COURT OF APPEAL FOR ONTARIO

CITATION: Deschenes v. Lalonde, 2020 ONCA 304
DATE: 20200520
DOCKET: C66312

van Rensburg, Paciocco and Thorburn JJ.A.

BETWEEN

Irene Deschenes

Plaintiff (Respondent)

and

Pauline Lalonde as estate trustee with a will ("Executrix") of the Estate of Charles H. Sylvestre, the Roman Catholic Episcopal Corporation of the Diocese of London in Ontario, the Estate of John Christopher Cody, the Estate of Gerald Emmett Carter, John Michael Sherlock, St. Clair Catholic District School Board, the Sarnia Police Force, John Smith, J. Torrance, Le Conseil scolaire de district des écoles catholiques du Sud-Ouest, the Sisters of Charity of Ottawa (also known as Grey Nuns of the Cross – "Soeurs Grises de la Croix") and Anthony Daniels

Defendants (Appellants)

John K. Downing and Brian Whitwham, for the appellants

Loretta P. Merritt, for the respondent

Heard: November 19, 2019

On appeal from the judgment of Justice David Aston of the Superior Court of Justice, dated November 27, 2018, with reasons reported at 2018 ONSC 7080.

van Rensburg J.A.:

A. OVERVIEW

[1] This is an appeal from a judgment rescinding and setting aside a settlement agreement and order dismissing the settled action. The respondent, Irene Deschenes, alleged that she was sexually assaulted as a child by a priest in the early 1970s. She sued the priest and the appellant, the Roman Catholic Episcopal Corporation of the Diocese of London in Ontario (the "Diocese"), claiming vicarious liability for the priest's actions, and negligence in failing to prevent the assaults. The Diocese maintained, and at the time there was no reason to believe otherwise, that it had no knowledge of the priest's prior abuse of others until 1989, many years after the assaults on Ms. Deschenes had ceased. Armed with this knowledge, and the fact that the law respecting vicarious liability was uncertain, Ms. Deschenes settled her action in 2000 for a payment by the Diocese of $100,000.

[2] In 2006, it came to light that in 1962, the Diocese had received police statements alleging that the priest had assaulted three girls well before Ms. Deschenes was assaulted. In 2008, Ms. Deschenes commenced a new action against the Diocese and others, claiming rescission of the settlement agreement and other relief. The parties moved for summary judgment to determine the enforceability of the settlement agreement entered into in 2000.

[3] For the reasons that follow, I would dismiss the appeal. Briefly, although the motion judge's analysis at times confounded the terminology of misrepresentation and mistake, the settlement agreement was properly rescinded for innocent

misrepresentation. The motion judge's conclusions that there was a misrepresentation by the Diocese, that it was material, and that it was relied on by Ms. Deschenes in concluding the settlement, as well as his conclusion that it would be fair and just to rescind the settlement agreement in the circumstances, reveal no error.

B. FACTS

[4] Ms. Deschenes was sexually assaulted by Charles Sylvestre when she was a student at St. Ursula Catholic School and a member of St. Ursula's Parish in Chatham, Ontario, which falls within the jurisdiction of the Diocese. Father Sylvestre had been ordained as a Roman Catholic priest in or about 1948. He retired in 1993. In 2006, Father Sylvestre pleaded guilty to having sexually assaulted 47 girls under the age of 18, including Ms. Deschenes.

[5] In 1996, Ms. Deschenes commenced an action in the Ontario Court (General Division) (the "First Action") against Father Sylvestre and the Diocese. She claimed damages for the sexual assaults committed against her by Father Sylvestre between 1970 and 1973. Among other things, she pleaded that the Diocese was both vicariously liable for Father Sylvestre's actions and that it was negligent in failing to protect her from Father Sylvestre when it knew or ought to have known that he was or might be assaulting members of the church.

[6] Father Sylvestre's Statement of Defence denied the allegations of sexual assault. The Statement of Defence of the Diocese did not admit any of the allegations in the Statement of Claim and denied direct and vicarious liability for Father Sylvestre's alleged actions. In particular, the Diocese denied "that it had direct, indirect, actual or constructive knowledge of the alleged sexual propensities or acts of Sylvestre" and stated that it had "no direct, indirect, actual or constructive knowledge of the allegations made by the plaintiffs until October 1992, well after the alleged assaults had ceased".

