signed minutes by end of day;

n. Around 5 p.m. her lawyer emailed her saying that if she did not sign by 6 p.m. she would have to deal with Crown counsel directly. Because of this 'extreme duress' she signed the minutes when she returned home;

o. She was misled to believe there was a binding agreement after the mediation and she had no choice but to sign the minutes; and

p. She felt she had no other option but to sign the full and final release.

[12] Fay Smith further argues her counsel and Crown counsel forced her into signing the minutes that contained a non-disparagement clause to prevent a criminal investigation, thus covering-up the Ministry's alleged negligent acts and omissions that caused her husband's death.

[13] The Crown submits there is a legally significant difference between a litigant feeling pressured and acting under duress. The former, though unpleasant, is to be expected in litigation. The Crown argues that duress cannot be made out when the facts of this case are viewed through the lens of *Kawartha Capital*.

[14] The Crown disputes that Fay Smith was left with no alternative but to sign the minutes. In the alternative, the Crown submits that the pressure applied in the circumstances was not illegitimate. Finally, the Crown argues that if illegitimate duress is made out, there is no evidence the Crown exerted any of that duress. In other words, duress exerted by counsel for the plaintiff, but not by the Crown, cannot invalidate the minutes of settlement and full and final release.

Analysis

[15] For the following reasons, I find Fay Smith has not established she signed the minutes under duress. A careful review of the record reveals a pattern of detailed, thoughtful independent legal advice. It also sets out a litigation strategy that, over a significant period, explored resolution of the action while defending the Crown's motion.

[16] As would be expected, Stephen Moreau provided some advice that he knew would not find favour with his clients. There is no evidence he ever pressured or rushed the plaintiffs into making decisions or told them what to do; he always left the decisions to them. Nor is there any evidence that any of the plaintiffs ever expressed to their counsel that they felt pressured to decide. For example, when time was requested to make a decision, Mr. Moreau provided it.

[17] I find the pressure described by Fay Smith is no different than the pressure any litigant experiences. It does not rise close to what is required for economic duress. There is often self-doubt and parties wonder if they obtained the best result. They wonder if more can or could have been done.

[18] Further, the evidence does not support Fay Smith's contention that her counsel and counsel for the Crown colluded to cover up Ministry malfeasance and/or nonfeasance. In the end, I find Fay Smith made considered decisions based on the independent legal advice she received. It is significant that it was not until January 2023 that she raised the allegation of duress, despite many opportunities to do so after the mediation concluded.

[19] A summary analysis of Mr. Moreau's continuing efforts on behalf of the plaintiffs and in advising the plaintiffs demonstrates quite clearly that nothing less than professionalism was exercised on their behalf.

January 2021 to September 20, 2021

[20] In an email dated January 14, 2021, the same day Mr. Moreau was contacted by counsel for the Crown, he alerted the plaintiffs to the Crown's intention to move to set aside the default judgment. He raised the hope that their costs to obtain the default judgment would be paid by the Crown if the default judgment was set aside.

[21] Two days later Mr. Moreau sent to the plaintiffs a detailed email responsive to questions raised by one of the plaintiffs. The email also contained additional advice, including the possibility that while discussing their motion, there "may be openings to say, 'look you may win this motion but the humane thing to do is to just settle the whole case quietly'".

[22] On February 18, 2021, Stephen Moreau sent to the plaintiffs an email containing his initial assessment and advice regarding the Crown's motion record. He cogently set out why he believed defending the motion would be "very challenging". He also set out some of the Crown's defences in the action itself, noting they were "very strong". He further asked for instructions from them to pursue global settlement at the right time. He repeated this request the next day and received a positive response from Jamie Campeau.

[23] On May 21, 2021, Stephen Moreau answered an email from Fay Smith regarding the upcoming cross-examinations on the affidavits filed for the Crown's motion. He told her that while speaking with Crown counsel he "took advantage of the opportunity to see what a settlement might look like…a settlement of <u>everything</u> where you and your children are paid some monies in exchange for being 100% done with the lawsuit (emphasis in original)". He closed the email saying he would update her with the Crown's response. I note he did not, as before, ask for permission to

explore settlement of the action. From this I conclude permission had been granted prior to this conversation with the Crown, which is borne out in later emails.

