CITATION: BURKE et al v MICHELS et al, 2011 **ONSC 2244**
COURT FILE NO.: CV-08-0195-00
DATE: 2011-04-08

2011 ONSC 2244 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
LORRIE LYNN BURKE, GREGORY BURKE, MICHAEL GREGORY BURKE by his LITIGATION GUARDIAN LORRIE LYNN BURKE	MR. D. MACGILLIVRAY, for the PLAINTIFFS
PLAINTIFFS	
- and -	
EILEEN MICHELS and CHRISTIAN MICHELS	MS. L. KRUSE, for the DEFENDANTS
DEFENDANTS	
	HEARD: March 24, 2011

Regional Senior Justice H.M. Pierce

Reasons on Motion for Leave to Appeal

Introduction

[1] The defendants seek leave to appeal to the Divisional Court from the order of Mr. Justice J. Wright dated February 17, 2011 granting the plaintiffs leave to amend their statement of claim

to increase damages. The effect of the order was to increase damages claimed from $1,650,000 to $7,500,000.

[2] The defendants submit that the motions judge found there was prejudice to the defendants arising out of an increased obligation to pay without recourse to a third party due to an expired limitation period. Nevertheless, the amendment was ordered. They also contend that the motions judge reversed the onus that was on the plaintiffs to rebut presumed prejudice after the expiry of the limitation period.

2011 ONSC 2244 (CanLII)

Background

[3] The significant events in the litigation considered by the motions judge are as follows:

1) May 5, 2006: the plaintiff, Lorrie Lynn Burke was injured in the first motor vehicle accident.

2) May 2, 2008: an action was commenced, naming the defendants and claiming damages of $1,550,000, which is over the defendants' $1,000,000 insurance limits.

3) May 13, 2008: the statement of claim was served.

4) September 11, 2008: Ms. Burke was involved in a second motor vehicle accident with a Thompson vehicle. Her vehicle was rear-ended.

5) October 24, 2008: Ms. Burke took a bus trip which she claims exacerbated her symptoms (as opposed to the September 11th accident).

6) January 21, 2009: Ms. Burke's counsel sent the defendants' insurer her medical records, which included the emergency room report from the accident of September 11, 2008. Defence counsel acknowledges that he was made aware of the second accident as of this date.

7) February 10, 2009: Ms. Burke's counsel forwarded further medical records to the defendants' insurer including a duplicate emergency room report from the September 11, 2008 accident.

8) September 8, 2009: The statement of claim was amended to increase Family Law Act claims. The total value of claims with this amendment is $1,650,000.

9) November 27, 2009: Ms. Burke's counsel corresponded with the defendants' insurer advising that she had exacerbated her back symptoms during a bus trip in October, 2008, enclosing further medical reports, and raising income loss issues.

10) May 7, 2010: the plaintiffs were advised that Mr. Demeo was retained by the defendants' insurer.

11) May 13, 2010: this was the first possible limitation date for defendants to claim over against the Thompsons for accident #2, pursuant to s. 18 of the *Limitations Act, 2002*.

12) June 2, 2010: the statement of defence was served. The same day, plaintiffs' counsel received a medical report that suggested damages would escalate beyond policy limits.

13) June 21, 2010: plaintiffs' counsel wrote to defence counsel warning that their damages may exceed the defendants' $1,000,000 policy limits.

14) September 8, 2010: plaintiffs served their notice of motion seeking to amend their prayer for relief to increase damages.

15) September 11, 2010: this was the second possible limitation date for the plaintiffs to sue the Thompsons for damages for the second collision and for the defendants to claim against the Thompsons for the second collision.

16) October 6, 2010: the plaintiffs' counsel forwarded a brief to the defendants' counsel including police report and property damage file relating to the second accident. Damages to the Burke vehicle were $1,056.54.

17) October 8, 2010: the defendants searched court records to determine if the plaintiffs sued the Thompsons for the second accident.

2011 ONSC 2244 (CanLII)

18) October 19, 2010: defendants' counsel advised plaintiffs' counsel that the defence was consulting a doctor.

19) October 27, 2010: defendants' counsel wrote to plaintiffs' counsel to confirm contact with an orthopaedic specialist.

20) December 1, 2010: defendants' counsel wrote to plaintiffs' counsel advising that they are seeking a medical opinion as to whether the defendants' ability to assess Ms. Burke's condition has been prejudiced.

21) January 20, 2011: the defendants issued a third party claim against the Thompson defendants concerning the September 11, 2008 collision. Defence counsel alleged this was the eve of the two year anniversary of the defendants' insurer becoming aware of the September 11, 2008 collision.

22) January 21, 2011: this was the third possible limitation date for the defendants to sue the Thompsons based on 2 years from the date of discovering the second accident.

23) January 26, 2011: defendants' counsel received the defence medical report.

24) February 2, 2011: defence counsel served responding motion material alleging prejudice based on an alleged missed limitation date.

25) February 10, 2011: the plaintiffs argued their motion to amend the damages claimed in the proceeding. The defendants opposed the amendment, arguing that they were prejudiced by the lapse of the limitation period for the second accident. The defendants relied on an orthopaedic opinion that contended the second collision caused or contributed to Ms. Burke's injuries.

Tests on Leave to Appeal an Interlocutory Order of a Judge

[4] Rule 62.02 of the *Rules of Civil Procedure* governs leave to appeal an interlocutory order of a judge to the Divisional Court. The test is set out at sub-rule 62.02(4) which provides:

> (4) Leave to appeal shall not be granted unless,

2011 ONSC 2244 (CanLII)

(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 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.