[7] Father Anthony Daniels (now Bishop Daniels) was the deponent of the affidavit of documents on behalf of the Diocese and was examined as its representative for discovery in the First Action. Father Daniels confirmed that he had conducted a search of the records of the Diocese and made diligent inquiries to determine when it first learned about the allegations against Father Sylvestre. He denied that anyone in the Diocese had any idea of the events alleged by Ms. Deschenes, and he specifically stated that no one at the Diocese had reason to believe that there were problems with Father Sylvestre until 1989, when a fellow priest raised concerns about his possible alcohol abuse.

[8] The parties attended a mediation in the First Action. In its mediation brief, the Diocese asserted the following:

> There were never any complaints about Father Sylvestre, or reason to believe there could be any problems with him or his behaviour prior to 1989 when a fellow priest

> raised concerns with the Bishop about possible alcohol abuse by Father Sylvestre. He was immediately removed from the parish where he was then serving, and sent to a treatment centre.

[9] Shortly after the mediation, the parties agreed to settle the First Action. The relevant terms of the settlement were that: (1) the Diocese would pay Ms. Deschenes $100,000; (2) Father Sylvestre would pay the Diocese $50 per month until his death; (3) Ms. Deschenes would execute a full and final release in favour of Father Sylvestre and the Diocese (the "Release"); and (4) Ms. Deschenes would obtain an order dismissing the action. Ms. Deschenes executed the Release, received her payment, and the First Action was dismissed on consent by order dated October 16, 2000.

[10] In late 2006, certain information came to light: on January 17, 1962, three girls had complained to the Sarnia Police Service that they had been sexually assaulted by Father Sylvestre, and each had provided a statement to the police to this effect. The police, who took no action against Father Sylvestre, provided copies of the statements to Monsignor Cook, of the Catholic Social Services in Sarnia, who forwarded them to the then bishop of the Diocese, Bishop Cody. Bishop Cody passed away suddenly in December 1963, apparently without having told anyone about the police statements. Between January 1962 and January 1963, Father Sylvestre was on a leave of absence in Roxboro, Québec. The police statements were discovered in 2006 by the executive assistant of the bishop of the Diocese at the time, in a filing cabinet where they had been misfiled with old

accounting records. Shortly thereafter, copies of the statements were sent to all lawyers representing plaintiffs with outstanding claims against Father Sylvestre, including Ms. Deschenes' former counsel.

[11] As a result of receiving this information, Ms. Deschenes commenced an action (the "Second Action") against the Diocese and others in December 2008, seeking to rescind her settlement of the First Action and claiming damages against the Diocese for, among other things, vicarious liability for Father Sylvestre's assault, and negligence in failing to prevent the assaults.

[12] Ms. Deschenes' position in the Second Action was that she would never have settled the First Action on the terms she did had she known that the Diocese had information about Father Sylvestre's prior abuse of children at the time she was assaulted.

[13] Eventually, the parties brought competing motions for summary judgment. The appellants moved to dismiss the Second Action on the basis that it was barred by the Release. Ms. Deschenes moved for a declaration rescinding or setting aside the Release and the related order giving effect to the settlement. Ms. Deschenes also sought summary judgment on the issue of liability, leaving damages as the only outstanding issue in the Second Action. Judgment was granted in Ms. Deschenes' favour.

[14] The appellants assert that the motion judge erred in rescinding the settlement agreement. They do not appeal the declaration of vicarious liability, which was made on consent.

C. DECISION OF THE MOTION JUDGE

[15] The motion judge began his reasons by recognizing, at para. 2, the "well-established public policy argument favouring finality in litigation", and that "[s]ettlement agreements and associated releases ought to be enforced unless enforcement would create a real risk of injustice."

[16] The motion judge reviewed the evidence of the Diocese in the context of the First Action, including its denial that it had failed to supervise Father Sylvestre, and the statements on discovery and in the Diocese's mediation brief stating that it had no knowledge or reason to believe there were problems with Father Sylvestre's behaviour nor had there been any complaints. He then described the terms of the parties' settlement and the events that precipitated the Second Action, namely the discovery of the police statements in 2006 and their subsequent disclosure to Ms. Deschenes' former counsel.