[24] Less than a week later, the Crown made an offer to the plaintiffs through their counsel: agree to set aside the default judgment (with full indemnity costs and partial indemnity costs) and the parties would attend mediation, likely paid entirely by the Crown. In an email to the plaintiffs, Stephen Moreau set out this offer as well as his opinion on the strength of the Crown's motion, saying the plaintiffs "may not want to hear this, but it's true. I strongly predict you will lose [the Crown's motion]".

[25] Put another way, the Crown would not agree to mediation of the action at an early stage unless the default judgment was set aside on consent. Stephen Moreau explained why he believed it was a "serious offer worth considering", and he was "[h]appy to talk by phone [with Fay Smith and/or her] children regarding this".

[26] An hour or so later, Fay Smith responded to Stephen Moreau, indicating that the plaintiffs were not interested in mediation and that they wished to defend the Crown's motion. Her position was that they would rather lose the motion than agree to set aside default judgment.

[27] Stephen Moreau responded and wrote he was "a bit surprised" and stated:

> Everything I have done for you these past four months has been, as we discussed, to get them to the point where we could try and settle the case. I worked many hours…in order to get to the point of telling our opponents that a bunch of media are coming [to the motion] not because we wanted media but because we wanted to scare them into a corner. I fought the redactions and sealing orders issue not because it helped you win the set aside motion but because I wanted Ontario to fear that the embarrassment would come out in the open, thus pushing them to talk settlement.
>
> All of the above was done on explicit instruction to do it as part of a master strategy to get them to settlement talks. And now that is has worked, you tell me to stop and argue a motion I feel you have very little chance to win…
>
> But I return to the main point. What we have managed to wrangle out of them is what I was asked by you to get and worked hard to get and now you are saying you do not want it? This is what causes me serious confusion.
>
> I would appreciate a call perhaps with you and Jamie and Kevin to ensure I understand the instructions and why it is they have changed so dramatically.

[28] Jamie Campeau responded the next day by email. She apologized for "misinterpretation" on their part and asked five questions to help them "make a better more informed decision". Stephen Moreau responded that evening. He recommended a phone call but took the opportunity to provide a detailed response to each of their questions in writing.

[29] He followed up that email with another one, over three pages in length, containing advice about the litigation. The latter email refers to a Zoom meeting with the plaintiffs the next day. By email the next morning, May 28, 2021, Fay Smith thanked him for this email and said "it was very helpful on how this works. I will have more questions for [sic] at 4 pm", the time of the Zoom meeting.

[30] I conclude Stephen Moreau received instructions to proceed with the Crown's proposal because on June 03, 2021, Crown counsel spoke with him and confirmed the Crown's terms on setting aside the default judgment and proceeding to mediation. Stephen Moreau requested minor modifications to the Crown's proposal, but more importantly, he declined the three mediators recommended by the Crown and instead suggested three retired judges. One of those judges, former Associate Chief Justice O'Connor, was chosen by the Crown.

[31] The Honourable Dennis O'Connor clearly set out the terms of the mediation in a letter dated June 21, 2021. Among the terms were the following:

> a. Any party may withdraw from the mediation at any time;
>
> b. The parties will ensure their representatives have full authority to settle; and
>
> c. The parties understand the mediation may result in a "settlement agreement that contains legally binding obligations that are enforceable in a court of law".

[32] The plaintiffs had this letter a month before the mediation. This provided them with more than enough time to consider its terms. The record also reveals the question of whether the mediator was in a conflict of interest was considered and correctly dismissed as a non-issue.

[33] On June 24, 2021, Fay Smith wrote to Stephen Moreau with several questions, including about the motion records and the mediation. She confirmed she was working on the mediation brief. Mr. Moreau responded to her questions the next day and cautioned her not to draft a brief because they would not be able to rely on it for the mediation; rather, he would use her memos to draft the brief.

[34] On July 14, 2021, Thomas R.S.J., released his consent endorsement which, among other things, set aside the default judgment and fixed the plaintiffs' full and partial indemnity costs.

[35] On August 23, 2021, Stephen Moreau wrote to Fay Smith about two letters dated 2007 that she had sent to him. These letters related to her claim against the WSIB. In his email, Mr. Moreau gave her what he described as "bad news". In short, his opinion based on the letters was that her claim against the WSIB was statute-barred. As a result, he noted the following:

> Please consider this information and the conclusion that you cannot win your case as a result. If this now means "take what you can" in mediation, it means just that. This is unfortunate news but I must deliver the truth here (emphasis in original).

[36] Fay Smith acknowledged receipt of this email.

