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August 8, 2009

Privacy and personal photos at heart of case

A decision released by the Supreme Court of Canada last month raises the interesting question of how much privacy an individual may expect with respect to personal photographs taken inside his or her own home.

The story began in June 2001. Agnieszka Wojtanowska (Agnieszka) lived with Douglas Weil in a house in the Regional Municipality of Halton.

On June 1, 2001 she delivered some photographs taken inside their residence to Black's Photography, located at the Bramalea City Centre, to be developed.

The photographs showed marijuana plants growing in the house. They also included "personal" photographs.

Employees of Black's turned copies of the developed photographs over to officers of the Peel Police Service before they gave the original photos to Wojtanowska. The Peel police then delivered the photographs to the Halton Regional Police Service.

A few days later, the Halton police executed a search warrant of the couple's house and seized the marijuana plants they found there.

Wojtanowska and Weil were charged with possession of marijuana, possession of marijuana for the purpose of trafficking, and production of marijuana.

The couple then brought a motion in Superior Court in Milton to exclude the fruits of the search from their trial, based on an allegation that their rights to be secure against unreasonable search or seizure guaranteed by Section 8 of the Charter were violated.

Their motion was granted and a few days later, all the charges were dismissed for lack of evidence.

The judge hearing the motion also ordered that the evidence seized under the warrant be returned.

Apparently, not all the photos were returned, so the couple brought another motion demanding return of the photographs in the possession of the police. The presiding judge ordered that these photographs be returned to the plaintiffs immediately.

She stated, "It is understandable that the applicants are dismayed about the missing photos ... as they contain personal images of the wife of a sensitive nature."

By June 2008, Weil and Wojtanowska had secured the return of all of the photographs.

Understandably somewhat miffed, they sued Black's Photography, their employees who dealt with the photographs, the Peel and Halton police, and the officers who were involved in the investigation.

They claimed that the defendants had violated their Charter rights and breached their copyright interest in the photographs.

The total claim exceeded \$1.4 million.

Weil did not want to introduce the photos in evidence at the trial against Black's and the police, and asked the court for an order excluding them from evidence.

The judge dismissed the motion by Weil and ruled that he had to produce the photographs, which could be used as evidence in the trial.

Weil and Wojtanowska then applied to the court for permission to appeal that order.

Justice Peter Hambly turned them down.

In his decision, he wrote "The plaintiffs, having sued on the basis of the use of the photographs by the defendants, cannot now refuse to produce them to the defendants. The defendants can only properly assess the case against them by viewing the photographs. ..."

"The plaintiffs are clearly very sensitive about others viewing the photographs. I can understand this. ... However, they cannot both sue on the photos and refuse to produce them."

Weil and Wojtanowska appealed again. The case reached the Supreme Court of Canada on July 9. In a short 42-word decision, a three-judge panel dismissed their application for permission to appeal.

Several lessons emerge from this case.

With respect to criminal charges, citizens do have some expectation that personal photographs may be shielded from the prying eyes of law enforcement authorities.

Suing on the basis of seizure of personal photographs is problematic. The photos have to be entered into evidence and may receive wider distribution than they would without a lawsuit.

Taking "personal" photos "of a sensitive nature" to a commercial photo lab for processing or printing is not a wise idea, especially if they contain evidence of what might be a criminal activity.

Wojtanowska v. Mustard, 2008 CanLII 42219 (ON S.C.)

Date: 2008-08-05

Docket: C-286/04

URL: <http://www.canlii.org/en/on/onsc/doc/2008/2008canlii42219/2008canlii42219.html>

Noteup: [Search for decisions citing this decision](#)

[Reflex Record](#) (related decisions, legislation cited and decisions cited)

Related decisions

• **Supreme Court of Canada - Applications for Leave**

Agnieska Wojtanowska and Douglas Weil v. Daniel Mustard, Estate of Steven Blanchard, Deceased, Shannon Tobin, Ontario Corporation 1034893 (c.o.b. as Black Photo Corporation), Heather Ramore, Robert Smith, Regional Municipality of Peel Police Services Board, Larry Burns, Edward Gies and Halton Regional Police Services Board, 2009 CanLII 36260 (S.C.C.) - 2009-07-09

• **Superior Court of Justice**

Wojtanowska v. Mustard, 2009 CanLII 1154 (ON S.C.) - 2009-01-13

COURT FILE NO.: C-286/04

DATE: 20080805

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Wojtanowska and Weil v. Mustard et al

BEFORE: Justice G. E. Taylor

COUNSEL: A. Stein, for the Plaintiffs

A. Di Domenico and D. Robertson, for the Defendants Mustard, Blanchard and Blacks Photo

M. Kotsopoulos, for the Defendants Ramore, Smith and Peel Police

K. Kirkpatrick, for the Defendants Burns, Gies and Halton Police

ENDORSEMENT

Introduction

[1] On June 26, 2008, I dealt with two motions, one that brought by the plaintiffs and it won them by the defendants. The motions dealt with the same issue and accordingly resulted in a single endorsement. I would categorize the motions as practice motions as they dealt with the plaintiffs obligation to produce certain photographs and whether in the plaintiffs should be required to re-attend to continue with their examinations for discovery to answer questions regarding the photographs. I dismissed the plaintiffs motion and allowed the defendants motion. Because counsel were not prepared to deal with the issue of costs on June 26, 2008 they requested and were given an opportunity to make written submissions. This is my ruling with respect to costs of the motions following receipt be written submissions from all counsel.