[17] The motion judge explained that actual or constructive knowledge on the part of the Diocese was an essential part of Ms. Deschenes' negligence claim. The motion judge summarized Ms. Deschenes' legal position at the time as follows: Ms. Deschenes' vicarious liability claim was problematic because an employer was

generally only vicariously liable if the employee's conduct was within the scope of their employment. He further noted that claims against non-profit organizations were even less likely to succeed: at para. 11.

[18] The motion judge considered the affidavit evidence of Ms. Deschenes and her former counsel, who both asserted that Ms. Deschenes would not have settled as she did in the fall of 2000 had they known about the 1962 police statements. He referred to Ms. Deschenes' position that the representation by the Diocese that it had no knowledge of Father Sylvestre's sexual abuse until 1989 constituted a misrepresentation of a material fact that she relied on in settling her claim.

[19] Citing *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 47, the motion judge noted that rescission would be available as an equitable remedy, even if the misrepresentation was innocent, provided that the misrepresentation was "material", "substantial" or "[went] to the root of the contract". He also cited *Buccilli v. Pillitteri*, 2012 ONSC 6624, 84 E.T.R. (3d) 208, at paras. 173-75, aff'd 2014 ONCA 432, 96 E.T.R. (3d) 6, as support for the proposition that reliance only requires that the misrepresentation was an influential part of Ms. Deschenes' decision to settle.

[20] The motion judge stated, at para. 14, that he agreed with Ms. Deschenes' counsel that the misrepresentation in this case "cannot be regarded as an 'innocent misrepresentation' as the law defines it". He did not question the veracity of Father Daniels' statement under oath that he had done a diligent search of the

Diocese's records and found nothing to alert the Diocese to Father Sylvestre's sexual abuse of young girls before 1989. However, he stated that the Diocese is a corporate body, that Bishop Cody knew of the police statements in 1962, and he agreed with Ms. Deschenes' counsel that "Father Daniels' ignorance of those police reports in 2000 is not the ignorance of the Diocese because Bishop Cody's knowledge in 1962 or 1963 is the knowledge of the Diocese": at para. 14. The motion judge further noted that "for the same reason, the misrepresentation cannot be considered a mutual or common mistake" but is "a unilateral mistake by the Diocese": at para. 15. These statements by the motion judge play a central role in the appellants' arguments on appeal and will be discussed in more detail in the balance of these reasons.

[21] The motion judge, at para. 16, characterized the misrepresentation as a "unilateral mistake" and considered whether this mistake was "material" to the settlement and relied on by Ms. Deschenes.

[22] The Diocese had submitted that the police statements were not material to the settlement because the settlement reflected the same damages Ms. Deschenes would have received had the settlement been based in negligence, and the June 1999 decision of the Supreme Court in *Bazley v. Curry*, [1999] 2 S.C.R. 534 had established the liability of the Diocese on the basis of vicarious liability. The motion judge described *Bazley* as a "landmark case in extending vicarious liability to non-profit organizations", and then referred to a

decision released the same day, *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, where the Supreme Court concluded that vicarious liability would not be imposed when the only evidence was in relation to sexual assaults that took place off-site and outside working hours. The motion judge noted that in *John Doe v. Bennett* (2000), 190 Nfld. & P.E.I.R. 277 (Nfld. S.C.), a diocese and three of its bishops had been found vicariously liable, but that this decision had been appealed and was only affirmed by the Supreme Court in March 2004. The motion judge observed that "[t]he decisions in *Bazley* and *Bennett* provided the plaintiff with strong precedents in her favour, but not necessarily decisive precedents": at para. 19. The motion judge also referred to the fact that, although the Diocese indicated in 1999 that it would be accepting liability on the basis of vicarious liability, it never did so formally, and had continued to deny such liability. He stated that "the vicarious liability of the Diocese in this case was not a certainty in the settlement with the plaintiff": at para. 20.

[23] The motion judge referred to Ms. Deschenes' motivations in settling the First Action, which were informed by the relevant case law at the time and the position of the Diocese. He concluded that what he characterized as the "unilateral mistake of the Diocese" was relied on by Ms. Deschenes. He accepted her evidence, and that of her former counsel, that the settlement reflected a "liability discount", and that Ms. Deschenes' claim was compromised because of the apparent inability to prove the prior knowledge of the Diocese as an essential element of the negligence

claim and the remaining uncertainty of the law regarding vicarious liability: at paras. 21-22.

