NOVA SCOTIA COURT OF APPEAL
Citation: Farrell v. Casavant, 2010 NSCA 71

Date: 20100901
Docket: CA 334399
Registry: Halifax

Between:

Bernard Farrell

Applicant

v.

Richard Casavant and Mary Casavant

Respondents

Judge:	The Honourable Justice Duncan R. Beveridge
Motion Heard:	August 26, 2010, in Chambers
Written Decision:	September 1, 2010
Held:	Motion extending the time to file a notice of appeal is dismissed with costs to the respondents.
Counsel:	Appellant in person Michael E. Dunphy, Q.C., for the respondents

Decision:

INTRODUCTION

[1] It cannot be gainsaid that Mr. Farrell's circumstances are unfortunate. He was injured in a motor vehicle accident that occurred on January 9, 2004. It is plain he was entirely without fault. A truck being driven by Richard Casavant crossed the center line of highway 101 and collided with Mr. Farrell's vehicle. Farrell suffered injuries and sued. Settlement negotiations failed. A trial was eventually held in January-February, 2009. The trial judge was Smith A.C.J.S.C.. She released a lengthy written decision on July 31, 2009 (2009 NSSC 233). I will refer in more detail later to this decision. For now it is sufficient to say the trial judge concluded the accident occurred without negligence by either Mr. Farrell or Mr. Casavant – it was an accident for which no one was legally liable.

[2] An order dismissing the action was issued on September 28, 2009. The *Judicature Act*, R.S.N.S. 1989, c. 240 gave to Mr. Farrell the right to appeal. By virtue of the *Nova Scotia Civil Procedure Rules*, such appeal must be commenced within 25 days from the date of the order. By application of how a period of days are calculated (*Nova Scotia Civil Procedure Rule* 94.02) the deadline to file an appeal by November 4, 2009. No appeal was filed.

[3] Mr. Farrell now seeks an order extending the time to file a notice of appeal. For the reasons that follow, I must dismiss the application.

BACKGROUND FACTS

[4] Mr. Farrell is self represented on this application. Nonetheless, he had the assistance of counsel in drafting his motion documents, including his affidavits of August 9, 2010 and August 18, 2010. To complete the record, the respondents rely on the affidavit of Ashley P. Dunn, of counsel for the respondents, sworn August 23, 2010. Mr. Farrell's application was heard August 26, 2010.

[5] Mr. Farrell acknowledges in his affidavit of August 9, 2010 that he was advised by his then lawyer, Kevin A. MacDonald, an appeal had to be filed before November 5, 2009. He says that he formed the intention to pursue an appeal during the period of September 28, 2009 (the date of the final order of Smith A.C.J.S.C.) and November 5, 2009. He says that he was confused and dismayed

by the decision and felt he did not have the resources to hire a lawyer to pursue an appeal. In addition, he was still enduring significant pain in his right wrist and did not feel he had the ability to pursue an appeal himself due to his emotional state. He says he had a further operation on his wrist in April 2010 and his hand is starting to recover. He asserts he is now better able to focus and has concluded that notwithstanding the expense he feels compelled to pursue an appeal "both for my own piece of mind and in the interest of justice".

[6] The proposed grounds of appeal are set out in Mr. Farrell's supplementary affidavit of August 18, 2010. They are:

> (1) The learned Associate Chief Justice erred in law by accepting the uncorroborated evidence of the Defendant, Richard Casavant, without the benefit of any expert evidence corroborating his claim that the accident could not have been avoided, notwithstanding that he had crossed the centre line and the onus was on him to prove that the accident occurred through no fault of his.
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> (2) That the learned Associate Chief Justice erred in law as to the legal effect of the warning sign that was posted just prior to the entry on the bridge where the Defendants' vehicle lost control and crossed the centre line, causing the accident.
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> (3) That the learned Associate Chief Justice erred in law in determining that my injuries were minor injuries and therefore were captured by the provisions of the ***Automobile Insurance Reform Act (2003)*****.**

[7] Mr. Farrell, through his counsel, communicated a settlement offer to Mr. Casavant on September 15, 2009. Included in that settlement offer was a clear announcement that Mr. Farrell had instructed his counsel to appeal. The settlement offer was not accepted. Ultimately, the parties were not able to agree on the issue of costs.

[8] The trial judge issued a written decision on February 4, 2010 (2010 NSSC 46) ordering costs to be paid to the respondents on or before May 4, 2010 in the total amount of $10,328.82.

