IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Young v. Ward, 2008 NSSC 151

Date: 20080523
Docket: SH. No. 233498
Registry: Halifax

Between:

Lindsay Alexandra Young,
by her litigation guardian, Richard Young

Plaintiff

-and-

Erin Ward and **William F. Ward**,
Ann Lorraine Ward and **Joseph E. Meery**

Defendants

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: April 30, 2008 in Halifax, Nova Scotia

Written Decision: May 23, 2008

Counsel: Plaintiff's Counsel - Raymond Wagner
Defendant Ward's Counsel - Fern Greening
Defendant Meery's Counsel - Darlene Willcott

Wright J.

[1] This is an application made on behalf of the defendant Joseph Meery for summary judgment under Civil Procedure Rule 13.01(a).

[2] The case arises out of a motor vehicle accident which occurred on a snowy day in February of 2004 on Grand Lake Road, a four lane highway linking the communities of Sydney and Glace Bay, Nova Scotia. The plaintiff Lindsay Young was a passenger in a Honda Civic being driven by her friend, the defendant Erin Ward, in an easterly direction towards Glace Bay. The defendant Joseph Meery was driving his Ford pickup truck in a westerly direction towards Sydney. The two vehicles collided as a result of which the plaintiff suffered serious personal injuries, notably, a brain injury from which she is permanently disabled.

[3] On June 8, 2005 the plaintiff commenced this action against the defendants Erin Ward and Joseph Meery as joint tortfeasors. Also joined as defendants were the parents of Erin Ward as the owners of the car she was driving. Both defendants Erin Ward and Joseph Meery then cross-claimed against each other, with mirrored claims of fault for the accident.

[4] Filed in support of this application are the transcripts of the discovery examinations of the two drivers and an eyewitness to the accident held on January 3 and 4, 2007 as well as their earlier written statements given to the accident investigators.

[5] There is no dispute as to how this accident happened. The defendant Ward, with the plaintiff as her passenger, was travelling eastwardly in the right-hand lane at a reduced speed of between 50-60 kph. (the posted speed limit on that stretch of highway being 80 kph). The highway was slushy and very wet. As she was nearing the local Tim Horton's outlet, her right front tire struck a chunk of ice lying on the highway which caused her car to start sliding sideways. She reacted by gearing down to second gear but her car continued to rotate in a counter-clockwise direction so that she completely lost control of it. As it slid rotationally, the car crossed over the centre line into the oncoming left-hand lane. Tragically, the car then collided with the defendant Meery's truck who happened to be the first oncoming vehicle in that lane travelling westwardly. When the impact occurred, the car had rotated almost 180 degrees so that the front of Mr. Meery's truck collided with the right rear quarter section of the Ward car. Although there was a lot of traffic on the highway at the time, no other vehicles were involved in the mishap.

[6] Mr. Meery had only driven approximately one kilometer on Grand Lake Road from his home when the accident occurred. He was on his way to Tim Horton's on a Sunday afternoon to buy coffee to take home for his wife and himself. He was travelling at a speed of approximately 60-70 kph and stayed in the left-hand lane after passing a couple of vehicles so as to be in a position to make a left turn into the Tim Horton's entrance. He was an estimated 100 yards short of that entrance when the collision occurred in his lane of travel.

[7] Based on this set of facts, which are uncontradicted in the evidence filed in support of this application, counsel for the defendant Meery submits that there is no arguable issue to be tried as against her client, either in respect of the plaintiff's action or the defendant Ward's cross-claim. Counsel's submission is that liability for this accident rests entirely with the defendant Ward and that Mr. Meery is therefore entitled to an order for summary judgment.

[8] Civil Procedure Rule 13.01(a) enables a defendant to apply for summary judgment on the basis that there is no arguable issue to be tried with respect to the claim. It reads as follows:

> After the close of pleadings, any party may apply to the court for judgment on the ground that:
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;

[9] The legal analysis to be applied in an application under this rule was most recently affirmed by the Nova Scotia Court of Appeal in *Huntley et al. v. Hogeterp* (2007) 256 N.S.R. (2d) 20 where Justice Roscoe stated as follows (at para 30):

30. The applicable test is well established and has been most recently reiterated by this court in **Milbury v. Nova Scotia (Attorney General)**, 2007 NSCA 52:

