COURT OF APPEAL FOR ONTARIO

CITATION: Chrisjohn v. Riley, 2015 ONCA 713
DATE: 20151026
DOCKET: C60237

Gillese, van Rensburg and Miller JJ.A.

BETWEEN

Deborah L. Chrisjohn, Kennard Chrisjohn, Rosaleen P. Weiler,
Pamela Chrisjohn, and Michelle Chrisjohn

Plaintiffs (Appellants)

and

Shawn C. Riley, Deceased, and/or the Estate of Shawn C. Riley,
Economical Mutual Insurance Company, Belair Insurance
Company, Iroquois Ironworks Ltd., and Langdon Insurance Company

Defendants (Respondent)

Douglas M. Bryce, for the appellants

Lauren N. Bloom and Amir Fazel, for the respondent

Heard: October 5, 2015

On appeal from the order of Justice Antonio Skarica of the Superior Court of Justice, dated February 15, 2015.

van Rensburg J.A.:

A. OVERVIEW

[1] The appellants appeal an order refusing to set aside an administrative dismissal of their personal injury action. Through no apparent fault of the appellants, and as a result of the delay, negligence and deliberate actions of their lawyers, no motion to set aside the dismissal was brought until more than five years after the dismissal, eight and a half years after the action had been commenced, and ten and a half years after the accident in which the appellant Deborah Chrisjohn was seriously injured. In the interim, the respondent (who had never been formally added as a defendant to the action) had been informed that the appellants would no longer pursue the personal injury action and instead would be suing their first lawyer. The respondent heard nothing from the appellants or their counsel for almost three years, when it received notice of a motion to set aside the dismissal.

[2] In these circumstances, was the motion judge wrong to refuse to set aside the dismissal?

B. FACTS

[3] The appellant Deborah Chrisjohn was seriously injured in a motor vehicle collision in August 2002. The other driver, who died in the impact, and is alleged to have been impaired at the time of the accident, was uninsured. In August

2004, an action was commenced by Ms. Chrisjohn's first lawyer, R.N., seeking damages for her injuries and damages under the *Family Law Act,* R.S.O. 1990, c. F.3, for the other appellants, who are her husband and daughters (the "personal injury action"). R.N. named two insurance companies among the defendants to the personal injury action. Pursuant to two orders made in 2005 and 2006 in unopposed motions, the action against these insurers was dismissed and the appellants were granted leave to amend the claim to add as defendants the owner of the vehicle Ms. Chrisjohn was driving at the time of the collision, and the insurer of that vehicle, the respondent, Langdon Insurance Company ("Langdon"), with the requirement that the amendment be made within 20 days.

[4] R.N. did not take the steps required to amend the pleading, as a result of which Langdon was never added to the action as a defendant. In fact, R.N. took no steps to advance the action. A status notice was issued in May 2007, and the action was dismissed by registrar's order on August 21, 2007.

[5] A month before the dismissal, Langdon's counsel examined Ms. Chrisjohn for discovery (although the examination was cut short by R.N. and not completed). Some 53 undertakings were given, and eight questions refused. The undertakings included to provide a sworn affidavit of documents by the end of the day and to deliver an amended statement of claim naming Langdon as defendant within 30 days. None of the undertakings have ever been answered.

[6] In November 2007, the parties attended a settlement conference without prejudice to the respondent’s position on the dismissal. The claim was not resolved.

[7] Between September 2007 and February 2009, in response to letters from Langdon’s counsel, R.N. indicated repeatedly that he would take steps to “regularize the proceedings”, that is, to move to set aside the administrative dismissal and to add Langdon as a defendant. Motion dates were proposed and abandoned; no motion materials were ever served by R.N. There was no contact between R.N. and Langdon after April 2009.

[8] Ms. Chrisjohn was aware of the administrative dismissal when it occurred, however she was assured by R.N. throughout his retainer that the personal injury action was continuing. R.N. told her that he had health and marital problems and when she threatened to change lawyers out of concern that her action was not progressing, he reacted angrily and bullied her.

[9] In July 2009, the appellants terminated their relationship with R.N. and they so advised Langdon. In October 2009, the appellants retained A.M. as their new lawyer. Instead of moving immediately to set aside the administrative dismissal, A.M. focussed on R.N., alleging that he had been negligent in his handling of the personal injury action and demanding that R.N. report himself to his professional liability insurer, LawPro.

