NOVA SCOTIA COURT OF APPEAL

Citation: *Keleher v Nova Scotia (Attorney General)*, 2021 NSCA 77

Date: 20211112
Docket: CA 499518
Registry: Halifax

Between:

Patrick Keleher

Appellant

v.

Attorney General of Nova Scotia, Nova Scotia Crown Prosecutor Herman Felderhof, The Honorable Judge Anne E. Crawford, Attorney General of Canada, Royal Canadian Mounted Police Bridgewater and Constable Shelley Marriott

Respondents

Judges:	Beveridge, Fichaud and Van den Eynden, JJ.A.
Appeal Heard:	May 11, 2021, in Halifax, Nova Scotia
Held:	Leave to appeal granted but the appeal is dismissed with costs per reasons for judgment of Van den Eynden, J.A.; Beveridge and Fichaud, JJ.A., concurring
Subject:	Summary judgment, *Civil Procedure Rule* 13, judicial immunity
Summary:	The appellant brought a civil action against the respondents for damages in the court below. The respondents made a motion for summary judgment to dismiss the action and sought injunctive relief to prohibit further legal proceedings without leave from the court. The judge granted the motion for summary judgment in part, striking several of the appellant's claims, but declined to grant injunctive relief. On appeal, the appellant asserts the judge made several errors. He asks this Court to reinstate the struck claims and to permit him to amend his statement of claim filed below.
Issues:	1. Did the judge err in dismissing all the claims against Judge Crawford? 2. Did the judge err in dismissing certain claims against the remaining respondents?

Result: Leave to appeal granted but the appeal is dismissed with costs. The appellant's complaints of error are without merit.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 12 pages.

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Counsel:	Patrick Keleher, self represented appellant Duane Eddy, for the respondents, Attorney General of Nova Scotia and Nova Scotia Crown Prosecutor Herman Felderhof Justin Adams, for the respondent, The Honorable Judge Anne E. Crawford Jan Jensen, for the respondents, Attorney General of Canada, Royal Canadian Mounted Police Bridgewater, and Constable Shelley Marriott

Reasons for judgment:

Overview

[1] In the court below the appellant (Mr. Keleher) brought a civil action against the respondents for damages allegedly suffered as a result of his overturned conviction. The respondents made a motion for summary judgment to dismiss the action and sought injunctive relief to prohibit Mr. Keleher from commencing further legal proceedings without permission from the court. The judge granted the motion for summary judgment in part, striking several of Mr. Keleher's claims, but declined to grant injunctive relief.

[2] Mr. Keleher appeals the judgment claiming several errors were made. On appeal, Mr. Keleher asks this Court to reinstate the struck claims and to permit him to amend his statement of claim filed in the court below.

[3] Mr. Keleher's complaints of error are not persuasive. For my reasons that follow, I would dismiss the appeal with costs.

Background

[4] To frame the issues, I will set out some background and supplement in my analysis as needed.

[5] The litigation in the court below has a long history. In November 2016, Mr. Keleher filed his Notice of Action and Statement of Claim (Action) against the respondents. However, the series of events precipitating his Action began in 2002.

[6] On September 10, 2002, Mr. Keleher, was charged summarily with assault causing bodily harm contrary to s. 267(b) of the *Criminal Code*. The offence arose from an altercation between Mr. Keleher and his common law spouse.

[7] Mr. Keleher pleaded not guilty. His trial was on January 24, 2003, before Judge Anne E. Crawford of the Provincial Court. She found Mr. Keleher guilty on March 20, 2003. He received a suspended sentence, probation, and an ancillary DNA order.

[8] Mr. Keleher appealed his conviction to the summary conviction appeal court. Justice Gerald Moir, of the Supreme Court of Nova Scotia, heard the appeal and released his decision on January 28, 2005. Justice Moir determined that Judge Crawford erred in law. He allowed the appeal, set aside the conviction, and ordered

a new trial. The Crown elected not to proceed with a new trial and the charges against Mr. Keleher were dismissed.

[9] Approximately eleven years later, Mr. Keleher filed his Action, advancing a litany of claims against multiple parties. The Action has been amended several times to include additional claims, additional parties, and to add refinements to the names of parties over the years.