2011 ONSC 2244 (CanLII)

[5] It is settled law that in order to satisfy the test for a conflicting decision it is necessary to show a difference in the principle chosen by the motion judge in coming to his conclusion. See: *Brownhall v. Canada (Ministry of National Defence)* 2006 CarswellOnt 995 (S.C.J.), para. 27.

[6] With respect to the second branch of the test, the court must determine whether the decision is open to "very serious debate." See *Brownhall,* para. 30. It is the correctness of the result and not the correctness of the reasoning that must be scrutinized. See: *Tarion Warranty Corp. v. Brookegreene Estates Inc.* [2006] O.J. No. 1923 (S.C.J.).

Discussion

Is There a Conflicting Decision?

[7] The defendants argue that prejudice arises from the defendants' obligation to pay increased damages in the absence of third parties rather than from their ability to pay. The defendants submit that they are prejudiced by the expiry of the limitation period for the second collision, which prevents the obligation to pay from being apportioned against the 2008 tortfeasors.

[8] In support of their argument that there are conflicting cases they cite *Churly v. Budnick*, 34 O.R. (3d) 729 (Ont. Master); *Willis v. Ontario Hydro*, 1998 CarswellOnt 444 (S.C.J.); and *Romita v. Sohi*, 2010 CarswellOnt 8999 (S.C.J.).

[9] In *Churly*, the plaintiff sued his solicitor for negligence in failing to serve a statement of claim on time. The first solicitor was aware of contributory negligence on the part of the plaintiff's second solicitor but delayed in seeking leave to amend his statement of defence in order to claim the second solicitor was negligent. The court held that if the amendment were allowed, the plaintiff would be prejudiced by potentially having his damages reduced at trial without recourse to the second negligent solicitor because the limitation period to sue him had expired.

[10] At para. 32, Master Peppiatt commented:

> It must be remembered that the defendant and his agents were aware of the facts which they now seek to rely on at the very moment they occurred and Mr. Churly presumably was not, or, at the very least, could not have been expected to appreciate the significance of them which has only occurred to the defendant's advisers recently. He was therefore in no position to protect himself.

[11] The court held that if the defendant wished a favourable ruling from the court, he had to expect that the court would examine his conduct before determining whether prejudice accrued to the plaintiff.

2011 ONSC 2244 (CanLII)

[12] The court refused leave to amend the statement of defence, finding that the delay in bringing the motion forward prejudiced the plaintiff in defending himself if the amendment were granted.

[13] In *Willis*, the defendant sought to add a plea of *novus actus interveniens* in a personal injury case, alleging that the physician and hospital provided negligent medical care to the plaintiff. The motion to amend the statement of defence was launched after the expiry of the limitation period as against the doctor and the hospital. The motion was dismissed. The court held that prejudice to the plaintiff could not have been remedied by an award of costs. It held that the defendant would have discovered the potential medical negligence had it delivered its statement of defence within a reasonable time so that it could ascertain the weaknesses in the plaintiff's case.

[14] The *Romita* case deals with the withdrawal of an admission, and therefore has no application to this case.

[15] In my view, *Churly* and *Willis* do not conflict with the case at bar. In both cases, the defendants waited until a limitation period passed before moving to amend their statements of defence. In this case, the defendants were put on notice of the second motor vehicle accident in sufficient time to investigate. The motions judge determined that a limitation period did not arise in the case. There is not a conflicting decision; the first branch of the test for leave to appeal is not met. It is not, therefore, necessary to consider whether it is desirable that leave to appeal be granted.

2011 ONSC 2244 (CanLII)

Is There Reason to Doubt the Correctness of the Decision?

[16] The defendants submit that the onus of rebutting prejudice is on the party alleging it unless a limitation period has expired in which case the onus shifts; then the party seeking the amendment must explain the delay and displace the presumption of prejudice. See: *Jourdain v. H.M.Q.*, ONSC 6315 (CanLII) (S.C.J.) para 15. The defendants argue that the motions judge shifted the onus to the defendants, who allege prejudice, when the onus correctly lay on the plaintiffs, in view of the expiry of the limitation period.

[17] This argument ignores the finding of the motions judge that no limitation period arises in this case. As set out in the time line, the defendants were aware of the second collision before the limitation period passed, if indeed it did pass. Therefore, pursuant to the reasoning in *Jourdain*, the onus in proving prejudice remains on the party alleging it, the defendants.

[18] The motions judge correctly applied the onus.

[19] The motions judge also correctly concluded that the defendants did not suffer legal prejudice if the claim for damages was increased. He distinguished *practical prejudice* of having to pay more money from legal prejudice. He correctly concluded that the plaintiffs were not adding a new and unrelated claim that was statute-barred, as in *Frohlick v. Pinkerton Canada Limited*, 2008 ONCA 3 (CanLII). Accordingly, he applied the mandatory wording of the rule that requires that amendments shall be granted.

[20] I conclude there is no reason to doubt the correctness of the decision. Consequently, it is not necessary to deal with whether the matter is of such importance that leave to appeal should be granted.

2011 ONSC 2244 (CanLII)

[21] The motion for leave to appeal is dismissed. If the parties cannot agree on costs, an appointment may be obtained from the trial coordinator within 30 days to argue same.

Regional Senior Justice H.M. Pierce

Released: APRIL 8, 2011

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REASONS FOR JUDGMENT

Pierce RSJ.

Released: APRIL 8, 2011

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