[9] On April 20, 2010 Mr. MacDonald, on behalf of Mr. Farrell, wrote and requested an extension of four months to pay the cost order. On June 4, 2010 the

respondents agreed to forego proceeding with an execution order provided Mr. Farrell deliver a post dated cheque dated September 4, 2010, in the full amount of $10,328.82. Nothing further was heard from or on behalf of the applicant. The respondents then wrote on June 28, 2010 indicating that if they were not in receipt of a cheque by July 9, 2010 with confirmation of the terms of the extension, they would proceed with procedures to enforce collection.

[10] Mr. Farrell acknowledges that on July 7, 2010 he discussed payment of the costs order with Mr. MacDonald. During that discussion he advised Mr. MacDonald that he wished to pursue an appeal. Due to scheduling issues, the earliest the application could be heard was August 26, 2010.

PRINCIPLES

[11] The motion for extension to file the notice of appeal is brought pursuant to *Nova Scotia Civil Procedure Rule* 90.37(12)(h). It provides:

> **90.37 (12)** A judge of the Court of Appeal hearing a motion, in addition to any other powers, may order any of the following:
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> (h) that any time prescribed by this Rule 90 be extended or abridged before or after the expiration thereof.

[12] To state the obvious, this Rule does not provide any particular guidance on how a judge is to exercise the broad discretion permitted by 90.37(2)(h). Neither does Rule 94.02 nor its reference to 2.03(2). However, the overall purpose of the *Civil Procedure Rules* are that they are enacted for "the just, speedy, and inexpensive determination of every proceeding".

[13] It is apparent that there have been various formulations on how to approach the exercise of the court's discretion. The power to grant an extension of time has been described as one that should only be exercised if "exceptional" or "special" circumstances have been shown (*Crowell Bros. Ltd. v. Maritime Minerals Ltd*., [1940] 2 D.L.R. 403 (N.S.S.C. *en banc*). See also *Blundon et al v. Storm* (1970), 1 N.S.R. (2d) 621 (A.D.)).

[14] Cooper J.A. in *Scotia Chevrolet Oldsmobile Ltd. v. Whynot* (1970), 1 N.S.R. (2d) 1041 (A.D.) accepted that the test was whether or not there were exceptional

or special circumstances so that the interests of justice required the exercise of judicial discretion to grant the extension of time sought. However, he also referred, with apparent approval, to the decisions of *Smith v. Hunt* (1902), 5 O.L.R. 97 and *Radclyffe et al. v. Rennie and McBeath* (1964), 45 D.L.R. (2d) 697, that in considering such an application, the applicant must show a bona fide intention to appeal, while the right to appeal existed; and a reasonable excuse for the delay in not having proceeded with the appeal within the prescribed time.

[15] Macdonald J.A. in *Maritime Processing Co. v. Hogg* (1979), 32 N.S.R. (2d) 71 accepted that one of the factors to be considered in an application to extend time to file a notice of appeal is a consideration of the merits of the proposed appeal. Various terms were referred to, including "it is at least arguable that the judgment is wrong" (para. 8) and "a strongly arguable case showing error" or "real grounds for interfering" (para. 10). This then became known as the three-part test. Pace J.A. in *Federal Business Development Bank v. Springhill Bowling Alleys Ltd.* (1980), 40 N.S.R. (2d) 607 expressed the test as follows:

> 15 I glean from these cases that the applicant must show that there are compelling or exceptional circumstances present which would warrant an extension of time to file the notice of appeal and that one of those circumstances may be that there is a strongly arguable case that the trial judge erred and there exist real grounds for interfering with his decision. However, even if merit is shown, the applicant must in addition show that he had a bona fide intention to appeal while the right to appeal existed and that he has a reasonable excuse for the delay.

[16] However, in *Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173, Hallett J.A. emphasized the so called three-part test may well be useful but is not the sole or ultimate consideration. He wrote:

> [14] There is nothing wrong with this three part test but it cannot be considered the only test for determining whether time for bringing an appeal should be extended. The basic rule of this court is as set out by Mr. Justice Cooper in the passage I have quoted from **Scotia Chevrolet Oldsmobile Ltd. v. Whynot**, supra. That rule is much more flexible. The simple question the court must ask on such an application is whether justice requires that the application be granted. There is no precise rule. The circumstances in each case must be considered so that justice can be done. A review of the older cases which Mr. Justice Cooper referred to in **Scotia Chevrolet Oldsmobile Ltd. v. Whynot** and which Mr. Justice Coffin reviewed in **Blundon v. Storm** make it abundantly clear that the

> courts have consistently stated, for over 100 years, that this type of application cannot be bound up by rigid guidelines.
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> . . .
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> [19] In summary it is clear from the case law extending back over 100 years that the test for determining whether an application to extend time for commencing an appeal should be granted must be a flexible one in which the court considers all the circumstances and determines what would be just.

