

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Johansson v. General Motors Canada Ltd., 2011 NSSC 20

**Date:** 20110121

**Docket:** Hfx No. 230488

**Registry:** Halifax

**Between:**

Maria Johansson, Steven Johansson  
and Jody Johansson

Plaintiffs

v.

General Motors of Canada Limited, a body corporate  
registered to carry on business in the Province of Nova Scotia

Defendant

**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** October 21, 2010, in Halifax, Nova Scotia

**Counsel:** Michelle Awad, Q.C. and Jeff Aucoin, Esq., for the defendant  
Nicolle Snow, Esq., for the plaintiffs

**By the Court:**

[1] The defendant, General Motors of Canada Limited (henceforth “GMCL”), moves for an Order for Summary Judgment on Evidence to dismiss the claims made by two of the plaintiffs, Steven Johansson and Jody Johansson (formerly Jody Robichaud).

[2] Steven and Jody Johansson were injured in a single vehicle accident while passengers in a vehicle driven by the other plaintiff, Maria Johansson. The accident occurred on October 25, 1998.

[3] Both Steven and Jody Johansson were paid damages for the injuries they sustained. The amount paid to each of the plaintiffs was acknowledged in writing and they each signed a release acknowledging full and final settlement of any claims arising from the accident. The releases were given to The Citadel General Assurance Company (henceforth “Citadel”), George Johansson, the owner of the motor vehicle involved in the accident and the driver, Maria Johansson. The releases are both dated the 14<sup>th</sup> day of April, 1999.

[4] On September 13, 2004 a Statement of Claim was filed on behalf of all three plaintiffs alleging that the motor vehicle accident which occurred on October 25, 1998 was caused by an inherent defect in the design and manufacture of the vehicle being driven by Maria Johansson.

[5] The vehicle, a 1997 Chevrolet Lumina, was manufactured by GMCL. The plaintiffs now claim damages for the injuries they sustained as a result of the accident which they allege was caused by the careless and negligent actions of GMCL in the design and manufacture of the vehicle involved.

[6] GMCL’s motion for summary judgment is against Steven and Jody Johansson only. It does not involve the other plaintiff, Maria Johansson.

**ISSUE:**

[7] Is the defendant, GMCL, entitled to summary judgment, dismissing the claims made by the plaintiffs, Steven and Jody Johansson, as a result of the releases given to Citadel?

**LAW:**

[8] *Civil Procedure Rule* 13.01(1) allows for summary judgment either on pleadings that are clearly unsustainable or on evidence establishing that there is no genuine issue for trial.

[9] *Rule* 13.04 deals specifically with summary judgment motions on evidence. It states:

**13.04** (1) 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.

(2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.

(4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.

(6) The motion may be made after pleadings close.

[10] There have been a number of cases decided after the implementation of the new rules. The test for summary judgment remains the same as that used under the 1972 *Rules*. In **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 (S.C.C.); Carswell Ont 3171, Iacobucci and Bastarache, J.J., stated the following at para 27:

27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para 15; *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4<sup>th</sup>) 257 (Ont. C.A.) at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (Ont. C.A.) at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success." *Hercules, supra*, at para. 15.

[11] This test was adopted by the Nova Scotia Court of Appeal in the case of **Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)**, 2007NSCA38. Justice Cromwell (as he was then) indicated at para. 8 that:

8 Summary Judgment is appropriate when a defendant shows that there is no genuine issue of material fact requiring a trial and a responding plaintiff fails to show that its claim is one with a real chance of success: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) at para 27.

[12] Previously the Nova Scotia Court of Appeal dealt with the situation where it is the defendant making the motion. In **Cook's Oil Company Ltd. v. Parkhill Construction (1980) Ltd.**, [2005] N.S.J. No. 69, Roscoe, J.A. had this to say at paras. 9 and 10:

9 As noted by the chambers judge, this court first examined the *Rule* after it had been amended to allow summary judgment applications by defendants in *United Gulf Developments Ltd. v. Iskandar*, where the following test was approved, at ¶9:

... The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. [case references and citations omitted] Once the moving party has made this showing, the respondent must then “establish his claim as being one with a real chance of success.”

10 It is a two part test. 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.

[13] It should further be noted that sub-section (1) of *Rule* 13.04 requires “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]. There is no room for the exercise of discretion in such instances. (See **Eikelenboom v. Holstein Assn. of Canada** (2004), 226 N.S.R. (2d) 235 (NSCA)).

#### **APPLICATION OF THE LAW TO THE FACTS:**

[14] Counsel for the plaintiffs argues that GMCL has failed to establish that there is no genuine issue of material fact requiring trial and as such the moving party has failed to pass the initial hurdle.

[15] She also argues that GMCL cannot rely on the releases given by the two plaintiffs (who are the subject of this motion) to Citadel as GMCL was not a party to the agreement nor was there an intention on their part to extend the benefit of the releases to GMCL. In short there was no privity of contract and since the alleged manufacturing defect was not known at the time the releases were signed there could be no intention to include GMCL.

[16] The operative provisions of the releases signed by Steven Johansson and Jody Robichaud (as she was then) contain the following:

UNDERSIGNED hereby for themselves, their heirs, executors, administrators, successors and assigns

- i) release and forever discharge The Citadel Assurance and George Johansson and Maria Johansson (herein referred to as the "Releasee") from any action, cause of action, or claim for damages specified above where the injury or, as the case may be, the damage, has been sustained as at the date hereof or may be sustained thereafter, as a result of collision on the Golden Grove Road, Saint John, NB on or about the 25 day of October, 1998.
- ii) agree not to make any claim or take proceedings against any person or corporation who might claim contribution or indemnity under provisions of any statute or otherwise;
- iii) agree that the said payment does not constitute an admission of liability on the part of the Releasee; and
- iv) declare that the terms of this settlement are fully understood, that the amount stated herein is the sole consideration of this release and that such amount is accepted voluntarily as a full and final settlement of the claim for damages specified above.

[17] The releases are clear and unambiguous and although neither of the two plaintiffs had the benefit of independent legal counsel they both accepted payment in full and final settlement of any claims they had for damages arising from the accident that spawned the current action. They each stated that they fully understood the terms of the settlement and agreed to it voluntarily. They should not now expect to be compensated further, particularly where to pursue a claim could result in a claim for contribution or indemnity against Citadel. This is indeed what could result based on the defence filed on behalf of GMCL. GMCL places the blame solely on the driver

and plans to seek contribution from her and her insurer should Steven and Jody Johansson be allowed to proceed with their claims.

[18] In the Supreme Court of Canada decision in **Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.**, [1999] S.C.J. No. 48, the following was written at para. 32:

32 In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependent upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination in general terms is made on the basis of two critical and cumulative factors: (a) did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision; and (b) are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

[19] Both “Fraser River” conditions are satisfied and GMCL should be entitled to use the Releases to defend against the two plaintiffs who have already been compensated for their injuries by Citadel. To allow their action to proceed would be an abuse of this Court’s process.

## **CONCLUSION**

[20] As between the plaintiffs, Steven and Jody Johansson, and the defendant, GMCL, there are no genuine issues of material fact requiring a trial. What facts are in dispute only pertain to the claim made by Maria Johansson. GMCL has passed the initial hurdle leaving it to the other two plaintiffs to establish, on the facts that are not in dispute, that their claim has a real chance of success. They have failed to do so. As a result, the motion for summary judgment is granted and the claims of both Steven Johansson and Jody Johansson are hereby dismissed.

[21] The parties are encouraged to try to reach agreement on costs failing which they are invited to file written submissions within 30 calendar days of the date of release of this decision.

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McDougall, J.