SUPREME COURT OF NOVA SCOTIA
Citation: Monk v. Wallace, 2009 NSSC 425

Date: 20090423
Docket: Amh No. 306720
Registry: Amherst

Between:

Catherine Monk

Applicant

v.

Dr. Timothy Wallace, Cumberland Regional Health Authority

Respondents

CHAMBERS DECISION

Judge: The Honourable Justice John D. Murphy

Heard: April 23, 2009, in Amherst, Nova Scotia
{Oral decision rendered April 23, 2009}

Written Decision: June 9, 2010
{Editing in written decision limited to improving organization and grammar, quoting text of Civil Procedure Rules referenced in oral decision and expanding references to parties' submissions.}

Counsel: Mary Ellen Nurse, for Applicant
Colin J. Clarke, for Respondent, Dr. Wallace
Scott Norton, for Respondent, Cumberland Regional Health Authority

By the Court:

INTRODUCTION AND BACKGROUND FACTS

[1] This is the first motion of which I am aware seeking to convert an application to an action under the *Nova Scotia Civil Procedure Rules* which came into effect January 1, 2009. Those revised Rules expand the scope of proceedings which can be advanced by the application route - under the *Nova Scotia Civil Procedure Rules* (1972) if there was a substantial dispute of fact, determination could only be made at trial; that has changed and a substantial dispute of fact no longer precludes resolution by hearing an application.

[2] This proceeding arises from a doctor/patient relationship and the allegations involve medical malpractice, breach of contract, standard of care, and the responsibility of a physician and a health authority. I have also been advised that the amount of damages will be in dispute.

[3] Ms. Monk commenced the proceeding by filing a Notice of Application in Court under *Rule 5*, and the Health Authority and Dr. Wallace (collectively the "Respondents") filed separate Notices of Contest disputing all bases upon which the Applicant claims. Notices of Motions for an order converting the application to an action have been filed by both Respondents.

[4] In early 2006, the Applicant visited her family physician regarding spasms and pains in her neck. Following consultations she was referred for a C.T. scan and ultrasound test, which were performed through the first half of 2006. After reviewing the scan and test results, which suggested a possible thyroid problem, her family physician referred Ms. Monk for a consultation with Dr. Wallace, who is a medical doctor and surgeon with experience in otolaryngology.

[5] The Applicant alleges that on January 23, 2007 Dr. Wallace performed a thyroid antinomy, and that during this surgery her recurrent laryngeal nerve was damaged. Ms. Monk asserts that among other things she can no longer speak above a whisper, has pain in her neck, and cannot participate in various activities she used to enjoy.

[6] The Applicant alleges that the Respondents are jointly and severally liable for her injuries, and she claims general and special damages, cost of future care, interest and costs.

[7] The Respondents have indicated that issues of credibility and expert evidence will be involved, and that they wish to exercise their right to trial by jury.

[8] Both Respondents submit that it is not appropriate for this claim to proceed as an application, and seek an order converting the case to an action pursuant to *Civil Procedure Rule 6*.

Applicable *Civil Procedure Rules*

[9] *Rule 6.02* provides for the conversion of an application to an action, and vice versa, in the following terms:

> **Converting action or application**
>
> **6.02 (1)** A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.
>
> (2) A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.
>
> (3) An application is presumed to be preferable to an action if either of the following is established:
>
> (a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, and the erosion will be significantly lessened if the dispute is resolved by application;
>
> (b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.
>
> (4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:

(a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;

(b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

(5) On a motion to convert a proceeding, factors in favour of an application include each of the following:

(a) the parties can quickly ascertain who their important witnesses will be;

(b) the parties can be ready to be heard in months, rather than years;

(c) the hearing is of predictable length and content;

(d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

(6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

[10] The intent of the application in court as a proceeding is stated in *Rule 5*:

Scope of Rule 5

5.01 (1) ...

(4) The application in court is for longer hearings, and it is available, in appropriate circumstances, as a flexible and speedy alternative to an action.

[11] This motion must be decided in accordance with the object of the Rules, stated in *Rule 1.03* to be "the just, speedy and inexpensive determination of every proceeding."

[12] Civil Procedure Rules provide methods, opportunities and safeguards to expedite determinations so that litigants can obtain just, prompt and efficient resolution. Ms. Monk's counsel notes that the Court should consider human

factors, and try to make proceedings as stress free and as streamlined for the parties as is practical. These considerations apply to every participant in litigation; all parties are entitled to their "day in court" as it is referred to; in some cases that can be achieved through an application procedure, while in others a fair day in court involves the right to have examination and cross examination, and to have witnesses appear and have their conduct and testimony assessed by a judge or jury.