[2] The defendants seek substantial indemnity costs of the motions which total \$56,421.44. Counsel for Blacks Photo and its employees seeks costs of \$18,296.25. Counsel for Peel Police and its officers seeks costs of \$12,675.44. Counsel for Halton Police and its officers seeks costs of \$25,449.75.

[3] Counsel for the plaintiffs submit that there should be no costs of the motions or in the alternative in the defendants should be awarded global costs on the partial indemnity scale totaling \$6,000 plus disbursements.

Discussion

[4] The defendants who were successful on these motions. Therefore, they are presumptively entitled to their costs. In my view, there is no reason to deprive the successful defendants of their costs of these motions.

[5] The defendants seek costs on a substantial indemnity basis. I see no justification for substantial indemnity costs. I found the position taken by the plaintiffs to be incorrect but there was nothing in the conduct of the plaintiffs or their counsel which would justify an award of costs on the substantial indemnity scale. Therefore, the defendants are entitled to partial indemnity costs of the motions.

[6] Before this motion was argued, the plaintiffs brought 3 proceedings before judges of the Superior Court in the Central West Region seeking the return of the photographs that were excluded by Walters J. at the plaintiffs criminal trial. The defendants seek costs of these 3 proceedings to be included in the costs of the present motion. From my reading of the endorsements with respect to each of these proceedings, it appears that there was divided success. Significantly, in my view, the endorsement of Snowie J. dated October 19, 2007 specifically made no order as to costs. The other 2 endorsement are silent as to costs. It seems to me that the appropriate time to seek costs of those other 2 proceedings was at the time the orders were made and to do so before the judge who made the ruling in question. Finally, I doubt my authority when dealing with costs of this motion to make cost awards in relation to separate proceedings before other judges.

[7] This was a relatively straightforward motion dealing with production of documents. The amounts sought by the defendants for costs far exceed a reasonable amount for costs of such a motion. As was stated in Moon v. Sher, [2004] O. J. No. 4651: "If a lawyer wants to spend four weeks in preparing for a motion when one week would be reasonable, this may be an issue between the client and his or her lawyer. However, the client, in whose favour a costs award is made, should not expect the court in fixing costs to require the losing party to pay for over-preparation, nor should the losing party reasonably expect to have to do so." In my view, that comment would apply to the preparation of all counsel for the defendants on this motion.

[8] Counsel for the plaintiffs, in his Submissions on Costs suggests a global award of costs for all defendants of \$6,000 plus disbursements. In my opinion this is a reasonable amount.

Disposition

[9] The costs of all defendants for the motion heard by me on June 26, 2008 are fixed at \$6,000 plus GST plus disbursements of \$127 for filing the Joint Motion Record payable by

the plaintiffs within 30 days. If the defendants are unable to agree on an allocation of the costs as between them, I would apportion the costs \$3,000 to the Blacks Photography defendants and \$1,500 to each of the other 2 groups of defendants.

G.E. TAYLOR J.

DATE: August 5, 2008

COURT FILENO.: C-286/04

DATE: 20080805

SUPERIOR COURT OF JUSTICE ONTARIO

RE: Wojtanowska and Weil v. Mustard et al

BEFORE: The Honourable Mr. Justice G.E. Taylor

COUNSEL: A. Stein, for the Plaintiffs

A. Di Domenico and D. Robertson, for the
Defendants Mustard, Blanchard and Blacks
Photo

M. Kotsopoulos, for the Defendants Ramore,
Smith and Peel Police

K. Kirkpatrick, for the Defendants Burns,
Gies and Halton Police

ENDORSEMENT

The Honourable Mr. Justice G.E. Taylor

DATE: August 5, 2008

Wojtanowska v. Mustard, 2009 CanLII 1154 (ON S.C.)

Date: 2009-01-13

Docket: C-286/04

URL: <http://www.canlii.org/en/on/onsc/doc/2009/2009canlii1154/2009canlii1154.html>

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Related decisions

- [Supreme Court of Canada - Applications for Leave](#)

• Superior Court of Justice

Wojtanowska v. Mustard, 2008 CanLII 42219 (ON S.C.) - 2008-08-05

Decisions cited

- D. P. v. Wagg, 2004 CanLII 39048 (ON C.A.) 71 O.R. (3d) 229 239 D.L.R. (4th) 501 184 C.C.C. (3d) 321 120 C.R.R. (2d) 52 187 O.A.C. 26

COURT FILENO.: C-286/04

DATE: 20090113

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
Agnieska Wojtanowska and Douglas Weil)	Adam J. Ezer, Agent for the Plaintiffs
)	
)	
Plaintiffs)	
- and -)	
)	
)	
Daniel Mustard, The Estate of Steven Blanchard, Deceased, Shannon Tobin, Ontario Corporation 1034893 (c.o.b. as Black Photo Corporation), Heather Ramore, Robert Smith, The Regional Municipality of Peel Police Services Board, Larry Burns, Edward Gies and Halton Regional Police Services Board)	Antonio Di Domenico, for the Defendants,
)	Daniel Mustard, The Estate of Steven Blanchard, Deceased, Shannon Tobin and Ontario Corporation 1034893 (c.o.b. as Black Photo Corporation)
)	
)	Kathryn Kirkpatrick, for the Defendants, Larry Burns, Edward Gies and Halton Regional Police Services Board
)	
)	Maria Kotsopoulos, for the Defendants, Heather Ramore, Robert Smith and The Regional Municipality of Peel Police Services Board
)	
)	
)	
)	
Defendants)	
)	HEARD: December 4, 2008

Introduction

[1] I heard a motion for leave to appeal two orders made by Justice Taylor on June 26, 2008. I gave oral reasons in which I dismissed the motion. These written reasons are made supplemental to my oral reasons.