[10] Langdon did not hear from the appellants or their counsel from July 2009 until April 2010, when A.M. called Langdon's counsel to advise that Ms. Chrisjohn was now pursuing a claim against her former lawyer, as the limitation period for pursuing a claim against Langdon had long since expired.

[11] In August 2010, A.M. commenced an action in the appellants' names against R.N. (the "solicitor's negligence action"). R.N., who is representing himself, brought an unsuccessful motion for summary dismissal of the solicitor's negligence action, asserting, among other things, that the action was premature and that A.M. ought to have moved immediately to set aside the administrative dismissal. A.M. filed an affidavit in that motion that was ultimately relied upon in support of the motion to set aside the dismissal of the personal injury action. In the affidavit, he explained the difficulties he encountered in the action against R.N. He asserted that the delay in the personal injury action was solely attributable to R.N.'s refusal or failure to co-operate with LawPro.

[12] Although A.M. did not explain in his own affidavit why he had delayed in bringing the motion to set aside the dismissal, Ms. Chrisjohn, in her affidavit, stated that A.M. told her that it was necessary to sue R.N. before the dismissal could be set aside.

[13] R.N. refused to report the claim to LawPro. A.M. made a complaint to the Law Society of Upper Canada, whereupon an adjuster was appointed for R.N.

LawPro ultimately closed its file and R.N. has been acting in his own defence throughout the solicitor's negligence action, which continues.

[14] In 2014, in proceedings by the Law Society to have R.N. psychiatrically assessed, it came to light that in April 2010, R.N. had taken leave of his law practice on medical grounds. The Law Society found that there are reasonable grounds to conclude that R.N. has been and is incapacitated.

[15] In February 2013, A.M. filed a notice of change of lawyer indicating that his firm was solicitor of record for the appellants in the personal injury action, and also served notice of a motion to set aside the dismissal of that action, originally returnable in March 2013. In April 2014, new counsel for the appellants filed a notice of change of lawyer in the personal injury action, and argued the motion to set aside the administrative dismissal and to amend the pleading to add the respondent as a defendant. The motion was heard in 2015 and dismissed.

C. DECISION OF THE MOTION JUDGE

[16] The motion judge concluded that the appellants had failed to satisfy a number of the criteria set out in *Reid v. Dow Corning Corp.*, [2001] O.J. No. 2365 (S.C.J.), rev'd on other grounds, using the contextual approach mandated by various decisions of this court, including *Scaini v. Prochnicki et al.* (2007), 85 O.R. (3d) 179 and *Marché D'Alimentation Denis Theriault Ltée. et al. v. Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660.

[17] First, the motion judge observed that the delay by R.N. was not properly explained. Before the administrative dismissal little progress had been made in the action and there was no evidence that R.N. intended to set down the action for trial within the time limit set out in the status notice. The motion judge noted that R.N was at one point depressed and had marital problems, but "what influence these problems had on R.N.'s conduct and decisions from 2002 to 2007 is unclear." R.N. did nothing in the next two years to set aside the administrative dismissal.

[18] After A.M. became involved, no steps were taken to set aside the administrative dismissal for another three and a half years. The motion judge observed that it was reasonable to conclude that A.M. had made a strategic decision to abandon proceedings against the respondent and to pursue R.N. instead.

[19] With a delay of five and a half years from the date the appellants became aware of the dismissal, it was clear that the motion to set aside the dismissal had not been brought promptly. The delay gave rise to a presumption of prejudice which was not rebutted by the appellants. There was also evidence of actual prejudice as numerous records relevant to Ms. Chrisjohn's pre-and post-accident medical condition and liability (including on the issue of the other driver's sobriety) were not available, and the investigating police officer had suffered a stroke. Finally, the motion judge emphasized the "compelling consideration" of

finality: based on the administrative dismissal and A.M.'s communication to the respondent's counsel, the respondent had assumed for almost three years that the case against it was over. He noted that the interest in finality in these circumstances must trump the plea for an indulgence.

D. ISSUES

[20] The decision of a master or judge refusing to set aside an administrative dismissal is entitled to deference and may be set aside only if made on an erroneous legal principle or infected by a palpable and overriding error of fact: *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67, at para. 16. The appellants assert that there were such errors in this case.

[21] First, the appellants contend that the motion judge erred in his consideration of the explanation for the litigation delay by ignoring, or failing to give proper weight to, the uncontroverted evidence that the appellants always intended to proceed with the personal injury action.