[10] The named defendants are: (1) the Attorney General of Nova Scotia (AGNS); (2) Herman Felderhof (Mr. Felderhof); (3) Judge Anne E. Crawford (Judge Crawford); (4) the Attorney General of Canada (AGOC); (5) the Royal Canadian Mounted Police Bridgewater, Nova Scotia (RCMP) [1] and (5) Constable Shelley Marriot (Constable Marriot). Unless otherwise stated, my use of the term "respondent" or "respondents" is interchangeable with "defendant" or "defendants".

[11] In his Action, Mr. Keleher seeks damages for alleged wrongdoing and harms resulting from the criminal charges laid against him and the overturned conviction. His Action has not been heard on its merits. This appeal determines issues that will affect the advancement of Mr. Keleher's Action in the court below.

[12] In summary, Mr. Keleher sought to advance these claims against the respondents:

- As against Mr. Felderhof, Crown prosecutor during Mr. Keleher's criminal trial in 2003, and/or the AGNS: malicious prosecution, abuse of process, lack of duty of care; lack of fiduciary duty of care; conspiracy; fraud and, *Charter* violations under sections 7, 11(d) and 15(1).
- As against Constable Marriott, lead investigating officer in the criminal assault charge against Mr. Keleher, and/or the AGOC: negligent investigation, abuse of process; lack of duty of care; lack of fiduciary duty of care; and the same *Charter* violations as above.

[13] As against Judge Crawford, who was added as a defendant in 2019: malicious prosecution, abuse of process, lack of duty of care, lack of fiduciary duty of care; conspiracy; fraud; and the same *Charter* violations. Each of

[1] The claim against the Attorney General of Canada was originally pled as being against "the Royal Canadian Mounted Police, Bridgewater, Nova Scotia Detachment". The judge in the court below directed that the style of cause be amended to remove this reference because he found it is neither a legal entity nor a proper party to the action. This change was not reflected in the appeal style of cause.

the respondents filed a motion for summary judgment in the court below contending that the claims against them should be struck. Two respondents, Mr. Felderhof and Judge Crawford, sought additional injunctive relief. They sought to bar Mr. Keleher from bringing any further related actions against them unless granted leave (prior permission) from the court. These motions were brought before the pleadings had closed and the reasons for each motion varied.

[14] Mr. Felderhof and the AGNS pursued summary judgment on the pleadings under *Civil Procedure Rule* (CPR) 13.03, contending the claims are prohibited under the scope of immunity afforded Crown prosecutors; or, alternatively, the claims are absolutely unsustainable and statute-barred under the *Limitation of Actions Act.*

[15] Constable Marriot and the AGOC also sought summary judgment on the pleadings on the basis that the claims are absolutely unsustainable. A request to amend the style of cause was made in order to accurately reflect the legal entities intended to be named in the Action.

[16] However, Judge Crawford contended all claims against her arose in the performance of her judicial functions and judicial immunity bars Mr. Keleher's claims. She requested Mr. Keleher's Action be struck on the following grounds: (1) as an abuse of process pursuant to CPR 88.02(1)(e), or in the alternative, (2) an order for summary judgment on the evidence be granted, dismissing the Action as time barred pursuant to CPR Rule 13.04. A supporting affidavit was filed confirming that her interaction with Mr. Keleher was limited to the performance of her judicial duties as a judge of the Provincial Court of Nova Scotia. Mr. Keleher did not contest this evidence.

[17] The motions for summary judgment were heard by Justice John A. Keith of the Nova Scotia Supreme Court on June 14, 2019. In his decision, *Keleher v. Nova Scotia (Attorney General)*, 2019 NSSC 375, Justice Keith:

1. Struck all claims against Constable Marriot, except allegations respecting the tort of negligent investigation. As noted, he directed the style of cause be amended to remove the reference to the "Royal Canadian Mounted Police, Bridgewater, Nova Scotia Detachment" (see footnote 1).

2. Struck all claims against Mr. Felderhof and the AGNS, except allegations respecting the tort of malicious prosecution.

3. Struck all claims against Judge Crawford. In an unreported Addendum, the judge clarified that the claims against Judge Crawford were summarily dismissed under Rule 13.04. At paragraph 6 of his Addendum, he noted the claims against Judge Crawford were unwarranted and egregious, and had it been necessary, would have found them to constitute an abuse of process.