Background

[2] Agnieszka Wojtanowska (Agnes) resided with Douglas Weil (Douglas) in a house located in the Regional Municipality of Halton. On June 1, 2001 she delivered some photographs taken inside their residence to Blacks Photography, located at the Bramalea City Center in the Regional Municipality of Peel, to be developed. The photographs showed marijuana plants growing in their residence. They also included personal photographs. Employees of Blacks turned copies of the developed photographs over to officers of the Peel Police Service before they gave the original photos to Agnes. On June 7, 2001 the Peel police turned over the photographs to officers of the Halton Regional Police Service. On June 14, 2001 the Halton police obtained a search warrant to the residence of Agnes and Douglas. They executed the search warrant on the same day. Agnes was at home when the police came. She was arrested. The police searched the residence. They seized the marijuana plants which they found there. On the following day Douglas surrendered to the Halton police. Agnes and Douglas were charged with possession of marijuana, possession of marijuana for the purpose of trafficking and the production of marijuana. They were released on bail.

[3] Douglas and Agnes brought a motion in Superior Court in Milton to exclude the fruits of the search from their trial pursuant to section 24(2) of the *Charter* based on an allegation that their rights to be secure against unreasonable search or seizure guaranteed by section 8 of the *Charter* were violated. On September 16, 2003 Justice L. Walters granted the motion. On September 22, 2003, on the representations of the crown that it had no evidence apart from the evidence that was excluded from the trial by her ruling, Justice Walters dismissed the charges. She also made an order that the evidence seized pursuant to the warrant be returned to the accused. Clearly what was contemplated by this order was the photographs that Blacks turned over to the police. This order of Justice Walters was issued and entered on October 8, 2003.

[4] Douglas and Agnes retained James W.W. Neeb Q.C. On their behalf, he caused to be issued a statement of claim in which they named as defendants, Blacks Photography, the individuals at Blacks who dealt with the photographs, the Regional Municipality of Peel Police Services Board, the Halton Regional Police Services Board and the Peel police officers and the Halton police officers who were involved in the investigation. They alleged against the defendants the violation of their rights guaranteed by s. 8 of the *Charter* and breach of their right to copyright in the photographs. They claimed a total of \$1,375,000 in damages against the various defendants, special damages in the amount of \$85,694, plus GST and costs.

[5] Examination for discovery of Agnes took place on March 27 and 28, 2006 and of Douglas on March 28 and March 29, 2006. Thereafter Agnes and Douglas have represented themselves and one or the other and sometimes both have been represented by a lawyer. Mr. A. Ezer represented them on the motion before me. Douglas brought a motion returnable February 7, 2007 for "an order excluding excluded evidence, that it cannot be revealed". The evidence that he sought to exclude was the photographs. After hearing his submissions, Justice Taylor granted a request of the defendants for an adjournment to permit them to file material. They also wished to bring their own motion to compel the plaintiffs to answer undertakings and to answer questions refused at their examinations for discovery. Douglas brought a motion in Kitchener which he did not file with the court returnable on March 8, 2007. This motion sought an order against Blacks Photography to produce a witness sumame, to produce documents requesting an audit and to produce undertakings. On March 7, 2007 he sent a letter to the lawyer for Blacks Photography in which he stated that he intended to proceed with the motion. Prior to serving the motion he had not sought a convenient date from opposing counsel. He did not appear on March 8, 2007. Solicitors for Blacks Photography did appear with material in response to the motion. The matter came before Justice Sills. He awarded costs against Douglas of \$1,500.

[6] The plaintiffs were of the opinion that the police had not complied with the order of Justice Walters made on September 22, 2003 that they return the photographs to them. They brought a motion before the Superior Court in Milton for enforcement of the order of Justice Walters. It came before Justice Snowie on October 19, 2007. She found that the police still retained photographs contrary to the order of Justice Walters. She ordered that these photographs be returned to the plaintiffs immediately. Justice Snowie stated, it is understandable that the applicants are dismayed about the missing photos and the index cards as they contain personal images of the wife of a sensitive nature. The plaintiffs brought another motion in Milton before Justice Coates in which they argued that they still did not have all the photographs or related material to which they were entitled, pursuant to the order of Justice Walters. On November 2, 2007 she found, on the basis of the affidavits filed before her, that the police had returned to the plaintiffs all the photographs that had come into their possession. The plaintiffs brought yet another motion in Milton before Justice Quigley in which they argued that the police still had photographs to which they were entitled pursuant to the order of Justice Walters. On March 28, 2008 he confirmed the finding of Justice Coates that the police had turned all the photographs in their possession over to the plaintiffs. However it was discovered that a file related to the preliminary inquiry was with the Ontario Court of Justice. That file contained photographs belonging to the plaintiffs which the police had acquired. He ordered that these photographs be returned to the plaintiffs.