[37] About a week prior to the mediation, Fay Smith wrote to Stephen Moreau with some minor changes for their extensive and detailed brief, but otherwise noted it was "excellent".

[38] The next day, on September 14, 2021, Mr. Moreau wrote to the plaintiffs and asked to have a meeting with them to prepare for the mediation. He also set out some points for them to consider in the interim. He cautioned them "in the strongest of language (emphasis in original)" not to speak unless asked a direct question by the mediator. He explained that the mediator was the former Associate Chief Justice of Ontario and that he would rather hear from the lawyers. He further explained the mediator would give the lawyers time to speak with their clients privately about what was going on. This evidence does not support Fay Smith's position that she was told she could not say anything at the mediation; rather it was advice on how best to conduct herself before the former Associate Chief Justice of Ontario.

[39] More importantly, Mr. Moreau reiterated their case had "major challenges" and he cautioned them not to expect a particularly large offer. He further provided the following advice:

> I can only advise on what the good and bad is, what you should consider, what your chances are, what you can obtain if you fight on, and so on. I cannot tell you to take or reject an offer. I may, if the offer is very poor, tell you that you should in my view reject it. At the other end, if really good, I may say "you really should take this offer." Anywhere in the middle you will hear "it is up to you but here are the various considerations.

[40] Mr. Moreau followed-up a few days later with another email setting out his opinion with respect to a new issue raised in the Crown's brief: the limitation period for claims by an Estate. In a second email later that day, he set out what he described as "very bad news": based on his research, the limitation period for the claim by the Estate is two years from the date of death (not the date of discovery of the claim). In addition, their *Family Law Act* claims were linked to that time period and expired at the same time. He concluded the email with the following advice: "I suspect the offer we get Monday will be quite low. I had hoped it would be low-to-middle, but now lower seems best we can hope for". He repeated this caution in another email about an hour later.

[41] On this record, the plaintiffs were well prepared for, and knew what to expect at, the mediation. They actively sought out and received advice from their lawyer in the almost eight months leading up to the mediation. None of this evidence suggests Stephen Moreau rushed the plaintiffs into making decisions. At one point it appeared the plaintiffs did not want to proceed with mediation, but after further discussions with counsel, they chose to attend mediation. This was a choice that on this evidence was theirs to make. They had an alternative course of action: not to attend the mediation.

The mediation to January 03, 2023

[42] The mediation took the full day on September 20, 2021. Fay Smith participated in Toronto with her counsel. Shortly after the mediation ended, Crown counsel sent to Stephen Moreau draft

minutes of settlement, about two pages long, and suggested their client would like the minutes executed that day.

[43] Mr. Moreau responded with a change that would limit the risk with WSIB, but otherwise he sent it to the plaintiffs and suggested he expected the change to appear in the next draft. The choice of words in his email is significant and is set out below:

> Attached is a draft. I have told them they forgot the wording I want to describe the monies so as to limit the risk as we disclose this to the WSIB. I want their next draft with that fixed.

[44] This evidence supports the Crown's position that an agreement was reached at the mediation, subject to settling the wording of the minutes and the full and final release. Mr. Moreau's very brief email suggests he was waiting for this draft. In other words, there is no surprise that draft minutes were provided. Further, there is no negotiation regarding the amount of the settlement.

[45] A few hours later, Mr. Moreau sent to the plaintiffs a copy of his email to Crown counsel in which he suggested wording that he believed would "help [him] with the WSIB". Fay Smith responded to this email and pointed out that Jamie was driving home and needed her help to sign documents. She pointed out that she wanted to talk to him about the non-disparagement clause the next day. He responded: "Tomorrow is fine". Contrary to Fay Smith's position, there was no pressure to sign the minutes the same day as the mediation.

[46] The next morning Fay Smith spoke with Stephen Moreau's co-counsel. In an email at 12:22 p.m. that day, Mr. Moreau wrote to Fay Smith. He stated that they spoke that morning at 10:50 a.m., which Fay Smith denied in oral argument. He confirmed his advice, which he said "forcefully" to her during that call as follows:

> a. Legally, I believe you have a settlement. It may not be signed yet, but they have a near 100% chance of getting a court to enforce what is now a settled claim.
>
> b. Professionally, I negotiated that settlement. I bargained hard to get our former Associate Chief Justice to push Ontario into a very good settlement (when you consider your claim has basically 0% chance of succeeding).
>
> c. I therefore will not go back to the other side and say "my client is not signing". I will look unprofessional and I am not prepared to do that.
>
> d. I left it with you to think about your actions and next steps. I will try and keep counsel at bay for today but I am asking you to choose one of two options:
>
> a) Sign the agreement you have already made; or