[13] The "educational notes" published by the Nova Scotia Barristers' Society offer assistance with respect to the proper application of *Rule 6*, and summarize as follows when each procedure should be used:

> An application is used if: substantive rights will erode, key witnesses can be quickly ascertained; parties can be ready in months; the hearing is of predictable length/content; credibility can be assessed summarily; or there are costs/delay factors warranting and expedited procedure.
>
> An action is used if: seeking trial by jury; early disclosure of impeaching evidence would be unreasonable; key witnesses are not yet known; parties need years to prepare; the hearing will be of unpredictable length/content; credibility can only be determined at trial; or cost/delay factors warrant an action... (N.S.B.S. Educational Notes, *Rule 6*)

[14] I have determined that in the circumstances of this case the Respondents' motions should succeed and the proceeding will be converted from an application to an action. I will highlight the reasons for this decision, and also note that I have accepted the submissions contained in the briefs from Respondents' counsel, which will remain in the file as part of the record to illustrate the bases for decision.

[15] Although the expanded application route under the Rules is intended to offer prompt and more economical relief to parties who qualify for an application procedure, the Rules now also provide a more streamlined action procedure. Ms. Monk will not necessarily be subjected to inordinate delays and procedural hurdles because this matter will be determined through an action rather than by application. The action procedure now allows parties to identify trial dates much earlier in the process, involves less discovery examination, and facilitates the parties' cooperation to exchange information and have matters determined promptly. This case raises many disputed issues, and if the parties are unable to resolve their dispute by out-of-court settlement, I am convinced that the

Respondents are entitled to the safeguards and benefits provided by trial procedures, which the Court also needs to fully assess all the issues.

[16] *Rule 6.02(2)* puts the burden on the Respondents to satisfy the Court that the matter should be converted from an application to an action, and I am satisfied that burden has been met.

[17] Neither of the situations identified in *Rule 6.02(3)* as making application the preferable route apply in this case:

(a) There is no indication that the Applicant's substantive rights will be eroded in the time it would take to bring the action to trial. The only issue the Applicant has raised in this context is preservation of evidence. That is not a substantive right, but rather a matter which can be addressed as easily under action as application procedures; indeed, the *Civil Procedure Rules* concerning discovery and disclosure protect the Applicant's right to receive all relevant documents and information prior to trial and all parties should have taken steps under *Rules 14-17* by this time to preserve evidence.

(b) There is no indication the Court will be required to hold several hearings in the one proceeding.

[18] On the other hand, I am satisfied that the criteria in *Rule 6.02(4)* have been met, deeming action to be the preferred procedure:

(a) Both Respondents have expressed an intention to exercise their right to trial by jury, and it would be unreasonable to deprive them of that. The *Judicature Act* provides the *prima facie* right to a jury trial, which is jealously guarded by the Courts. I accept the Respondents' indication that they wish to exercise that right in this case which raises substantial disputes of fact. If the Respondents' position changes prior to trial and they do not elect jury, it would not have been improper to express a desire at this stage in the proceeding to preserve their right to a jury trial, which I find they are doing in good faith.

(b) With respect to subsection *(b)* of *Rule 6.02(4)*, I conclude that it is premature to determine whether issues involving impeachment of credibility will arise. The file material does not specify the type of damages claimed, and based on

> the limited information available, it would be unreasonable prior to document exchange and discovery examination to require the Respondents to provide the early disclosure of complete witness information which is contemplated by the application procedure. This consideration is particularly important in this case, as both Respondents predict that the issue of credibility, (as it relates to the parties, additional witnesses of fact, and experts), will be fundamental to determining the outcome.

[19] The factors in favour of an application set out in *Rule 6.02(5)* are not present in this case -

(a) The parties cannot quickly ascertain who their important witnesses will be, and may not be able to reasonably do so until late in the process; opinion evidence will likely be required, and potential expert witnesses have not been identified;

(b) It is unrealistic to expect that a medical malpractice case, presently only in its early stages, can be prepared and heard in months rather than years.

(c) At this time, the length and content of the hearing cannot be predicted; and

(d) The Court is not satisfied at this stage that the evidence will be such that credibility can satisfactorily be assessed during an application hearing, rather than at trial.

[20] I have considered the relative cost and delay associated with the application and action routes, and I am not convinced that litigation would be more efficient or less costly if this matter proceeds as an application, rather than by the trial route, which preserves the right to determination by jury and offers more procedural safeguards which may be needed to properly address matters relating to fact finding, expert testimony, and assessing credibility. If this case were allowed to continue as an application now, there is substantial risk that the parties might realize as the hearing approached that a trial is required, leading to later conversion and delay.

[21] I accordingly conclude that the Respondents' motion should succeed, as this matter involves sufficient fact, uncertainty, and complexity to warrant conversion.

[22] At the conclusion of the hearing, it was determined, following discussion with counsel, that:

(a) The Applicant's Notice of Application and the Respondents' Notices of Contest will become pleadings in the Action, with each party having the right to amend those documents within 30 days without leave of the Court.

(b) The Applicant will pay costs of this motion in amount $500.00 to each Respondent, upon resolution of the cause.

J.