> Test for Summary Judgment:
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> [17] In **Orlandello v. AGNS**, [2005] N.S.J. No. 249, 2005 NSCA 98, Justice Fichaud explained the two stage test on a summary judgment application:
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> > [12] **Rule** 13.01 permits a defendant to apply for summary judgment on the ground that the claim raises no arguable issue. **Rule** 17.04(2)(a) allows a third party to invoke **Rule** 13.01 to challenge a plaintiffs claim. In **Eikelenboom**, after reviewing the authorities, this court stated the test:

> [25] Applying these authorities to the circumstances of this case, it is apparent that in order to show that summary judgment was available to it, [the defendant] had to demonstrate that there was no arguable issue of material fact requiring trial, whereupon [the plaintiffs] were then required to establish their claim as being one with a real chance of success.

See also: **United Gulf Developments Ltd. v. Iskandar**, 2004 NSCA 35 at 9; **Hercules Managements Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165 at 15; **Guarantee Co. of North America v. Gordon Capital Corp.**., [1999] 3 S.C.R. 423 at 27.

[18] As stated in **Selig v. Cooks Oil Company Ltd.**, [2005] N.S.J. No. 69, 2005 NSCA 36, there are two distinct parts of the test and they should be dealt with sequentially:

> [10] ... First the applicant, must show that there is no genuine issue of fact to be determined at trial. If the applicant passes that hurdle, then the respondent must establish, on the facts that are not in dispute, that his claim has a real chance of success.

[19] If the applicant does not establish that there is no genuine issue of fact, it is not necessary to go to the second step. There is no onus on the responding party if the applicant does not succeed on the first prong of the test. If there are genuine issues of fact, the application should be dismissed..

[10] Under the first part of the test, it is decidedly up to the applicant to show that there is no genuine issue of material fact to be determined at trial. Counsel for the applicant Meery contends that this part of the test has been met where the evidentiary record before the court clearly establishes that Mr. Meery was travelling on his own side of the centre line, at a lawful and prudent rate of speed, when suddenly the oncoming Ward vehicle spun out of control and crossed into his lane, leaving him with no time to react and no way to avoid being struck by the Ward vehicle.

[11] Counsel for the plaintiff takes a different view of the evidentiary record. His main argument is that it does leave open a genuine issue of material fact that should be left for determination at trial, namely, whether or not Mr. Meery was keeping a proper lookout such that he ought to have been able to see the Ward vehicle in distress in time to take some evasive action to avoid, or at least lessen, the collision. He therefore argues that the applicant has not satisfied the first part of the test and that there is a reasonable chance that the trier of fact could determine that Mr. Meery was partly at fault for the accident. He has so pleaded in the Statement of Claim.

[12] Before addressing this argument, it should be mentioned that the Statement of Claim, amongst the usual recitation of particulars of negligence in motor vehicle cases, also alleges that the defendant Meery was not driving in his proper lane of travel and was driving at an imprudent rate of speed in the circumstances. These allegations were also raised in the plaintiff's written submissions as issues of material fact that should be left for determination at trial although they were not seriously argued on the hearing of this application.

[13] These allegations have proven to be baseless. Indeed, it is abundantly clear from the evidentiary record before me that there are no genuine issues of material fact, either in respect of the defendant Meery's speed or proper lane of travel, that should be left for determination at trial. Neither can the plaintiff establish that her claim is one with a real chance of success on either of those two grounds.

[14] The same can be said for an additional argument which is not raised in the

pleadings but was mentioned in the plaintiff's written submissions, namely, that the defendant Meery was driving his vehicle while his vision was impaired by reason of his medical history of diabetes. Again, this issue was not pursued in oral argument and understandably so because it is completely speculative without any factual underpinning whatsoever. As such, it cannot be said that there is a genuine issue of material fact to be determined at trial, or that the plaintiff's claim has a real chance of success, on that particular ground.

[15] This application therefore boils down to the question of whether there is an arguable issue to be tried in respect of the defendant Meery's alleged failure to take proper avoiding action because he did not keep a proper lookout and did not see the Ward vehicle sliding out of control towards him as quickly and responsively as he should have.

[16] I have carefully reviewed the evidentiary record before me in considering the first part of the test of whether the applicant has shown that there is no genuine issue of material fact to be determined at trial in this respect. The evidence of Mr. Meery at discovery is that he first saw the Ward car when it was just about ready to cross the centre line about six to eight feet away, and that it was coming straight across the road towards him at about a 90 degree angle to the highway. He said that he came onto his brakes as hard as he could but that the Ward car just about disappeared under the front of his much higher truck.