[22] Second, the appellants assert that the motion judge refused to consider as relevant the very real prospect that, if the action were not restored, they may be without any real remedy in respect of the very serious personal injuries sustained by Ms. Chrisjohn after a head-on collision with an impaired driver. LawPro has refused to defend R.N. in the solicitor's negligence action, and (although not in evidence, but adverted to in oral argument), A.M. is actively defending a second

solicitor's negligence action brought by the appellants, arguing that R.N. and not A.M. was responsible for the dismissal of the personal injury action and the failure to have the dismissal set aside.

[23] Third, the appellants argue that the motion judge erred in his assessment of prejudice, when the evidence compiled by their counsel suggested that there was no "actual and significant prejudice" and the action was capable of being fairly tried on the merits.

[24] The respondent contends that there was no error in the motion judge's reasoning or decision. It was reasonable for the motion judge to conclude on the evidence before him that the appellants had failed to satisfy any of the *Reid* factors and that the motion should be dismissed.

E. ANALYSIS

[25] It is an understatement to say that the appellants were not well served by their former legal counsel in this case. Their first lawyer, R.N., took on Ms. Chrisjohn's personal injury claim and did little to advance it. When the personal injury action was dismissed, he did not move promptly to set aside the dismissal. While there is evidence that R.N. suffered from personal problems as early as 2007, as the motion judge observed on the evidence before him, "what influence these problems had on R.N.'s conduct and decisions from 2002 to 2007 is

unclear". And as Langdon points out, during this time, R.N. managed to settle Ms. Chrisjohn's long-term disability claim.

[26] After Ms. Chrisjohn changed counsel, A.M. commenced and pursued the solicitor's negligence action on her behalf against R.N., and did not take any steps in the personal injury action. Indeed, he did not deliver a notice of change of lawyer in that action until 2013, shortly before his retainer ended. He informed Langdon that the personal injury action was not being pursued. This was, as the motion judge concluded, a "deliberate" and "strategic" decision, and not inadvertent, even if, in retrospect, A.M. should have moved to set aside the administrative dismissal at the same time he pursued the solicitor's negligence action.

[27] Ms. Chrisjohn's intention throughout was to recover damages for the personal injuries she suffered as a result of the 2002 collision. Unfortunately, however, the personal injury action had been dismissed in 2007, and from at least 2010, the respondent considered the dismissal to be final and that the action against it had ended.

[28] In my view, the motion judge did not make any of the errors asserted by the appellants. His decision not to set aside the administrative dismissal was based on a careful consideration of the relevant circumstances. As he was

required to do, he weighed all the factors and made the order that was just in the circumstances: *Habib v. Mucaj*, 2012 ONCA 880, at para. 6.

[29] First, the motion judge was well aware of the fact that it was the conduct and inaction of her counsel, and not of Ms. Chrisjohn herself, that led to the administrative dismissal and the failure to move to set aside the dismissal promptly. He had before him the evidence in Ms. Chrisjohn's two affidavits that made it clear that, while she knew of the administrative dismissal in August 2007 when it occurred, she relied on her counsel's assurances that the action would nevertheless continue. She stated that it was always her intention to pursue her claim for compensation.

[30] The motion judge considered this evidence. After noting that, in August 2007, both Ms. Chrisjohn and her lawyer were aware of the administrative dismissal, he stated that R.N. assured Ms. Chrisjohn that everything was all right and even conducted mediation shortly thereafter. He also noted that, in order to get around the dismissal, A.M. pursued R.N.

[31] In *Finlay v. Van Paassen*, 2010 ONCA 204, 101 O.R. (3d) 390, Laskin J.A. noted, at para. 33, that on a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel. In *Marché*, at para. 28, Sharpe J.A. observed: "The law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to

proceed by reason of the inadvertence of his or her solicitor." Sharpe J.A. went on to recognize that the situation may be different where the lawyer's conduct is not inadvertent but deliberate.

[32] The fact that Ms. Chrisjohn always intended to pursue her claim is a factor that weighs in favour of setting aside the administrative dismissal. It is not however sufficient. The rights of the appellants as plaintiffs and the respondent as defendant to an action that has been dismissed must be considered to determine ultimately whether it would be fair and just to set aside the dismissal and to allow the action to proceed.