[7] On June 26, 2008 Justice Taylor heard the motion brought by Douglas which was before him first on February 7, 2007. He also heard a motion of the defendants that Douglas and Agnes comply with undertakings and answer questions which they refused to answer at their examination for discovery. The focus of these two motions was whether the plaintiffs were required to produce the photographs that Blacks Photography had developed.

[8] These photos were now all in the possession of Douglas and Agnes. The photos were in a file of the Peel police and then of the Halton police. They were used by the Halton police to obtain a search warrant. They were used to prosecute Douglas and Agnes for serious drug offences. Notwithstanding that the charges were dismissed and that the photographs were now all in the possession of Douglas and Agnes they argued that Justice Taylor was obligated to view the photographs and to decide whether or not they were required to produce them to the defendants. This was a process that was approved by the Court of Appeal in *D. P. v. Wagg* 2004 CanLII 39048 (ON C.A.), (2004), 71 O.R. (3d) 229 (OCA). In that case the defendant had been convicted of sexual assault of the plaintiff. He was in possession of a file provided to him by the crown as part of the disclosure process in the criminal proceedings. Of particular interest to the plaintiff was a statement which the defendant gave to the police. The statement was ruled inadmissible in the criminal proceedings pursuant to section 24(2) of the *Charter* as a result of a finding that the police violated the defendant's right to counsel guaranteed by section 10(b) of the *Charter*. Justice Taylor, in relation to *Wagg*, stated the following:

It must be kept in mind that it was a defendant (in *Wagg*) resisting production of a statement which had been excluded in criminal proceedings against him. In the present case, the plaintiffs have commenced this action on the basis of the excluded evidence which they now claim to be entitled not to produce that evidence in the civil proceeding. In my view this is a significant difference.

He held that the principles in *Wagg* did not apply. He dismissed the plaintiffs motion. He allowed the defendants motion. He required that the plaintiffs produce the photographs and re-attend for examination for discovery on the photographs. After receiving written submissions on costs in which the defendants claimed a total of \$56,421, he allowed the defendants costs on a partial indemnity basis in the amount of \$6,000, plus GST, plus disbursements of \$127.

[9] On June 26, 2008 Justice Taylor also heard another motion brought by Douglas to set aside the costs order of Justice Sills made on March 8, 2007. Douglas argued that the following rule applied.

37.14 (1) Motion to set aside or vary A party or other person who,

- (a) is affected by an order obtained on motion without notice;
- (b) fails to appear on a motion through accident, mistake or insufficient notice; or
- (c) is affected by an order of a registrar.

[10] Justice Taylor held that this rule had no application because the facts did not satisfy the conditions set out in the rule. The applicable rule was the following:

37.09 (1) A party who makes a motion may abandon it by delivering a notice of abandonment.

(2) A party who serves a notice of motion and does not file it or appear at the hearing shall be deemed to have abandoned the motion unless the court orders otherwise.

(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

[11] He held that Justice Sills was correct in assessing costs against Douglas because he had brought a motion which he had abandoned. He assessed costs of the motion at \$2,000, inclusive of disbursements and GST.

Analysis and Disposition

[12] The plaintiffs seek leave to appeal the decisions of Justice Taylor made on June 26, 2008. In order to obtain leave to appeal they must meet the tests set out in rule 62.02 (4) which reads as follows:

62.02 (4) Grounds on which leave may be granted Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to be the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[13] The argument of the plaintiffs on the first branch of rule 62.02 (4)(a) is that Justice Taylor's decision conflicts with *Wagg*. In *Wagg*, the chiefs of police of the Toronto and Halton police services intervened. They were concerned that the police would be restricted in defending actions brought against them in their use of original materials which may have been disclosed to the defence in criminal proceedings. The Court of Appeal in the judgment of Justice Rosenberg stated the following:

[82] The Chiefs of the Toronto and Halton Region Police Services intervened in this appeal principally to put forward the position that the screening mechanism should not apply to a police force when it is required to defend itself against a civil action, such as an action for malicious prosecution. Apparently, the Attorney General has taken the position that the police service requires the consent of the Attorney General to use the contents of the Crown brief.

[83] I agree with the Chiefs that the screening process developed by the Divisional Court in this case does not apply to the original materials that ultimately find their way into the Crown brief. This case concerns the use of materials disclosed to the accused as part of the constitutionally mandated disclosure process. Those materials will contain copies of various kinds of documents such as officers notes, witness statements, potential exhibits, and other materials such as copies of videotapes and photographs. The originals remain with the police, although some may be entered as exhibits. The Crown brief may also contain copies of notes or other material produced by Crown counsel. Again, the originals would remain with Crown counsel, or perhaps would be left with the police for safekeeping.

[84] I can see nothing in the decision of the Divisional Court that was intended to circumscribe the use that a police service may make of its own documents and other materials merely because copies of those materials found their way into the Crown brief and were disclosed to the defence. This material is essential to permit the police service to defend itself against lawsuits arising out of their investigations.

[85] The question of use by a former accused of material in the Crown brief in an action against the police was not before the court in this case. Accordingly, I would leave that issue for another day, where the matter is directly raised.

[86] To conclude, in actions against the police the screening process discussed in this case does not apply to the original materials prepared by the police during their investigation. The police would only require the consent of the Attorney General in respect of the use of materials created by Crown counsel.