[17] Given the myriad of circumstances that can surround the failure by a prospective appellant to meet the prescribed time limits to perfect an appeal, it is appropriate that the so called three-part test has since clearly morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted. (See *Mitchell v. Massey Estate* (1997), 163 N.S.R. (2d) 278; *Robert Hatch Retail Inc. v. Canadian Auto Workers Union Local 4624*, 1999 NSCA 107.) From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines.

ANALYSIS

[18] It is a fundamental principle that when a dispute between parties has been litigated, the decision rendered by the courts is a final one. This principle underlies the doctrine of *res judicata*. The decision by A.C.J.S.C. Smith was a final determination on the issues of liability and damages as between the parties, subject only to the right of the applicant to pursue an appeal. That right expired no later than November 4, 2009. To now have the ability to pursue an appeal requires the applicant to demonstrate that justice requires his application to be granted.

[19] During the hearing of this application, Mr. Farrell conceded that between September 15, 2009 and November 4, 2009 he made a conscious decision not to pursue an appeal. He explained that the major reason was one of cost. He also said he was trying to straighten his life out and he was waiting for a subsequent

surgical procedure on his wrist. It is therefore inescapable that while Mr. Farrell may well have had a bona fide intention to appeal when the right to appeal existed, at some point, while he was represented by counsel, he made a conscious decision not to appeal.

[20] In terms of explanation for not pursuing his appeal within the prescribed time frame and within a reasonable time once the prescribed time frame passed, Mr. Farrell says he was "completely shocked and confused" by the decision and that he was suffering significant pain and was emotionally distraught. No medical, or other evidence was submitted by Mr. Farrell to indicate that the shock, confusion or pain compromised his ability to properly consider his options and make informed decisions. If anything, the evidence is to the contrary. Mr. Farrell fairly conceded that he maintained full time employment throughout the relevant time periods. Furthermore, he acknowledged the major issue was simply one of cost when he made the conscious decision not to appeal. In terms of what has changed since then, he explained that really nothing had changed – he would simply now have to borrow the money to pursue an appeal. This can hardly constitute a suitable reason for any delay, let alone the eight months from the expiration of the appeal period until he instructed Mr. MacDonald to communicate to the respondents his instructions to proceed with an application to extend the time to file an appeal.

[21] If strong grounds of appeal are articulated, in my opinion, the weakness of an excuse and/or the absence of a bona fide intention to appeal within the prescribed time period may fade in significance. The proposed grounds of appeal identified by Mr. Farrell claim that the trial judge erred in finding that Mr. Casavant had satisfied the onus on the defendant to prove that the accident occurred without fault by accepting Casavant's evidence without the benefit of expert evidence to corroborate it. He also claims that the trial judge erred as to the "legal effect" of the warning sign locate just prior to the bridge/overpass, which read "BRIDGES FREEZE BEFORE ROAD". Lastly, the applicant claims that the trial judge erred in determining that Mr. Farrell's injuries were "minor injuries within the provisions of the *Insurance Act* and hence caught by the "cap".

[22] I have reviewed the decision of the trial judge. It is some 240 paragraphs in length. The trial judge carefully set out the evidence, and positions of the parties. She made very specific findings of fact. At the hearing of this application, Mr. Farrell was adamant that it was an error by the trial judge to have accepted "his

word against mine". However, the decision of the trial judge reflects no conflict between the evidence offered by the applicant and by the respondent at trial. There was a difference in positions. The applicant argued that the respondent had failed to establish that the accident occurred without negligence. The respondent took the position that although his vehicle crossed the center line and plainly caused the accident, it was not due to a lack of reasonable care on his part.

[23] The applicant does not suggest clear and overriding error by the trial judge in her assessment of the evidence. The trial judge made a number of key findings of fact. She found that neither party had any difficulty with traction prior to the collision. She found that both parties were travelling well below the speed limit and that the respondent was operating a vehicle in sound mechanical condition and with good tires. The trial judge plainly understood that the onus was on the respondent. She wrote:

> [37] I am satisfied, on a balance of probabilities, and I find that the accident occurred when the Defendants' vehicle hit a patch of ice and slid into the Plaintiff's lane of travel. The Defendant breached his statutory and common law duty to allow the Plaintiff one half of the road free and clear. This gives rise to *prima facie* case of negligence against the Defendant casting upon him the "onus of explanation" (***Gauthier Co., v. Canada***, *supra*, at p. 150.)

She concluded as follows:

> [39] I have carefully reviewed all of the evidence at trial. The Defendant has satisfied me that the skid which caused this accident occurred without his negligence.