[17] This evidence is generally consistent with a written statement which Mr.

Meery gave in September of 2005. On that occasion he said that he first saw the Honda sliding sideways with the front end partially in his lane at about 10-12 feet ahead of him. He said that he slammed on his brakes and that the impact was almost instant to his view of the Honda.

[18] Also examined at length on discovery was Carol Milne, an eyewitness to the accident. Ms. Milne, a teacher, was travelling westwardly two vehicles behind Mr. Meery's truck which had just passed her. She testified that she was travelling at a reduced speed of about 60 kph because she was nervous over the driving conditions, the roads being snow covered and slushy.

[19] Ms. Milne testified that the first time she noticed the Ward vehicle was when it veered or swerved across the centre line into the westbound lane. She recalled a feeling of panic and had only a chance to ask herself "what are they doing?" before the impact occurred. She said that from the first time she noticed the Ward car crossing the lane, "it all seemed very, very fast, seconds". She herself was driving far enough back of the Meery vehicle to be able to stop in time.

[20] When asked if she thought that there was not enough time for the operator of the truck to avoid the collision, Ms. Milne answered "oh, absolutely, yeah. It was horrible." When next asked the question, "so there was nothing he could have done in your opinion to avoid the accident?", Ms. Milne answered, "oh no, it was horrible."

[21] Ms. Milne then went on to say that the basis of her opinion was that the

accident seemed to happen so very quickly from her noticing the vehicle veer across the lane.

[22] During the course of her discovery examination, Ms. Milne also confirmed and adopted the written statement she gave to the accident investigators in December of 2005. In that statement, Ms. Milne said that when she saw the Ward car crossing over the centre line, there didn't seem to be enough time for the operator of the truck to avoid the collision. She said that the Ward car came in front of the truck suddenly. She also added that the truck was not travelling at an excessive rate of speed.

[23] I turn now to a review of the discovery evidence given by the defendant Erin Ward. She was travelling on Grand Lake Road in an easterly direction, with the plaintiff as her passenger, at an estimated speed of 50-60 kph when her right front tire hit a chunk of ice lying on the road. She thereupon lost control of her car as it began to slide in a counter clockwise rotation to the other side of the road. It was only then, while the car was rotating and out of control, that she first saw Mr. Meery's truck approaching from the opposite direction. She guessed that the truck was then maybe four to five car lengths away.

[24] At one point in her discovery examination, Ms. Ward was asked if she had any sense of how much time had passed from when she first hit the piece of ice to the time of impact. She answered, "it wasn't long, it might have been 30 seconds, 40 seconds. That's a guess once again...it seems very slow, takes forever. But I would say about 30-40 seconds, yeah".

[25] Later on in her examination, Ms. Ward was asked how much time lapsed from when she first saw Mr. Meery's vehicle (when her vehicle was already sliding out of control) to the time of impact. The following exchange took place:

399-Q. And how much time had lapsed between when you first saw Mr. Meery's vehicle to the time of impact?

A. To the time of impact it might've been a minute maybe, maybe a little under. It's a guess. But it wasn't right away cause I remember thinking I wasn't sure if we were going to get hit .....

400-Q. Now you had told my friend earlier that from the time you hit the ice to the point of impact, approximately 30 to 40 seconds had lapsed?

A. Yeah, it could've been, it's not exact. It might've ... sometime ... no longer than a minute.

401-Q. I guess I'm confused, because from the time you hit the ice to the time of impact you said 30 to 40 seconds?

A. Oh, the time of impact. And what did you just ask me, sorry?

402-Q. I asked from the time you saw Mr. Meery's truck to the point...to the time the actual collision took place, how many seconds had lapsed?

A. See both I don't have exact answers for. But the time that I lost control, yeah, sorry. At the time I hit the ice to the time that I...

403-Q. Of the impact?

A. It was about a minute. Mr. Meery might've been ... it wasn't right away but it wasn't ... it wasn't long after. I can't say exactly cause I was spinning so... I was going so fast that it was hard to say. Maybe 15 seconds, 20 seconds, it's a guess once again.