[24] The motion judge concluded, at para. 23, that the failure to disclose the 1962 police statements was a “material misrepresentation” relied on by Ms. Deschenes in her decision to settle.

[25] Finally, the motion judge turned to the discretionary nature of the remedy of rescission and policy considerations favouring the finality of settlements. In this context, he referred to what had come to light since the settlement of Ms. Deschenes’ claim in 2000 regarding the cover-up policy of the Diocese in the 1960s and 1970s with respect to allegations of misconduct by its priests. He recognized that the Diocese had dramatically changed its ways in Southwestern Ontario and had genuinely tried to make amends. Nevertheless, he concluded, at para. 24, that there were overarching considerations of fairness and justice that favoured Ms. Deschenes and that it would be wrong in the circumstances of this case to protect the settlement.

D. ISSUES

[26] The appellants raise the following issues on this appeal:

1. Did the motion judge err in rescinding the settlement agreement on the basis of unilateral mistake?
2. Did the motion judge err in his assessment of materiality?

3. Did the motion judge err in not giving effect to the "finality of settlements" and in relying on findings in another action in deciding whether to grant the equitable remedy of rescission?

E. ANALYSIS

(1) The relevant legal principles

[27] I begin by setting out the relevant legal principles. The point of departure is that there is a strong presumption in favour of the finality of settlements: *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 165 D.L.R. (4th) 268 (Ont. C.A.), at paras. 15-16, leave to appeal refused, [1998] S.C.C.A. No. 518; *Mohammed v. York Fire & Casualty Insurance Co.* (2006), 79 O.R. (3d) 354 (C.A.), at para. 34, leave to appeal refused, [2006] S.C.C.A. No. 269. A settlement agreement will not be rescinded on the basis of information that has come to light following the settlement that indicates that a party has entered into an improvident settlement. As the motion judge recognized here, "it is not enough to revisit a settlement decision based on the better vision of hindsight": at para. 2.

[28] A settlement agreement, as a contract, may be rescinded on the basis of misrepresentation. The interest in the finality of settlements will not "trump" the need to rescind a settlement agreement in such cases. In *Radhakrishnan v. University of Calgary Faculty Association*, 2002 ABCA 182, 215 D.L.R. (4th) 624, at paras. 30, 43, Côté J.A. stated that "[t]he recognized ways to upset a settlement

contract are the same as those to upset any other contract", and that "[in a settlement] [i]nterests of finality prevail, unless there are contractual problems such as fraud, misrepresentation, duress, undue influence, unconscionability, or mutual or unilateral mistake". See also *Teitelbaum v. Dyson* (2000), 7 C.P.C. (5th) 356 (Ont. S.C.), at para. 38, aff'd (2001), 151 O.A.C. 399 (C.A.), leave to appeal refused, [2001] S.C.C.A. No. 532.

[29] The equitable remedy of rescission is available for a false or misleading representation that induces a contract: *Guarantee Co. of North America*, at para. 39. Rescission requires proof that the misrepresentation was material and was relied on by the party seeking to rescind the contract: *1323257 Ontario Ltd. o/a "Hyundai of Thornhill" v. Hyundai Auto Canada Corp*. (2009), 55 B.L.R. (4th) 265 (Ont. S.C.), at para. 71; *Barclays Bank v. Metcalfe & Mansfield*, 2011 ONSC 5008, 82 C.B.R. (5th) 159, at paras. 156-59, aff'd 2013 ONCA 494, 365 D.L.R. (4th) 15, leave to appeal refused, [2013] S.C.C.A. No. 374. To be material, a misrepresentation must relate to a matter that would be considered by a reasonable person to be relevant to the decision to enter the agreement, but it need not be the sole inducement for acting: *York University v. Makicevic and Brown*, 2016 ONSC 3718, 33 C.C.E.L. (4th) 26, at para. 145, aff'd 2018 ONCA 893, 51 C.C.E.L. (4th) 30, leave to appeal refused, [2019] S.C.C.A. No. 134. Whether a contracting party did in fact rely on the misrepresentation, at least in

part, to enter into the agreement is a "question of fact to be inferred from all the circumstances of the case and evidence at trial": *Barclays Bank*, at para. 159.