[14] Paragraph 86 might well have included at the end "or the police". This would include the statement given by the defendant in the police investigation which was at issue in *Wagg*. The photographs which the plaintiffs do not wish to produce are original material. They were not created by the police or the crown.

[15] There is an important point that may not have been argued before Justice Taylor and which was given only passing reference in argument before me. Agnes and Douglas undertook at their examinations for discovery to produce the photographs. At the examination for discovery of Agnes on March 27, 2006 the following dialogue took place:

450. **MR. MAZZUCA: Q. Just so you understand, we can't use them for any purpose other than this lawsuit.**

- **A. Thank you.**

451. **Q. Okay, and while we were off the record an undertaking was given to provide laser copies of the fronts and backs of both the original photographs and the copies that were returned following the criminal trial.**

[UNDERTAKING]

- **MR. NEEB: All right, the only —**

- **THE DEPONENT: I'm not sure if we're going to give you laser copies. I may give you the original, I may actually give you the pictures, but I'm not going to go and make copies of them for this proceeding.**

- **MR. NEEB: Well, if production of the photographs are made, as they will be tomorrow, you'll undoubtedly have them marked as an exhibit and then we can take it from there as to who is going to make the copies.**

- **THE DEPONENT: But why do the photographs need to be put into evidence?** (emphasis added)

MR. MAZZUCA: Can we go off the record?

Further dialogue took place at her examination for discovery on March 28, 2006 as follows:

803: MR. SWAN: Q. Good morning Ms. Wojtanowska.

- A. Good morning.
- 804: Q. Did you bring with you the photographs that we spoke about yesterday?
- A. I have brought with me, the factum —
- MR. NEEB: You re not being asked that. You re asked about the photographs.
- THE DEPONENT: Yes, the photographs, yes. And on page 3 in paragraph 8 —
- MR. NEEB: You re not here to make argument.
- THE DEPONENT: —Constable Gies and Pedano they asked me if we were provided with photos and Pedano and Gies were subsequently provided with a second copy of the photograph in which both officers identified the female party who attended to pick up the photos as the same individual observed in —
- MR. NEEB: — be that as it may —
- THE DEPONENT: — the series of photographs seen —
- MR. NEEB: —the question is, did you bring the photographs with you today?
- THE DEPONENT: No.
- MR. NEEB: That s the question.
- THE DEPONENT: They, they have a copy —
- MR. NEEB: No, the question is —
- THE DEPONENT: —of the photographs.
- MR. NEEB: —did you bring your photographs today?
- THE DEPONENT: No.
- MR. NEEB: All right. That s the answer. I apologize for that. I didn t realize that Ms. Weil was going to take this position, which is certainly contrary to my position. She will produce the photographs, but it s unfortunate that she did not produce them today.
(emphasis added)
805. MR. SWAN: Q. I m sorry. I referred to you at the outset as Ms. Wojtanowska. Do you prefer to be called Ms. Weil wouldn t you?
- A. Yes.
806. Q. Okay. I m sorry.
- A. No problems.
807. Q. All right. So let me just explore with you what you have said. You were asked yesterday to bring with you the photographs. Correct?
- A. Yes, and the factum.
808. Q. And the factum and some other documents. But right now I m interested in the photographs. And you remember being asked that question yesterday, correct?
- A. Yes.
809. Q. And indeed you do have the photographs at home, correct?
- A. In part, yes.
810. Q. In part. Why only in part?
- A. There are some missing.
811. Q. Where are they, the ones that are missing?
- A. Um, we didn t get all of our photographs back. There are some photographs missing in terms of numbers. We didn t get our full complete order back.
812. Q. All right. Let s take this in two pieces because there are actually two different sets of the same photographs. So we re talking about, let s call the set that you received, you personally received from the store on June 1, 2001 at set one. Okay. Do you know what I m talking about there?
- A. Yes.
813. Q. So that s the set that you went into the store at Black s and you received them on the day that you got your hair cut, as you described yesterday.
- A. Yes.
814. Q. We ll call those sets, set one. And there was a second set, it s not in dispute, that the police obtained, and ultimately you received that second set of photographs back from the Halton Regional Police. Correct?
- A. Yes.
815. Q. And in respect to the first set, the set that you got from Black s itself, you received a complete set of photographs. Correct?
- A. Yes and there s also a third set of photographs.
816. Q. Okay. The third set is that you got doubles at the time that you is that correct? Where did the third set come from?
- A. The third set, the Peel police still have.