[26] The other passage of note from the transcript of Ms. Ward's discovery evidence is found at 236-Q. where she was asked if she was coming quite sharply across the roadway. Her answer was, "yes, it was very quick and yes, very

obvious". Ms. Ward was not asked the question during the course of her discovery examination whether she thought there was any evasive action which the driver of the truck could have taken to have avoided, or at least lessened, the impact.

[27] Bearing all this evidence in mind, can it be said that there is a genuine issue of material fact that should be left for determination at trial which may affect the outcome of whether there was any negligence on the part of Mr. Meery that contributed to this accident?

[28] The evidence of both the defendant Meery and the eyewitness Milne is generally consistent, both internally and with one another, in support of the conclusion that there was no evasive action which Mr. Meery could reasonably have been expected to take to avoid or lessen the impact. Although they were travelling two vehicles apart, both first took notice of the Ward vehicle when it began sliding across the centre line of the highway. The impact then happened very quickly. Mr. Meery said that all he had time to do was jam on his brakes. Ms. Milne could not recall seeing Mr. Meery's brake lights come on but the focus of her attention, as she said, was on the Ward vehicle. Her evidence with respect to the brake lights is therefore of no significance. More importantly, Ms. Milne holds the absolute view, based on what she saw, that there was nothing Mr. Meery could have done to avoid the accident.

[29] It appears that the only evidence which might call this issue into question is Ms. Ward's estimates of the time lapse from the point when her vehicle spun out of control until the collision with Mr. Meery's truck. If that evidence could be found

to be reliable, it might be inferred that Mr. Meery did not take proper evasive action from his failure to keep a proper lookout.

[30] Ms. Ward's evidence by her own admission, however, is pure guesswork. She admits that she can't say how long it was that her vehicle was sliding out of control before impact. One could hardly expect an accurate answer from someone in the agony of collision. Ms. Ward nonetheless ventures into guesswork where she vacillates in her estimates from about a minute to maybe 15-20 seconds (after earlier guessing that it might have been between 30-40 seconds after she encountered the ice).

[31] Not only are these guesses internally inconsistent, they are obviously haphazard and unreliable, especially in light of her opening answer that she cannot say how long that time lapse was. The court does not need expert evidence to readily conclude as a matter of common sense that Ms. Ward's time lapse guesses, even at the lowest estimates, are not only unreliable but plainly impossible in circumstances where two vehicles were bearing down on one another from opposite directions after one spun out of control, both travelling in the range of 60 kph, on a level stretch of highway. These haphazard guesses do not stack up against the otherwise consistent body of evidence, indeed that of Ms. Ward herself above referred to, that this accident happened very quickly.

[32] In drawing this conclusion, I underscore that I am not thereby making an adverse finding against Ms. Ward's credibility, that is to say, the veracity or

sincerity of her testimony. Rather, I simply find her testimony, as it pertains to haphazard guesswork of the lapse of time during the agony of collision, to be unreliable because of its speculative nature and obvious inaccuracy.

[33] With the rejection of this one aspect of Ms. Ward's testimony, there is really no evidence left to support the argument that there is a genuine issue of material fact to be tried in respect of Mr. Meery's actions of keeping a proper lookout and taking proper avoiding action. I therefore find that the applicant Meery has satisfied the first part of the test to obtain summary judgment.

[34] Having so found, the second part of the test requires the plaintiff to establish her claim as being one with a real chance of success, based on the facts that are beyond dispute. Based on the foregoing analysis, the plaintiff is unable to demonstrate that her claim has any real chance of success as against the defendant Meery. There is simply no factual basis, beyond mere speculation, upon which a court could conclude that Mr. Meery failed to take proper avoiding action by reason of not keeping a proper lookout and is therefore liable as a joint tortfeasor.

[35] The suggestion that this accident might have been avoided or the impact lessened by Mr. Meery's swerving out of harm's way, had he been keeping a proper lookout, is not something that can be reasonably inferred from the established facts. It is also at odds with the well-known principle that the law recognizes that a driver, in the agony of the moment, may react in a manner that is less than perfect, without liability. Here, Mr. Meery did try to take some evasive action by jamming on his brakes.

[36] In the result, I find that the defendant Meery has satisfied the two part test to be applied and is therefore entitled to an order for summary judgment both in respect of the plaintiff's claim and the cross-claim of the defendant Ward. The latter, incidentally, took no position on the hearing of this application.

[37] If the parties need to be heard on the matter of costs on this application, I would direct that written submissions be filed with the court within 30 days of this judgment.

J.