SUPREME COURT OF NOVA SCOTIA
Citation: Bond v. Morse, 2009 NSSC 270

Date: 20090916
Docket: Hfx No. 285336
Registry: Halifax

Between:

Wendy Bond

Plaintiff

v.

Marissa Lee Morse, Alan Barker,
and Tabitha Lynn Samways

Defendants

Judge: The Honourable Justice Glen G. McDougall

Heard: June 16, 2009, in Halifax, Nova Scotia

Counsel: Tim Hill, for the plaintiff
Patricia Mitchell, for the defendant, Tabitha Lynn Samways
Ian Dunbar, for the defendant, Alan Barker
Connie Morrissey, for the defendant, Marissa Lee Morse

By the Court:

[1] This relates to an Amended Notice of Motion filed on behalf of the defendant, Tabatha Lynn Samways (henceforth "defendant Samways" or "Ms. Samways"). Counsel for Ms. Samways is seeking an order determining the issue of liability and apportionment amongst the defendants for any claim which might be established by the plaintiff and granting such dismissal or judgment as is necessary to give effect thereto or a dismissal of all claims against Ms. Samways in these proceedings. A similar motion was filed by counsel for the defendant, Alan Barker (henceforth "defendant Barker" or "Mr. Barker").

[2] The motion is opposed by the remaining defendant, Marissa Lee Morse (henceforth "defendant Morse" or "Ms. Morse").

[3] The plaintiff, Wendy Bond (henceforth "the plaintiff") is prepared to consent to the motions "provided that the defendant Morse is estopped from arguing later that Samways and Barker were liable for the collision and Morse was not." (Refer to paragraph 5 of counsel's brief submitted on behalf of Wendy Bond dated June 11, 2009.)

[4] The motions are brought pursuant to **Civil Procedure Rule** 12 – Question of Law; **Rule** 13 – Summary Judgment; and **Rule** 88 – Abuse of Process.

FACTUAL BACKGROUND

[5] The plaintiff's action arises out of a multi-vehicle accident that occurred on Commercial Street (Highway No. 1), New Minas, Nova Scotia on September 9, 2004.

[6] According to the statement of claim, the vehicle driven by the plaintiff had come to a complete stop behind another vehicle which was waiting to make a left turn in the face of oncoming traffic.

[7] While stopped, waiting for the vehicle in front to complete its left-turning manoeuvre, the plaintiff's vehicle was struck from behind by the vehicle being driven by the defendant Barker.

[8] The plaintiff claims to have been struck a second time by the Barker vehicle after the latter vehicle was struck from behind by the vehicle driven by the defendant Samways.

[9] It did not end there. The plaintiff alleges that her vehicle was hit for a third time when the vehicle driven by the defendant Morse struck the Samways vehicle from behind which started a chain reaction forcing the Samways vehicle to collide with the Barker vehicle and the Barker vehicle to collide once again with the plaintiff's vehicle. Mercifully, it ended there save for the law suits.

[10] The plaintiff commenced her action on September 10, 2007. Her claim has been subrogated to the Workers' Compensation Board which has been paying benefits to her since the time of the accident.

[11] Prior to the commencement of this action, the defendant Barker filed a claim in the Small Claims Court seeking damages for the cost of repairs to his motor vehicle arising out of this accident. He named Ms. Samways as the defendant.

[12] Because the *Small Claims Court Act*, R.S.N.S. 1989, c. 430 (as amended) makes no provision for a Third Party claim, Ms. Samways, in addition to filing a defence, commenced a separate action against Ms. Morse seeking indemnification or, at least, some contribution in the event that she was found liable for Mr. Barker's damages. A defence was filed by Ms. Morse in which she denied liability for Mr. Barker's loss. She pointed the finger at Ms. Samways alleging that she was solely responsible for the collision with Mr. Barker or, alternatively, that she was at least contributory negligent in causing it.

[13] Both claims were heard together pursuant to section 25 of the *Small Claims Court Act* which provided for joinder of two or more claims. Although the plaintiff was not named as a party in either claim she did, however, testify under subpoena.

[14] The adjudicator who heard the matters rendered his decisions on November 7, 2005. The two decisions are virtually identical. In his decision and order the adjudicator stated:

> The facts, simply stated involved a vehicle driven by Wendy Bond being rear-ended by that of Alan Barker, who was rear-ended by Tabitha Samways, who was rear-ended by Marissa Morse. This is not in dispute.
>
> The dispute centres on the sequence of events and whether there was a continuous chain of events starting with Marissa Morses' [sic] vehicle or whether some or all of these collisions happened independently.
>
> The Court finds that the chain of events commenced with the Morse vehicle and ended with the Barker vehicle in a continuous event.

[15] The adjudicator ordered Ms. Samways to pay Mr. Barker for the cost of repairs to his vehicle. He then ordered Ms. Morse to reimburse Ms. Samways for the monetary damages she had to pay to Mr. Barker.

[16] The adjudicator found Ms. Samways liable for the cost of repairs to Mr. Barker's motor vehicle and then ordered Ms. Morse to indemnify Ms. Samways for

the full amount. In effect, the accident was due to negligence on the part of Ms. Morse.