- MR. SWAN: Okay, I don't know about that. Do you know that ---
- MR. NEEB: I don't ---
- MR. SWAN: ---Mr. Neeb?
- MR. NEEB: I don't
817. MR. SWAN: Q. What are you talking about Ms. Weil?
- A. Gies and Pedano were provided with a second copy of the sets of photographs.
818. Q. Okay. Your Counsel doesn't know anything about that.
- MR. NEEB: That's correct.
- A. It's in the evidence.
819. MR. SWAN: Q. All right. Well let's ignore that set because it seems to be a matter of dispute and---
- A. It was in the warrant to obtain the information that Gies and Pedano got, receive a second copy and that they identified me in the photos.
820. Q. All right. I'm going to ask your Counsel to undertake to provide me with further information in respect to this so called third set of photographs.
- MR. NEEB: I shall. **[UNDERTAKING]**
- MR. SWAN: And what your position is in relation to that, whether they exist and what your position is in relation to those, that third set.
821. MR. SWAN: Q. Okay. Let's go back to sets one and two. The set that you received from Black's on June 1, 2001, set one.
- A. Yes.
822. Q. Do you still have a complete set of those photographs?
- A. It's not all together but it can be put together, and as well, we didn't receive my full order. I did not receive my full order from Black's.
823. Q. What do you say you didn't receive?
- A. I didn't receive index cards and I believe there were a few pictures missing as well.
824. Q. So you say you didn't get index cards and a few pictures were missing?
- A. Yes.
825. Q. Do you know which ones?
- A. No. Like I said, I haven't looked at the pictures. I don't want to look at the pictures.
826. Q. Okay. And the set that you got back, set two, from the Halton police, you acknowledge getting a set back from the Halton police?
- A. Yes.
827. Q. And was that a complete set?
- A. I believe that there were some pictures missing from there as well.
828. Q. The same ones that you say are missing from set one or different?
- A. I'm not sure. I haven't compared them.
829. Q. Could you advise me which pictures you say are missing from set one, to the extent that you can identify them, and also, would you advise me which pictures you say are missing from set two, and when I say missing, I'm referring to the fact that you say you never received them either in the first case from Black's or in the second case from Halton? Do I have that undertaking?
- MR. NEEB: Yes. **[UNDERTAKING]**
830. MR. SWAN: Q. Did you ever receive an index card from either Black's or the Halton police or some other source for these photographs?
- A. Yes, there are index cards missing. I'm not sure how many. I believe that with one set with Halton is which one are you calling that?
831. Q. Halton is set two.
- A. Set two there were some index cards provided, I'm not sure if one or two. With set one, there were no index card provided.
832. Q. All right.
- A. As well as the courts had an 8 sheet by 11 with all four index cards on them.
833. Q. Okay but ---
- A. ---that we have not received as well.
834. Q. As I understand it those were not prints but something else, were they not?
- A. It was an 8 x 11 sheet that had the index, that had, I guess, index cards, so it would have been 24 pictures on each of the index cards on an 8 sheet.
835. Q. Okay. Let's come back to set one, the set that you did get back from Black's. And your evidence is, you think a few pictures are missing from those.
- A. Yes.

836. Q. Are they missing and you say you didn't get them from Blacks in the first place?
- A. Yes.
837. Q. And you also say you didn't get an indexcard?
- A. Yes.
838. Q. Now that's not, the fact that you didn't get a couple of pictures back and didn't get an indexcard, that's not part of your claim is it, against Blacks?
- A. Indexcards.
839. Q. Am I correct that that isn't part of your claim against Blacks?
- MR. NEEB: It's not.
840. MR. SWAN: Q. All right. And where are those pictures, set one, those that you did receive from Blacks on June 1, 2001. Where are they today?
- A. They're at 185/186?
841. Q. You're home?
- A. Yes.
842. Q. And are they together or are they separated in some fashion?
- A. My husband's been through them so they're all over the place.
843. Q. Are they collected in a shoebox are they in a scrap book, a journal, a photo album?
- A. They're in some binders, they're in a FedEx box, they're in some other place in some other boxes.
844. Q. Okay. Are any of them in your husband's journals that you refer to?
- A. No.
845. Q. Are any of ---
- A. I do not believe so.
846. Q. Are any of them in books that have writing or other material in them?
- A. No.
- 847. Q. Okay. What I would like you to do, Ms. Weil, is to produce to us, and I was hopeful that you would do it today, in fact I had understood that you were undertaking to do it today, to bring with you and produce that complete set of photographs that you received from Blacks on June 1, 2002 for the defendants to review.**
- **A. I refuse.**
- **848. Q. Why do you refuse?**
- **A. Because they're my personal pictures and I do not wish to show them again.**
- **MR. NEEB: This is a complete set of photos ---**
- **THE DEPONENT: There's a naked picture of me, if that lady would like to show herself naked, most certainly, but I'm not showing myself naked. This are personal pictures. I will provide the backs which have the numbers, which clearly identify each picture as an individual picture. I will provide that.**
- **MR. NEEB: What you just ---**
- **THE DEPONENT: Halton ---**
- **MR. NEEB: Excuse me. Excuse me. What's your position with respect to the naked picture?**
- **MR. SWAN: I don't know. I'd have to give that some thought.**
- **MR. NEEB: All right. You'll have our undertaking as was given yesterday, to produce the complete set of photos, absent the naked photo for the time being. [UNDERTAKING]**
- **849. MR. SWAN: Q. Are you prepared and I'm still asking for production of all of the photos because I think it's important that we have a complete record. I do understand your concern about one or two other photos but the parties can deal with that in an appropriate manner, but let's leave aside, so I'm still asking for that, but let's that aside, are you prepared to produce all of the other photos in this set aside from the one that is a naked photograph of yourself?**
- **A. I will produce the backs of the photographs which clearly identify each photo. I will not produce the photographs themselves which depict my personal life and life choices and lifestyle. I will not.**
- **850. Q. And you do understand that those photographs are the gravamen of your claim?**
- **A. Yes.**
- **851. Q. But you're not prepared to produce them?**
- **A. I will produce the backs. That proves that they have the photographs. It proves that the photographs are in existence.**
- **852. Q. And why will you not produce the fronts of photographs?**
- **A. Why do you need the fronts of the photographs?**
-

853. Q. Well you're asserting that there is copyright in the photographs and in order for the court to adjudicate on whether copyright exists and whether there's been any breach of copyright, the court will have to see the photographs.