> b) Tell me you are refusing.
>
> e. If you say "a", I will have the document cleaned up for signature.
>
> f. If you say "b", I will professionally, in writing, and bccing you so you can have the full communication, advise opposing counsel that I no longer represent the Plaintiffs due to a breakdown in the solicitor-client relationship. At that point, Faye, you can take whatever position you want to take. You can tell Ontario that the deal is off and see what happens. You can tell them that you do not like the "shut up" agreement (or at least, what you say is a "shut up" agreement), and discover for yourself what happens when you tell Ontario that [hint, having negotiated hundreds of these settlements before, Ontario will [illegible] a more strongly worded agreement because you, having told them that you do not like it, will have essentially told them that you intend to say all kinds of things about them…now they will want something more akin to a non-disclosure agreement which you will not sign, quite rightly…point is you need to understand the consequences of your actions].

[47] He closed the email with the following:

> I am sorry that this very firm email comes after over 18 months of solid work and what I think has been a good partnership to see you through difficult times. I have no choice but to write it so that the situation as it currently stands is clearly and accurately placed out there.
>
> I appreciate the compliments you paid to me on the phone. I know you know we have done the very best job for you. But now it is up to you to make a choice.

[48] Throughout the afternoon Stephen Moreau emailed the plaintiffs and told them Crown counsel were following up on the minutes and he was keeping them at bay. He asked for instructions several times.

[49] Around 5 p.m. counsel for the Crown provided Mr. Moreau with minutes signed by their client. They asked the plaintiffs to do the same by the end of the day.

[50] At this point Stephen Moreau wrote to the plaintiffs and set a deadline of 6 p.m. for them to decide. Around 6:30 p.m. Jamie Campeau emailed Mr. Moreau and said that "unless Faye has a change of heart in the next 5 minutes, you should expect her to send a signed and scanned copy of the Minutes of Settlement shorty…Once you have my mother's signature you won't encounter any challenges from my brother or I signing".

[51] Approximately ten minutes later Fay Smith emailed the signed minutes to Stephen Moreau. She asked him if he would "be filing" the dismissal order and the final release. She also asked a question about the non-disparagement clause. Mr. Moreau asked her to clarify her question. A few

hours later Mr. Moreau's co-counsel provided an answer to the question which Fay Smith confirmed was responsive to her issue. She also confirmed that "both [she] and Stephen did a great job in this case…". Notably, there is no mention of duress.

[52] Fay Smith's argument that she signed the minutes under "extreme duress" is without merit. Consider the draft minutes were brief, two pages long, and the culmination of about eighteen months of legal advice within the litigation. When she asked for time to consider, it was granted. A day after the mediation ended, Stephen Moreau gave the plaintiffs a choice: sign the minutes or not. That he indicated he could no longer act for them if they chose not to did not amount to undue duress. As he explained, his professional ethical obligations prevented him from acting if they chose the latter.

[53] I conclude the delay in signing the minutes was related to the potential impact of the non-disparagement clause. Fay Smith and Mr. Moreau exchanged several emails about the non-disparagement clause after the minutes were signed. In an email sent on September 22, 2021, Fay Smith explained "[t]hat's why I was having such a hard time with this agreement I believe that criminal negligence charges will be laid against all parties involved…". It is significant that she did not take this opportunity to mention she was tricked into throwing out numbers at the mediation that she did not expect could be accepted by the Crown. Rather, she sets out the real reason for her delay in signing: the possible impact of the non-disparagement clause on a criminal investigation into her husband's death.

[54] By November 10, 2021, the settlement funds had been paid to the plaintiffs, the full and final release had been executed and the action had been dismissed without costs. At no point while those steps were taken did Fay Smith signal that she had been forced, under duress, to sign the minutes, despite many opportunities while communicating with her counsel.

Conclusion

[55] For these reasons, Fay Smith's motions are dismissed.

[56] If the parties cannot agree on costs, the Crown may file written submissions of no more than two pages, double-spaced, not including a bill of costs and any offers to settle, within fifteen days of this decision. Fay Smith may file responding submissions of no more than two pages, double-spaced, within thirty days of the date of this decision. The Crown may file reply submissions of no more than two pages, double-spaced, within forty days of this decision.

Regional Senior Justice Patrick J. Boucher

Date: March 26, 2024