[24] The basis for her decision was that the defendant had no indication that the highway was slippery, was not driving at an excessive speed, and used the kind of care and caution that a reasonably prudent driver would exercise under similar circumstances. In addition, once the skid occurred, he acted reasonably. The applicant has failed to identify any authority for the proposition that to satisfy the onus on the respondent there was a need for corroborative evidence, either lay or expert.

[25] With respect to the "legal effect" of the warning sign, the trial judge was well aware of the existence of the sign and its claimed significance. She wrote:

> [48] Further, during the trial a great deal of attention was paid to the fact that prior to entering the area where the accident occurred the Defendant passed a sign which read "BRIDGES FREEZE BEFORE ROAD". The Plaintiff submits that this sign was a warning to the Defendant of possible ice on the bridge ahead and that this sign, along with a number of other factors (including the fact that this was a bridge – not just an overpass), should have caused the Defendant to reduce his speed before entering upon the bridge that day.
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> [49] While I agree that this sign provided a warning to drivers that bridges freeze before the roads, I do not accept the suggestion that this sign, along with the circumstances that existed that day, should have caused the Defendant to reduce his speed prior to entering upon the bridge.
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> [50] I have found that the temperature on the day of the accident was well below zero. The Defendant testified that it was so cold that day that he assumed that everything would be frozen. This was a reasonable assumption in light of the temperature that day.
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> [51] Further, the evidence established that the Defendant had passed over a number of overpasses and bridges that day while travelling from home to the area of the accident, a number of which had signs indicating that bridges freeze before the road. The Defendant had no difficulty with ice or slipperiness on any of those overpasses/bridges. Looking at all of the circumstances, and taking into account what would be expected of a reasonable and prudent driver in light of those circumstances, I am not satisfied that it was incumbent upon the Defendant to reduce his speed as he approached the overpass in question even though there was a sign on the road which read "BRIDGES FREEZE BEFORE ROAD".

[26] Quite apart from the applicant's assertion that the trial judge made an error in law, he fails to articulate what that error is.

[27] The last claimed error has to do with the trial judge's determination that the applicant's injuries were caught by the cap introduced by the *Automobile Insurance Reform Act* and the *Automobile Insurance Tort Recover Limitation Regulations*. These provisions were recently reviewed by this court in *Hartling v. Nova Scotia (Attorney General)*, 2009 NSCA 130 (leave to appeal refused [2010] S.C.C.A. No. 63).

[28] There are two hurdles that the applicant faces. The first is any complaint of error by the trial judge in her assessment of damages is moot since the respondents have been found not to have been liable for the accident that caused his injuries.

The second is that the applicant fails to identify how the trial judge erred in law, or otherwise, in her determination that the personal injuries suffered by the applicant were limited by the legislated definition of "minor injury". To Mr. Farrell, his injuries were far from minor. To him they were serious and caused ongoing interference with his daily activities. The trial judge did not say otherwise. However, she was required to apply, not a lay definition to such consequences, but a legislated definition of what constitute a "minor injury" and hence caught by the "cap".

[29] Although Mr. Farrell is self represented at the hearing of this application, he had the assistance of counsel in drafting all of the motion documents, including the prospective grounds of appeal. In my opinion, the proposed appeal lacks sufficient merit or substance to permit me to conclude that it raises fairly arguable issues.

SUMMARY AND CONCLUSION

[30] Mr. Farrell finds himself in the unfortunate position of having suffered injuries through no fault of his own. As reflected in the decision by the trial judge on costs, Mr. Farrell turned down a significant settlement offer. The fact of him having done so is of no immediate consequence to this application. It merely makes his circumstances all that more unfortunate. The trial judge made a number of findings of fact, and of mixed law and fact. The key one was that the respondent had established, on a balance of probabilities, that the skid which caused the accident occurred without the respondent's negligence and hence there was no liability for the injuries caused by the accident.

[31] The applicant was obviously profoundly disappointed by the outcome of trial. But it is clear he knew what his options were. He instructed his counsel to appeal and then changed those instructions by making a conscious decision not to proceed with an appeal within the time period he knew to govern his right to do so. More than eight months after the appeal period expired, Mr. Farrell then announces his intention to seek an extension of time to pursue an appeal just at the time that the respondents are about to commence collection procedures for their costs.

[32] I am not satisfied that the proposed appeal raises fairly arguable issues. The objective of the discretion is to do justice between the parties. The circumstances here are not such that justice requires this application to be granted. To the contrary, to grant an extension on these circumstances would be inappropriate.

[33] The parties agree that costs on the application should be in the amount of $750. Accordingly, the application is dismissed with costs to the respondents in that amount.

Beveridge, J.A.