[30] The remedy of rescission is available even if the misrepresentation was made innocently, that is, by a party who believed it was true: "Where rescission is claimed it is only necessary to prove that there was misrepresentation. Then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand": *Derry v. Peek* (1889), [1886-90] All E.R. Rep. 1 (H.L.), at p. 13, *per* Lord Herschell. In *Kingu v. Walmar Ventures Ltd*., [1986] B.C.J. No. 597 (C.A.), McLachlin J.A. (as she then was) set out a list of requirements for rescission of a contract on the basis of innocent misrepresentation. In addition to the requirement of a positive misrepresentation of an existing fact that induced the plaintiff to enter into the contract, in order for rescission to be granted, the plaintiff must have acted promptly upon discovery of the misrepresentation to disaffirm the contract, no third party may have acquired rights for value as a result of the contract, and it must be possible to restore the parties substantially to their pre-contract position: *Kingu*, at para. 15.

[31] It is apparent from this summary of the legal principles that, in determining whether the settlement agreement could be rescinded for innocent misrepresentation, the motion judge had to consider: (1) whether the Diocese made a misrepresentation; (2) whether the misrepresentation was material to the

settlement; and (3) whether Ms. Deschenes had relied on the misrepresentation in settling the First Action on the terms she did. The record before this court indicates that while questions of delay, third-party rights, and the ability to restore the parties to their pre-settlement positions were pleaded in the appellants' Statement of Defence, they were not pressed at the hearing of the motions. Nor did they figure in the appeal.

[32] As noted by Côté J.A. in *Radhakrishnan*, a settlement agreement may also be rescinded on the basis of unilateral mistake. I will explain why I reject the appellants' submission that the motion judge, after finding a "unilateral mistake by the Diocese", erred in this case in rescinding the settlement agreement on this basis. The law on rescission for unilateral mistake is that a party may seek rescission of a contract for its own unilateral mistake only where the mistake goes to a material term of the contract, where the other party knows or ought to know of the mistake, and where it would be unconscionable for the second contracting party to rely on the contract: *256593 B.C. Ltd. v. 456795 B.C. Ltd*. (1999), 171 D.L.R. (4th) 470 (B.C.C.A.), at p. 479. See also Gerald H. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Reuters Canada Limited, 2011), at pp. 252-54; *Toronto Transit Commission v. Gottardo Construction Limited et al.* (2005), 257 D.L.R. (4th) 539 (Ont. C.A.), at para. 30, leave to appeal refused, [2005] S.C.C.A. No. 491. The motion judge did not refer to these principles, and for good reason. Although the motion judge characterized the misrepresentation

as a “unilateral mistake of the Diocese”, he did not, nor could he have, rescinded the settlement agreement for unilateral mistake, where the only mistake he found was that of the Diocese, not Ms. Deschenes. Rather, the framework he applied was that of rescission for innocent misrepresentation.

[33] I turn now to consider in detail the appellants’ arguments based on the law of unilateral mistake.

(2) The motion judge did not err in applying the law of unilateral mistake; he applied the law of innocent misrepresentation

[34] The appellants assert that the motion judge erred in law when he rescinded the settlement agreement based on unilateral mistake. Referring to the elements that are required to rescind an agreement for unilateral mistake, the appellants contend that: (1) the Diocese had no actual or constructive knowledge of the mistake at the time it was made; and (2) there was no evidence of unconscionable conduct on the part of the Diocese.

[35] On the knowledge point, the appellants argue that the motion judge erred in imputing knowledge of the 1962 police statements to the Diocese at the time of the settlement when, at para. 14, he agreed with Ms. Deschenes’ counsel that “Father Daniels’ ignorance of those police reports in 2000 is not the ignorance of the Diocese because Bishop Cody’s knowledge in 1962 or 1963 <u>is</u> the knowledge of the Diocese”. The appellants submit that because Bishop Cody (who was the only person in authority who knew about the statements) had since passed away,

although the statements existed, no “directing mind” of the Diocese knew about the police statements when the settlement was concluded in 2000. Without actual or constructive knowledge on the part of the Diocese that there was a mistake, there is no basis for rescinding the settlement agreement on the grounds of unilateral mistake.

[36] According to the appellants, the imputation of knowledge requires the application of the corporate identification doctrine, which was ignored by the motion judge. The appellants refer to the Supreme Court decision in *Canadian Dredge & Dock v. The Queen*, [1985] 1 S.C.R. 662, which addresses the circumstances in which, under the corporate identification doctrine, liability will be attributed to a corporation for a *mens rea* offence, as well as certain civil authorities where the corporate identification doctrine was applied to causes of action requiring knowledge or intention on the part of a corporate defendant. The appellants submit that the motion judge erred in attributing Bishop Cody’s knowledge in the 1960s to the Diocese some 40 years later.