- A. But they are in your possession to have. You have reach and control to get them.

854. Q. How is it that I am able to get them?

- A. Peel police has a copy. Gies and Pedano will provide it with a second set that were never relinquished to us, as well there are index cards that clearly show each of the pictures.

855. Q. Mm hmm.

- MR. NEEB: Can we go off the record?

- MR. SWAN: Mm hmm.

856. MR. SWAN: Q. Ms. Weil, even if it meant that you couldn't pursue your claim you're still not prepared to produce those photographs?

- A. Perhaps.

857. Q. Well I've asked for the undertaking.

- MR. NEEB: And you have it.

858. Q. And would you also produce to me or produce to the defendants, all of the photographs that you received back from the Halton police, the so called copies?

- A. Same, same answer.

859. Q. You're refusing to --

- A. --Halton --

- MR. SWAN: --to produce that.

- THE DEPONENT: --Halton police has a copy on their computer. They have copies of the pictures. Again, it's within their reach and power to have and get.

860. MR. SWAN: Q. You're refusing to produce them?

- A. Yes.

- MR. NEEB: You have the undertaking to produce them. (emphasis added)

861. MR. SWAN: Q. Yes. Thank you. And let me just explore with you where that second set is. The Halton pictures that you obtained back from the Halton police in ---

MR. NEEB: September 3rd ---

MR. SWAN: ---September ---

MR. NEEB: ---I'm sorry, September 20.

862. MR. SWAN: Q. September of 2003, is that when you receive them back from the Halton police approximately?

A. I believe so.

863. Q. Okay. Where are those and you say a few of those are missing as well, or do you have a complete set of those?

A. Yes, a few of those are missing as well.

864. Q. Okay. I'd like you to identify which of those are missing by way of undertaking. And if you say there are index cards missing, I'd like you to tell me which index cards you say are missing. Can I have that undertaking?

MR. NEEB: We've given an undertaking to advise you which photographs are missing from set one and set two.

MR. SWAN: Okay. So we have that already.

MR. NEEB: You've already got that. Now you're adding another.

MR. SWAN: The index cards as well.

At the examination for discovery of Douglas on March 29, 2006 the following dialogue took place:

565. Q. Okay. So I'd like you to do is to produce copies of those photographs, just of the plants.

- MR. NEEB: Do you still have those photographs that were returned from the Halton police of the plants?

- THE DEPONENT: I'm not sure.

- MR. NEEB: We'll use our best efforts. (emphasis added)

THE DEPONENT: Yes. [UNDERTAKING]

566. MR. MAZZUCA: Q. So you're unable today then to tell us whether there were more or less than 100 marijuana plants on the day of the seizure?

A. No.

[16] Mr. Neeb brought a motion to be removed from the record as the solicitor for the plaintiffs on August 17, 2006, which was granted.

[17] On March 8, 2007, Douglas wrote a letter to Elizabeth Jasci, who was on the record as the solicitor for Agnes, and to the solicitors for the defendants. He held himself out as representing both Agnes and himself. He stated the following:

3. To provide copies of the fronts and backs of both the original photographs and the copies that were returned following the criminal trial.

- A) Answer on page 123 Q: 847, March 28, 2006
- B) The plaintiffs do not have the original photographs in their possession;
- C) The defendants Peel regional police, has original set;
- D) The defendants Peel regional police have the index cards;
- E) Both police agencies are in unlawful possession of the plaintiffs property;
- F) This property was ordered back by the Superior Court of Ontario;
- G) The photos are Grounds for the statement of claim to the Copyright law violation;
- H) The plaintiffs *do not* authorize any copies being made or to the viewing of the photos;
- I) The photographs are excluded from evidence and are protected by the constitution;
- J) No relevance to claim

[18] Question 847 and its answer is set out above. I reproduce it here for convenience:

847. Q. Okay. What I would like you to do, Ms. Weil, is to produce to us, and I was hopeful that you would do it today, in fact I had understood that you were undertaking to do it today, to bring with you and produce that complete set of photographs that you received from Blacks on June 1, 2002 for the defendants to review.

A. I refuse.

[19] In the statement of claim the plaintiffs seek damages for the violation of their right to be secure against unreasonable search and seizure guaranteed by section 8 of the *Charter*. Justice Walters, in her judgment dated September 16, 2003, held that the police seized the photographs from Blacks Photography and thereby violated the plaintiffs rights under section 8 of the *Charter*. The photos were used to obtain a search warrant. The execution of the search warrant resulted in the discovery of the marijuana plants. This resulted in the charges against the plaintiffs. Justice Walters held that the evidence obtained as a result of the execution of a search warrant was inadmissible pursuant to section 24(2) of the *Charter*. The charges were dismissed because the crown had no other evidence. The plaintiffs seek leave in their statement of claim to refer to the reasons for judgment of Justice Walters. The plaintiffs claim copyright in the photographs. They allege breach of their copyright against Blacks Photography by reason of their giving the photographs to the Peel police and against the Peel police by reason of their giving the photographs to the Halton police. The plaintiffs, having sued on the basis of the use of the photographs by the defendants, cannot now refuse to produce them to the defendants. The defendants can only properly assess the case against them by viewing the photographs. Mr. Neeb recognized this by undertaking to produce the photographs at the examinations for discovery contrary to the wishes and perhaps instructions of his clients.