4. Declined to grant the injunctive relief requested by Judge Crawford and Mr. Felderhof. Although Justice Keith limited the scope of the Action against Mr. Felderhof, he considered injunctive relief inappropriate since the proceeding will continue. As for Judge Crawford's request for injunctive relief, Justice Keith noted that Mr. Keleher's decision to draw her into his Action was ill-advised and misguided, but since it was the only Action he brought against her, he could not find this single proceeding to constitute repetitive, vexatious misconduct warranting injunctive relief. Rather, costs could address Mr. Keleher's conduct.

[18] Mr. Keleher appeals the interlocutory order resulting from Justice Keith's decision and requests we reinstate the struck claims.

Issues

[19] In his Notice of Appeal Mr. Keleher advances thirteen grounds of appeal. However, these grounds can be distilled into two primary issues:

1. Did the judge err in dismissing all the claims against Judge Crawford?

2. Did the judge err in dismissing certain claims against the remaining respondents?

[20] Since the order under appeal is interlocutory, leave to appeal is required: *Civil Procedure Rules* 90.05(1)(c) and 90.09. Mr. Keleher filed a Notice of Appeal (General) but should have filed a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory). That might explain why Mr. Keleher did not address leave in his submissions. Judge Crawford was the only respondent to address the prerequisite of leave in their factum, who, in the interests of having the appeal determined on its merits, took no position on the leave requirement.

[21] The threshold for leave is relatively low—an arguable issue is required, meaning a ground that, if successful, could result in the appeal being allowed (see *Nova Scotia (Attorney General) v. Nova Scotia Teachers Union*, 2020 NSCA 17 at para 42). Although this appeal might not survive a leave analysis, I will accede to the preference to address the issues on their merits.

[22] In conjunction with his appeal, Mr. Keleher filed a motion with this Court asking for permission to make additional amendments to his pleadings in the lower court. During oral submissions on appeal, he was asked why he did not bring his motion in the court below. Mr. Keleher said he was not aware he could still pursue such a motion below. As a general statement, this type of motion is the proper domain of the lower court. In my view, on this record, it should not be entertained by this Court. I decline to do so.

[23] I turn to Judge Crawford's Notice of Contention wherein she requests that, if any part of the appeal is allowed, the judgment under appeal be affirmed on the alternative grounds set out in her Notice. In light of my conclusion that the appeal should be dismissed, I need not address this further.

[24] Finally, I address Mr. Keleher's issue with Justice Keith's direction to amend the style of cause in the court below. The judge explained why he directed the amendment (*Keleher v. Nova Scotia (Attorney General)*, at para 80):

> [80] As indicated, I agree that the term "Royal Canadian Mounted Police, Bridgewater, Nova Scotia Detachment" is not a legal entity and should be struck from the style of cause. The Notice of Action (As Amended) refers to the Attorney General of Canada and Constable Shelly Marriott, both of whom are proper legal entities.

[25] In his appeal submissions, Mr. Keleher quibbled with this, saying:

> The style of cause was to be changed with regard to the RCMP. This was clarified, the reference to the RCMP is to identify the specific police service, and not to identify the RCMP as a legal entity …

[26] This is a non-issue. The judge made clear why the amendment was necessary. Any resistance by the appellant is not something this Court needs to entertain on appeal.

Standard of Review

[27] In *CNH Capital Canada Ltd. v. Canadian Imperial Bank of Commerce*, 2013 NSCA 35 at paras 33-34, this Court reviewed the appellate standard of review for an interlocutory summary judgment under Rules 13.03 and 13.04:

> [33] *Innocente* involved a motion for summary judgment on the pleadings, governed by *Civil Procedure Rule* 13.03. Rule 13.03 says that a judge "must" set aside the pleading and grant summary judgment if the prerequisite conditions are shown. This Court (para 23), noting this mandatory language, said that the motion for summary judgment on the pleadings is not discretionary, and the standard of review is correctness or palpable and overriding error, without consideration of patent injustice.
>
> [34] This appeal involves a motion for summary judgment on the evidence under Rule 13.04. Rule 13.04(1) says:
>
> > A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial **must** grant summary judgment.
> >
> > [Emphasis added in original]
>
> Once the judge has assessed the merits of the summary judgment motion and has determined that the conditions for summary judgment have been established, Rule 13.04(1)'s remedial power is not discretionary. For reasons analogous to those stated in *Innocente*, the Court of Appeal's standard of review should be correctness for extractable issues of law and palpable and overriding error for issues of either fact or mixed fact and law with no extractable legal error.