[37] The corporate identification doctrine, which applies when liability is sought to be attributed to a corporation for the wrongdoing of an individual, has no application here. Rescinding the settlement agreement on the basis of an innocent misrepresentation does not require proof of a crime, or even of an intentional wrong by the Diocese that might require an inquiry into whose intentional misconduct could be attributed to the Diocese to found liability.

[38] It is unclear why the motion judge made the statement he did at para. 14 about the knowledge of Bishop Cody in 1962 and 1963 being the knowledge of the Diocese in 2002. Perhaps it was simply a rejection of the argument – made obliquely on appeal as well – that the institutional memory of the Diocese was somehow lost when Bishop Cody died without having told anyone about the police statements.

[39] Whether or not the motion judge, at para. 14, imputed knowledge to the Diocese ultimately had no bearing on his decision to rescind the settlement agreement. The appellants' argument on this point is based on the assumption that the motion judge rescinded the settlement agreement for unilateral mistake. However, as I will explain, the motion judge did not, and could not have, rescinded the settlement agreement on this basis. Instead, the settlement agreement was properly rescinded for innocent misrepresentation.

[40] Rescission based on innocent misrepresentation does not require a finding that the Diocese had actual or constructive knowledge that the representation was false at the time it was made. An innocent misrepresentation is one that is made without knowledge that it is wrong: see *Barclays Bank*, at para. 156.

[41] I note here that, although the motion judge said that he accepted that the misrepresentation was not "innocent", later in his reasons, he stated that he was "mindful that the evidence of Father Daniels in the original proceeding reflected an honest, albeit mistaken belief": at para. 24. Regardless of the motion judge's

characterization of the misrepresentation, the motion judge properly found that the requirements for rescinding the settlement agreement on the basis of misrepresentation had been made out: the Diocese made a misrepresentation; the misrepresentation was material to the settlement; and the misrepresentation was relied on by Ms. Deschenes.

[42] The appellants' second argument also assumes that the motion judge rescinded the settlement agreement for unilateral mistake. The appellants submit that unconscionable conduct had to be established for the motion judge to rescind the settlement agreement on the basis of unilateral mistake, and that the finding that Father Daniels had an honest but mistaken belief precluded such a finding.

[43] The appellants insist that, because of the motion judge's use of the language of mistake on a number of occasions in his reasons, his decision to rescind the settlement agreement must have been based on the law of unilateral mistake. For example, at para. 15, the motion judge stated that "the misrepresentation cannot be considered a mutual or common mistake", and that it was a "unilateral mistake by the Diocese". Moreover, at para. 16, he identified the question as whether "the unilateral mistake of the Diocese was relied upon by the plaintiff".

[44] I agree that the motion judge, at times, confused the language of mistake and misrepresentation and described the misrepresentation as a "unilateral mistake by the Diocese". The Diocese's misrepresentation could be viewed as a unilateral mistake in the sense that it was a one-sided error made on the part of

the Diocese, but not in the legal sense of the term. Despite this confusion, the motion judge only applied the framework of rescission for innocent misrepresentation, and made the findings that were necessary to rescind the settlement agreement on this basis.

[45] As I have previously noted, a contracting party may obtain rescission on the basis of its own unilateral mistake where the mistake goes to a material term of the contract (something that goes to the root of the contract, or is fundamental to the contract), where the other party knows or ought to know of the mistake, and where it would be unconscionable for the second contracting party to rely on the contract. Indeed, this is the law that the appellants rely on in this appeal. There is no question that where there has been a unilateral mistake by the innocent party to a contract, a contract can be rescinded only if the non-mistaken party knew, or ought to have known, of the innocent party's mistake. The core element of knowledge, however, is that of the non-mistaken party. Professor Fridman makes this clear when he says, at pp. 252-54:

> If the party not in error knows or ought to know of the other's mistake, any purported agreement between them may not be enforceable in equity … on the ground that equity will not permit a party to take advantage of the error in offering or accepting by the other party. The rationale of such cases is that equity penalizes unconscionable conduct, whether it actually constitutes fraud or involves something amounting to fraud in the view of equity. It must be unfair, unjust or unconscionable to enforce or uphold the contract.

