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The Disaster Plaintiff: The Best Worst Litigation Strategy Created by and Starring Tommy Wiseau

The legacy of the movie *The Room*, Tommy Wiseau's infamously terrible 2003 cult classic, reached new heights (or lows depending on your point of view) last week when it made its mark on Canadian law in Justice Schabas' decision in *Wiseau Studio, LLC v Harper*. A movie lovingly advertised as providing a viewing experience akin to "getting stabbed in the head" prompted copyright litigation and, in the process, has provided a new story of the risks of pursuing an ill-advised litigation strategy through trial.

The Room premiered in 2003 to terrible reviews. Where many independent movies that open to bad reviews simply fade in the cultural zeitgeist, *The Room*, and its creator and star Mr. Wiseau, gained fame because of how exceptionally and remarkably bad *The Room* was. It is a rare film that is so bad that it turns out to be good.

The Room became a cult classic amongst a sub-genre of movie goers and provided Mr. Wiseau with a certain celebrity and notoriety. Mr. Wiseau's co-star and friend published a non-fiction book in 2011 detailing the making of *The Room* entitled *The Disaster Artist – My Life Inside The Room The Greatest Bad Movie Ever Made*. The book was turned into an award-winning feature film of the same name starring James Franco as Mr. Wiseau in 2017, which premiered at the Toronto International Film Festival.

As part of its cult fandom, *The Room* inspired enthusiasts to host interactive screenings of the movie. Fans engaged in discussions regarding the mysteries surrounding *The Room* – particularly how the movie was financed and who Mr. Wiseau was, since his age, birthplace and original name are not publicly known. Born out of this fandom, the defendants, filmmakers from Ottawa, undertook to make a documentary about *The Room* which focused on how the movie was made, its rise in popularity and its enduring legacy. The documentary, entitled *Room Full of Spoons*, was originally supported by Mr. Wiseau but he quickly distanced himself from the project.

The defendants' film was completed in January of 2016. Mr. Wiseau objected to the documentary throughout, claiming the

depiction was overly negative and taking issue with the personal details discovered by the defendants in their investigations. Despite Mr. Wiseau's objections, the defendants released the documentary and received positive reviews. Mr. Wiseau engaged in a campaign to stop the documentary from being screened, just as *The Disaster Artist* was set to premiere.

Mr. Wiseau and his related companies commenced an action for breach of copyright, breach of moral rights under the *Copyright Act*, misappropriation of personality, breach of contract, fraudulent misrepresentation and trademark violation, amongst other claims. The plaintiffs immediately moved for an *ex parte* injunction to stop the documentary from being released.

The injunction coincided with the release of *The Disaster Artist*. It ultimately prevented the defendants from releasing the documentary at the height of mainstream interest in Mr. Wiseau and *The Room* and scuttling a distribution deal for the film.

The injunction was eventually lifted in a decision by Justice Koehnen where he found that the plaintiffs failed to make proper disclosure on the *ex parte* motion, including Mr. Wiseau making statements to the Court that the documentary mocked and disparaged *The Room*, which Mr. Wiseau portrayed as a serious film made by a serious filmmaker. Notably, Mr. Wiseau failed to attend for cross-examinations on his affidavit for the injunction, preventing any financial disclosure from Mr. Wiseau.

Following the dissolution of the injunction, the case lumbered toward trial. Mr. Wiseau had six different counsel during the case, with a number of lawyers seeking to be removed from the record on the basis that Mr. Wiseau refused to enter into any traditional retainer agreement that would permit them to prepare for trial. The defendants sought to bring an Anti-SLAPP motion to speed the hearing along, but the parties eventually settled on a trial schedule rigorously enforced by Justice Koehnen as case management judge.

In the leadup to trial, the plaintiffs sought on many occasions to have the trial adjourned on various bases, including that the plaintiffs did not have counsel, that the plaintiffs sought to have the defendants prosecuted for perjury in advance of trial, and that Mr. Wiseau intended to withdraw the action to proceed against the defendants in another jurisdiction.

Despite the procedural wrangling and over the plaintiffs' strenuous objections, ultimately the case proceeded to trial as scheduled in January of 2020 before Justice Schabas. The plaintiffs abandoned a number of their claims prior to trial, but proceeded on the basis of breach of copyright, moral rights,

misappropriation of personality, passing off, and intrusion upon seclusion. The defendants counterclaimed for damages incurred as a result of the injunction, including the lost distribution deal for the documentary.

In a decision brimming with fascinating details about Mr. Wiseau's life and litigation strategy, ultimately Justice Schabas found that while Mr. Wiseau had standing to advance a copyright claim, the documentary was fair dealing. It was found to clearly fall within the exceptions for criticism, review and news reporting and was considered "fair" in all the circumstances of the case. On the other issues, Justice Schabas likewise found for the defendants. The counterclaim was allowed to account for the profits lost by the defendants as a result of the plaintiffs' ill-gotten injunction.

While the plaintiffs' claim failed on all fronts, the defendants were awarded $550,000 USD in compensatory damages and $200,000 in punitive damages on the basis of the plaintiffs' outrageous conduct during the litigation.

There are many fascinating takeaways from this case. Mr. Wiseau's conduct in the litigation will be of interest to movie buffs and lawyers alike – particularly Mr. Wiseau's eccentric approach to both his claim and his interactions with the Court. The case displays the enduring mysteries surrounding Mr. Wiseau, as his financing arrangements for *The Room*, birthdate and origin ultimately remain mysteries to those reading the decision.

It may be fitting that a movie so bad that it was good has resulted in the ultimate lesson in ill-conceived litigation – unlike an initially badly reviewed movie, a flawed litigation strategy at the outset does not improve as the case moves forward. An initial strategic victory may ultimately turn out to be no win at all. While the conduct in this case was exceptional, it is an important reminder that strategic decisions made early on when a claim is drafted or an injunction sought can haunt a piece of litigation all the way through to the end of trial.