Analysis

Did the judge err in dismissing all the claims against Judge Crawford?

[28] Justice Keith dismissed the claims against Judge Crawford because they were barred by the absolute immunity afforded to judges in the exercise of judicial duties.

[29] As in the court below, Mr. Keleher is self-represented on appeal. With respect, his lengthy appeal submissions lack focus and restate unsuccessful arguments advanced below. This is an appeal, not a rehearing. To succeed on appeal, Mr. Keleher must establish the judge erred.

[30] On appeal, Mr. Keleher repeats his many grievances with Judge Crawford and his allegations about her bad faith dealings. In summary, Mr. Keleher’s claims of wrongdoing broadly fall under a few themes. In particular, he claims that Judge Crawford:

- Actively selected and excluded evidence to support his conviction;
- Took judicial notice of facts to create evidence to convict; and
- Deliberately made mistakes during his trial to ensure a wrongful conviction.

[31] Mr. Keleher does not see judicial immunity as absolute. He argues these alleged bad faith actions are inconsistent with acting judicially, equating to Judge Crawford acting outside her jurisdiction and thus beyond the scope of judicial immunity.

[32] Justice Keith's reasons for dismissing the claims against Judge Crawford are set out in paragraphs 28 to 39 of his decision, and were further clarified, as noted, in an Addendum. There is no need to restate his reasons other than to note that he referred to the correct legal principles, including Rule 13.04, which provides:

> **Summary judgment on evidence in an action**
>
> (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

[33] The record before us unequivocally establishes that when interacting with Mr. Keleher, at all times, Judge Crawford was acting in her judicial capacity. A brief recap of the governing legal principles explain why she was properly afforded judicial immunity, as found by Justice Keith.

[34] Section 4A of *Nova Scotia's Provincial Court Act*, R.S.N.S. 1989, c. 238, makes clear that the immunity afforded to Provincial Court Judges mirrors the immunity enjoyed by a judge of the Supreme Court. It provides:

> **Immunity**
>
> **4A** A judge has the same immunity from liability as a judge of the Supreme Court. 1992, c. 16, s.23.

[35] Respecting the immunity afforded to superior court (Supreme Court) judges, in *McPherson v Campbell*, 2019 NSCA 23, this Court said:

> [24] The absolute immunity of Superior Court Judges in Canada is a rule of the common law that has been applied since at least the early 17th century. In *Floyd v. Barker* (1607), 12 Co. Rep. 23, 77 E.R. 1305, the principle of judicial immunity was recognized on the following basis:
>
> > …for this would tend to the scandal and subversion of all justice. And those who are the most sincere, would not be free from continual calumniations …
>
> The public policy rationale for immunizing judges against civil suit for actions taken in the course of their judicial duties was explained in a frequently quoted passage from *Garnett v. Ferrand* (1826-27), 6 B. & C. 611, 108 E.R. 576 at pp. 625-626:
>
> > This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.
>
> See *Morier v. Rivard*, 1985 CanLII 26 (SCC), [1985] 2 S.C.R. 716 and the cases cited therein; *Sirros v. Moore*, [1974] 3 All E.R. 776 (C.A.); and *Jordan v. Nation*, 2013 ABCA 117.

[36] Justice Keith's reasons disclose no error in his identification of the legal principles nor in his application of them to the evidence. The appellant's submissions do not establish otherwise.

[37] There is no merit to Mr. Keleher's complaints of error. The judge's decision, on this record, in no way results in a patent injustice. I would dismiss this ground of appeal.

Did the judge err in dismissing certain claims against the remaining respondents?

[38] I am of the view this ground of appeal also lacks merit and should be dismissed.

Claims against Mr. Felderhof and the AGNS

[39] To recap, Mr. Felderhof and the AGNS, pursued summary judgment on the pleadings under Rule 13.03. They contended Mr. Keleher's claims must fail

because of: (1) prosecutorial immunity; and/or (2) the claims are absolutely unsustainable and statute-barred under the *Limitation of Actions Act*.