> It is not necessary for the party seeking to avoid the contract on the ground of mistake to prove that the other party caused or induced the mistake (although if such causation is established it might lead to rescission for fraud, or for innocent misrepresentation). As long as the unmistaken party knows of the mistake, without having caused it, that party cannot resist a suit for rectification on the grounds of mistake. The same will apply if the other party had good reason to know of the mistake and to know what was intended. The converse of the proposition as to the knowledge of the other party's mistake is that if the unmistaken party is ignorant of the other's mistake the contract will be valid and neither rescission nor rectification will be possible. [Footnotes omitted.]

[46] The unilateral mistake analysis simply does not fit this case. Here, the mistake was that of the Diocese, not Ms. Deschenes. Indeed, as noted above, the motion judge characterized the misrepresentation at various points in his reasons as a "unilateral mistake by the Diocese" (emphasis added). To support an analysis based on rescission for unilateral mistake, the motion judge would have had to have found that Ms. Deschenes was the mistaken party and that the Diocese was trying to take advantage of her mistake. It may be that Ms. Deschenes was also "mistaken", in which case, as Professor Fridman notes in the passage quoted above, rescission for innocent or fraudulent misrepresentation could follow on proof that the other party caused or induced the mistake.

[47] The proper characterization of what occurred here is that the Diocese made a representation that was false when it stated repeatedly, including under oath, that no one knew that there was any reason to be concerned about Father

Sylvestre's behaviour before Ms. Deschenes claimed to have been assaulted by him, and that there had been no prior complaints. In this sense, the Diocese made a "mistake". Although the Diocese was mistaken when it made the representation, this was not a case of rescission for unilateral mistake. Rather, rescission of the settlement agreement was warranted on the basis of the law of innocent misrepresentation.

[48] Although there were points in the motion judge's analysis where he spoke of a "unilateral mistake", the motion judge arrived at his decision by applying the test for innocent misrepresentation. He identified the misrepresentation made by the Diocese. He then assessed the evidence to determine whether the misrepresentation was material to the settlement and had been relied on by Ms. Deschenes. Finally, he considered factors relevant to the exercise of his discretion in rescinding the settlement agreement for misrepresentation, including the importance of the finality of settlements.

[49] Even assuming that the motion judge did incorrectly apply the law of unilateral mistake, this court has jurisdiction to apply the correct legal framework to the evidence: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1)(a); *L.M. v. Peel Children's Aid Society*, 2019 ONCA 841, 149 O.R. (3d) 18, at para. 54; and *Ontario (Attorney General) v. Darby Road, Welland (In Rem)*, 2019 ONCA 31, 431 D.L.R. (4th) 243, at para. 30. In doing so, for the reasons stated above, I would

conclude that rescission was warranted under the framework of innocent misrepresentation.

(3) The motion judge did not err in his assessment of materiality

[50] The appellants submit that the motion judge erred in finding that the nondisclosure of the 1962 police statements was material to Ms. Deschenes' decision to settle her claim. I disagree.

[51] The conclusion that the misrepresentation was material to Ms. Deschenes' decision to settle on the terms she did was fully supported by the evidence, and by a reasonable understanding of the case law and the legal position of the Diocese at the time. The motion judge accepted the evidence of Ms. Deschenes and her former counsel that Ms. Deschenes would not have settled her claim as she did if they had known about the 1962 police statements.

[52] At the time the First Action was settled, Ms. Deschenes had a difficult case in respect of vicarious liability, and she had no evidence that the Diocese knew about Father Sylvestre's history of abusing girls. She could not make out a case of negligence against the Diocese without such evidence. Further, although the Diocese contends that it advised Ms. Deschenes' counsel in 1999 that it would accept vicarious liability for Father Sylvestre's actions, the motion judge correctly noted that there was no admission in this regard, and that in 2000, both on

discovery and at the mediation, the Diocese continued to deny liability on all bases, including vicarious liability.