[17] It should be noted that Ms. Samways claim was for indemnification only in the event she was found liable for Mr. Barker's damages. She was not seeking compensation for any damages to her own vehicle.

[18] It should also be noted that the plaintiff testified under subpoena. She was not represented by counsel nor was she a party to either of these Small Claims Court claims.

[19] There is no record of the evidence tendered orally in the Small Claims Court nor does the decision and order of the adjudicator provide much in the nature of detail. The Court's finding was brief and to the point:

> The Court finds that the chain of events commenced with the Morse vehicle and ended with the Barker vehicle in a continuous event.

[20] The two decisions of the adjudicator have not been appealed and the limitation period for doing so has long since expired.

ISSUES

[21] The issues that are before this Court are:

(i) Does the *res judicata* sub-doctrine of issue estoppel bar the defendants from re-litigating the question of liability in the circumstances of this case?

(ii) Would allowing the plaintiff's claim against all defendants and the defendants' existing cross-claims to proceed amount to an abuse of process?

(iii) Should summary judgment be granted dismissing the plaintiff's claims against defendant Barker and defendant Samways – leaving Ms. Morse as the sole remaining defendant to answer to the claims of the plaintiff?

DISCUSSION AND ANALYSIS

(I) ISSUE ESTOPPEL

[22] In the leading case of **Angle** v. **Minister of National Revenue**, [1975] 2 S.C.R. 248, the applicable test for issue estoppel, Justice Laskin (as he was then) borrowed the following from the Ontario Court of Appeal in **McIntosh** v. **Parent** (1924), 55 O.L.R. 552, where Middleton, J.A., at p. 555, stated:

> When a question is litigated the judgment of the Court is a final determination between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or as an answer to a claim set up cannot be retired in a subsequent suit between the same parties or their privies though for a different cause of action. The right, question or fact once determined must as between them be taken to be conclusively established so long as the judgment remains...

[23] All three defendants participated in the Small Claims Court hearing. While the plaintiff was not a named party she was called to testify. Assuming her evidence of the circumstances surrounding the multi-car accident was consistent with the written statement she gave on September 28, 2004 (a copy of which is attached to the affidavit of Neil Stuart, a Casualty Specialist with Intact Insurance, the automobile insurer of the defendant Morse) the adjudicator must have rejected her version of events in which she stated there was a series of three collisions or “bangs” to her vehicle.

[24] There is no transcript of the testimony in Small Claims Court matters. In the case of **Henderson** v. **Henderson**, [1843-60] All E.R. Rep. 378, (1843), 67 E.R. 3133, 3 Hare 100 (Ch.), Wigram, V.C. said:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[25] In **The Law of Evidence In Canada**, by Sopinka, Lederman and Bryant (Second Edition) Butterworths Canada Ltd. (1999) the authors, after citing this passage, wrote at paragraph 91.68, on p. 1079:

> By reason of the operation of this second principle, estopped by *res judicata* “also extends to any point whether of assumption or admission which was in substance the ratio of and fundamental to the decision.”

[26] Counsel for the plaintiff did not present any affidavit evidence regarding the events leading up to the accident. The only evidence offered pertained to the quantum of potential damages being claimed which are already well in excess of the monetary jurisdiction of the Small Claims Court. Nor did he raise any concerns about the plaintiff's inability to appeal the ruling of the Small Claims Court Adjudicator if she was dissatisfied with the decision.

[27] It is clear from the adjudicator's decision that the issue decided is the same as that which must be determined in the cross-claims. The Small Claims Court has the jurisdiction to determine the issue and its decision is now final.

[28] All the requirements establishing issue estoppel have been met.

(II) ABUSE OF PROCESS

[29] I do not propose to deal with this issue in any great detail. Since the requirements of issue estoppel have been met, it would be an abuse of process to permit an issue that has already been decided to be re-litigated.

(III) SUMMARY JUDGMENT

[30] As earlier stated, the plaintiff did not present any evidence other than figures establishing the potential quantum of damages at play. It was the defendant Morse that attempted to present at least some evidence suggesting that there might be some negligence on the part of the other two defendants that contributed to or caused the accident. Although the plaintiff's statement of claim alleged a series of three collisions the pleadings are not evidence (Reference: **Civil Procedure Rule** 13.04(3)). The adjudicator rejected this version of events. The plaintiff's failure to present affidavit evidence of herself or any other witness would suggest an acceptance of the adjudicator's findings.

[31] Under the circumstances I would also grant the motions for summary judgment dismissing the plaintiff's action against the defendant Barker and the defendant Samways.

CONCLUSION

[32] The motions for dismissal of the plaintiff's claims against the defendant Barker and the defendant Samways based on issue estoppel and abuse of process along with the motions for summary judgment are granted.

[33] I will leave it to counsel to use their best efforts to come to an agreement on costs. If an agreement cannot be reached I will accept their written submissions within 45 days from the date of the release of this decision.

Justice Glen G. McDougall