[40] Rule 13. 03 provides:

> **Summary judgment on pleadings**
> (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court or tribunal;
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

[41] Justice Keith struck Mr. Keleher's claims of abuse of process, breach of duty of care, breach of fiduciary duty, conspiracy, fraud and *Charter* violations under sections 7, 11(d) and 15(1). He allowed the remaining tort of malicious prosecution to stand because, on the limited record before him, he was not prepared to conclude this claim was statute-barred or absolutely unsustainable. Further, the judge explained that Crown prosecutors do not enjoy absolute immunity from civil actions and could be liable for claims of malicious prosecution (see *Nelles v Ontario*, [1989] 2 S.C.R. 170).

[42] The judge's reasons for doing so are detailed in paragraphs 40 to 79 of his decision. He carefully reviewed the evidence, the positions of the parties and the over-arching legal principles and *Civil Procedure Rules* that must guide his analysis. I detect no error in Justice Keith's articulation of these components, nor has Mr. Keleher identified anything of substance in his submissions to this Court that suggest otherwise.

[43] It is worth restating that it is Mr. Keleher's responsibility, as an appellant, to substantiate his claims that the judge erred. Saying so, even repeatedly, is insufficient.

Claims against Constable Marriot and the AGOC

[44] Constable Marriot, the lead investigating officer in the criminal assault charge against Mr. Keleher, and the AGOC requested summary judgment on the pleadings under Rule 13.03, claiming the Action against them was absolutely

unsustainable. They succeeded in striking all claims against them except allegations respecting the tort of negligent investigation.

[45] Mr. Keleher did not devote much attention to this argument in his appeal submissions. Nevertheless, I will briefly explain why he has not identified any error, let alone a material one, warranting our intervention.

[46] The judge explained why he sustained one claim advanced by Mr. Keleher and dismissed the rest in paragraphs 80 to 92 of his reasons. For convenience, I reference paragraphs 86-90:

> [86] I have carefully reviewed the allegations of negligent investigation contained in paragraphs 27 to 34 of the Amended Statement of Claim. Accepting these allegations as proven facts, the claim in the Amended Statement of Claim is not absolutely unsustainable.
>
> [87] In written legal submissions, the Investigating Officer focusses on Mr. Keleher's complaints as being limited to alleged shortcomings in the investigation of Mr. Keleher. However, Mr. Keleher's pleadings are broader and they refer to lapses in the Investigating Officer's notes in respect of "essential" evidence; "neglect" in recording important evidence (paras 30 and 31); a failure to consider relevant evidence (para 30); and a lack of a thorough investigation due to bias (para 34). Read generously, these allegations are not simply alternate investigative techniques but speak to active errors in the investigation which did occur; and indicate that the errors were either deliberate or the result of improper bias.
>
> [88] Again, I make no comment on the strength of these allegations when compared with evidence outside the four corners of the Amended Statement of Claim and tested under the forensic scrutiny of the litigation process.
>
> [89] However, for the purposes of this motion and assuming these allegations to be proven for the purposes of this motion, they do not render the claim of negligent investigation absolutely unsustainable.
>
> [90] The Investigating Officer's motion for summary judgment on the pleadings with respect to negligent investigation is dismissed. The motion for summary judgment on the balance of the allegations made against the Investigating Officer is granted.

[47] Other than disagreeing with the dismissal of the other claims against Constable Marriott and the AGOC, Mr. Keleher did not identify anything of substance that might suggest Justice Keith erred or that his decision resulted in a patent injustice. I would dismiss this ground of appeal.

Disposition and Costs

[48] I would dismiss the appeal and award costs, inclusive of disbursements and payable forthwith, by the appellant to the respondent, Judge Crawford, in the amount of $3,400. This represents forty percent of the costs awarded in the court below.

[49] The remaining respondents requested nominal costs in the court below and on appeal. Accordingly, I would award costs in the amount of $200, inclusive of disbursements, to each of the remaining respondents, namely, Mr. Felderhof, the AGNS, Constable Marriot, and the AGOC, for a total of $800.

Van den Eynden, J.A.

Concurred in:

Beveridge, J.A.
Fichaud, J.A.