[53] Moreover, the motion judge's determination that Ms. Deschenes did in fact rely on the misrepresentation in deciding to enter into the settlement agreement is a question of fact that was properly inferred from all the circumstances of the case and the evidence before the motion judge: see Fridman, at p. 291; *York University v. Makicevic*, 2018 ONCA 893, 51 C.C.E.L. (4th) 30, at para. 21, leave to appeal refused, [2019] S.C.C.A. No. 134; and *Barclays Bank*, at para. 159. This is a finding that can only be disturbed on the basis of a palpable and overriding error. No such error has been shown.

(4) The motion judge did not err in failing to enforce the finality of the settlement

[54] As noted by the appellants, settlements are compromises made on the basis of the information that is available to the parties at the time. In many instances, civil actions are settled on the basis of imperfect or incomplete information. In other cases, as here, they are settled after the discovery of documents and oral discovery. Settlement decisions are based on the available information and the parties' assessment of the strength or weakness of their case, informed by a consideration of legal precedent.

[55] Contrary to the appellants' suggestion, Ms. Deschenes did not seek to resile from the settlement simply because new information had come to light which would

have strengthened her case. Rather, rescission was available because certain key information that was provided to Ms. Deschenes by the Diocese was false. Rescission was available as a remedy for innocent misrepresentation, which could only be granted once the requirements had been met.

[56] The appellants assert that the judgment rescinding the settlement agreement is contrary to the principle of finality of litigation. I disagree.

[57] The appropriate framework, which was applied by the motion judge, was to consider whether there were grounds to rescind the settlement agreement on the basis of the Diocese's innocent misrepresentation, and, in deciding whether to grant the remedy of rescission, to address the equitable considerations of whether such a remedy would be fair and just. In this context, the motion judge, at para. 24, adverted to the appellants' arguments with respect to the public policy considerations favouring the finality of settlements. After referring to the Diocese's historical conduct, he concluded that there were overarching considerations of fairness and justice that favoured Ms. Deschenes and that it would be wrong in the circumstances of this case to protect the settlement. I see no error in the manner that the motion judge exercised his discretion.

[58] In any event, in the circumstances of this case, any interest in the finality of settlements could not "trump" the need to rescind a settlement agreement that, based on the evidence, was induced by the Diocese's innocent misrepresentation.

[59] In oral submissions, the appellants advanced another argument in respect of the motion judge's conclusions at para. 24. The appellants submitted that the motion judge erred in relying on the findings and evidence in another case against the Diocese involving sexual assaults by Father Sylvestre, *K.M.M. v. The Roman Catholic Episcopal Corp.*, 2011 ONSC 2143, when he stated: "I cannot disregard what has come to light since the settlement of the plaintiff's claim in 2000 regarding the cover-up policy of the Church in the 1960s and 70s respecting allegations of misconduct by its priests."

[60] I agree that it would not have been appropriate for the motion judge to base his decision on whether the requirements of innocent misrepresentation had been made out on evidence and findings in another decision. However, that is not what the motion judge did here: his findings with respect to the misrepresentation, materiality and reliance were all based on the evidence that was before him in Ms. Deschenes' case. It was only in the context of his overall consideration of fairness and justice in deciding whether to rescind the settlement agreement, and in responding to the appellants' arguments regarding the finality of the settlement, that the motion judge referred to "what has come to light since the settlement".

[61] Evidence that the Diocese had, in the past, attempted to cover up allegations of sexual assault was relevant to the consideration of fairness and justice, to be weighed in the balance with the arguments of the Diocese in favour of the finality of the settlement. The fact that the parties had placed the *K.M.M.* decision before

the motion judge as part of the Agreed Facts on the motion suggests that they agreed that this decision was both relevant and admissible. In any event, whether or not the motion judge was entitled to rely on the finding in that case that there had been a cover-up policy by the Diocese, there was evidence before him from which a cover-up policy could be inferred: in 1962, the police statements were not disclosed by Bishop Cody to anyone in authority at the Diocese and Father Sylvestre was transferred out of the Diocese and placed on a leave of absence. The motion judge's decision did not turn on the *K.M.M.* decision.

[62] There is no reason to interfere with the motion judge's determination that the interests of fairness and justice favoured the equitable remedy of rescission in this case.

F. DISPOSITION

[63] For these reasons, I would dismiss the appeal. I would award costs to Ms. Deschenes in the agreed sum of $60,000, inclusive of disbursements and HST.

Released: May 20, 2020 ("K.M.v.R.")

"K. van Rensburg J.A."
"I agree. David M. Paciocco J.A."
"I agree. Thorburn J.A."