[20] The plaintiffs are clearly very sensitive about others viewing the photographs. I can understand this as did Justice Snowie in the passage quoted above. However, they cannot both sue on the photos and refuse to produce them. The plaintiffs position has no merit. They have not satisfied the first branch of either rule 62.02 (4) (a) or (b).

[21] Regarding the order of Justice Sills made on March 8, 2007, Douglas did not appear on a motion which he had served after he had assured counsel in writing that he would appear. Clearly Justice Sills was correct in awarding costs against him and Justice Taylor was correct in declining to set aside the order of Justice Sills. His position in seeking leave to appeal Justice Taylor's order refusing to set aside the order of Justice Sills has no merit. He has not satisfied the first branch of either rule 62.02 (4) (a) or (b).

[22] The Peel police submitted a bill of costs in the amount of \$4,437, including disbursements but exclusive of GST. The Halton police submitted a bill of costs, inclusive of GST and disbursements of \$5,642. Blacks Photography submitted a bill of costs, inclusive of GST and disbursements of \$7,090. The total claim of the defendants for costs is \$17,079. The defendants filed a single factum and a single brief of authorities. Counsel for Blacks Photography argued the motion for all the defendants. I fixed costs at \$12,000. The position of the plaintiffs in declining to produce the photographs has no merit. Mr. Neeb recognized this. Clearly the plaintiffs do not wish to produce the photographs. They want to protect their privacy. I can understand this, as could Justice Snowie. If the plaintiffs do produce the photographs they cannot be used by the defendants for any purpose other than the lawsuit. The plaintiffs will have to choose between production of the photographs or abandoning the lawsuit. The position of the plaintiffs in seeking leave to appeal the orders of Justice Taylor has no merit. Although the costs which I fixed at \$12,000 may be on the high side, I decline to change my order. Parties cannot bring frivolous motions to which opposing parties are required to respond with impunity. I will make an order deferring payment of \$6,000 until after the trial or settlement. The balance of \$6,000 is payable forthwith.

P.B. HAMBLY J.

Released: January 13, 2009

COURT FILE NO.: C-286/04

DATE: 20090113

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Agnieszka Wojtanowska and Douglas Weil

Plaintiffs

- and

Daniel Mustard, The Estate of Steven Blanchard, Deceased,
Shannon Tobin, Ontario Corporation 1034893 (c.o.b. as Black
Photo Corporation), Heather Ramore, Robert Smith, The Regional
Municipality of Peel Police Services Board, Larry Burns, Edward
Gies and Halton Regional Police Services Board

Defendants

REASONS FOR JUDGMENT

The Honourable Mr. Justice P.B. Hamby

Released: January 13, 2009

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**Agnieszka Wojtanowska and Douglas Weil v. Daniel Mustard, Estate of Steven
Blanchard, Deceased, Shannon Tobin, Ontario Corporation 1034893 (c.o.b. as Black
Photo Corporation), Heather Ramore, Robert Smith, Regional Municipality of Peel
Police Services Board, Larry Burns, Edward Gies and Halton Regional Police Services
Board, 2009 CanLII 36260 (S.C.C.)**

Date: 2009-07-09

Docket: 33007

URL: <http://www.canlii.org/en/ca/scc-l/doc/2009/2009canlii36260/2009canlii36260.html>

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• **Superior Court of Justice**

[Wojtanowska v. Mustard](#), 2009 CanLII 1154 (ON S.C.) - 2009-01-13

• [Wojtanowska v. Mustard](#), 2008 CanLII 42219 (ON S.C.) - 2008-08-05

No. 33007

Coram: Binnie, Fish and Charron JJ.		Coram: Les juges Binnie, Fish et Charron
BETWEEN:		ENTRE :
Agnieska Wojtanowska and Douglas Weil		Agnieska Wojtanowska et Douglas Weil
Applicants		Demandeurs
I and I		I et I
Daniel Mustard, Estate of Steven Blanchard, Deceased, Shannon Tobin, Ontario Corporation 1034893 (c.o.b. as Black Photo Corporation), Heather Ramore, Robert Smith, Regional Municipality of Peel Police Services Board, Larry Burns, Edward Gies and Halton Regional Police Services Board		Daniel Mustard, Estate of Steven Blanchard, Deceased, Shannon Tobin, Ontario Corporation 1034893 (c.o.b. as Black Photo Corporation), Heather Ramore, Robert Smith, Regional Municipality of Peel Police Services Board, Larry Burns, Edward Gies et Halton Regional Police Services Board
Respondents		Intims
JUDGMENT		JUGEMENT
The application for leave to appeal from the judgment of the Ontario Superior Court of Justice, Number C1286/04, dated December 4, 2008, is dismissed with costs. The motion to quash the application for leave to appeal is moot and without costs.		La demande d'autorisation d'appel du jugement de la Cour supérieure de justice de l'Ontario, numéro C1286/04, daté du 4 décembre 2008, est rejetée avec des dépens. La requête en annulation de la demande d'autorisation d'appel est sans objet et sans dépens.

J.S.C.C.

J.C.S.C.