[33] Similarly, the absence of a guaranteed alternative recovery against her former counsel cannot be determinative. While the appellants point to the fact that R.N. is defending himself, suggesting that insurance will not be available to satisfy their claim should they succeed in the solicitor's negligence action against him, and that the solicitor's negligence action against A.M. is being defended, whether Ms. Chrisjohn will succeed or fail in either or both of the solicitors' negligence actions, or in recovering damages in either action, is far from certain. The motion judge specifically stated that he did not take into account whether the plaintiffs had another remedy against either R.N. or A.M. for negligence. In this regard, he followed this court's advice in *Finlay v. Van Paassen*, where Laskin J.A. cautioned against weighing as a factor in such motions the plaintiff's ability to sue her former counsel, at para. 32:

> A judge who refuses to set aside a dismissal order will naturally be concerned that the effect of the refusal will be to deprive an innocent party of its day in court. To protect the claim of the innocent party, the judge will often raise the possibility of a negligence action against the party's own lawyer. Although perhaps understandable, I do not find this helpful. Speculation about whether a party has a lawsuit against its own lawyer, or the potential success of that lawsuit, should not inform the court's analysis of whether the registrar's dismissal order ought to be set aside.

[34] The motion judge, accordingly, did not err in refusing to consider the appellants' chances in their solicitors' negligence actions. He did not fail to appreciate the very serious consequences to the appellants if the personal injury action were not restored. Rather, his decision turned on the important question of prejudice – whether the respondent, after such a significant delay and after being informed that the action was at an end, would fairly be able to defend the appellants' claims if the action were restored.

[35] I therefore turn to a consideration of the appellants' final argument, that the motion judge erred in his assessment of prejudice in this case.

[36] As this court noted in *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887, 104 O.R. (3d) 689, at para. 33, on a motion to set aside a dismissal for delay, the question of prejudice is invariably a key, if not *the* key consideration. The relevant prejudice is to the defendant's ability to defend the action that would arise from steps taken following dismissal or which would result from the restoration of the action: *MDM Plastics Ltd. v. Vincor International Inc.*,

2015 ONCA 28, 124 O.R. (3d) 420, at para. 25; see also *806480 Ontario Ltd. v. RNG Equipment Inc.*, 2014 ONCA 488, [2014] O.J. No. 2979, at para. 4.

[37] I would not interfere with the motion judge's assessment of prejudice in this case. He recognized that the appellants had the onus of rebutting the presumption of prejudice as a result of the passage of time; however, he relied not only on the presumption, but also on the extensive evidence put forward by the respondent of actual prejudice to its ability to defend the action.

[38] There is no question that the appellants' present counsel went to considerable lengths to attempt to address the question of prejudice. They made inquiries of various sources and confirmed that certain medical and other records had been preserved. They did not however produce such records, and as such, the respondent was unable to assess whether records said to have been available were complete. The motion judge noted that, as a result of the passage of time, there were important gaps in the available medical evidence. These include OHIP records for the first five months after the accident as well as pre-accident OHIP records for Ms. Chrisjohn, the original CT scans and x-rays taken after the collision, and records of certain treating professionals and prescription drug records for the first three years after the accident. No pre-accident medical records were produced or confirmed to be available. Many of the undertakings given in her discovery would have required Ms. Chrisjohn to obtain and produce medical records. None of the undertakings were answered. The respondent's

ability to assess and evaluate Ms. Chrisjohn's claim for damages has been impaired.

[39] As the motion judge noted, significant evidence respecting liability is also no longer available, in a case where liability would be a live issue. In her examination for discovery, Ms. Chrisjohn agreed that her vehicle had crossed over the centre line before impact, and there is little evidence indicating whether the other driver was impaired by alcohol. The investigating police officer suffered a stroke and has retired. Undertakings to produce 911 and Fire Department records, as well as to identify names and contact information for witnesses were not fulfilled. There was no evidence before the motion judge that any such evidence had been obtained or preserved.

[40] The onus was not on the respondent to demonstrate "significant and actual" prejudice, as asserted by the appellants (although there was evidence of such prejudice on the record), but on the appellants to rebut the inference of prejudice, that is, prejudice to the respondent's ability to defend the action. The motion judge correctly concluded that the onus was not met in the present case, and that actual prejudice relevant to the ability to defend the action on damages and liability had been established.

[41] This is not a case where a defendant complained of prejudice that it might have taken steps to avoid. Langdon's counsel acted responsibly, even

proactively – "defending" the action although Langdon had not been formally added as a defendant, communicating with R.N. and co-operating in scheduling the proposed motions respecting the dismissal, and even engaging in mediation on a without prejudice basis – until being informed that the appellants would not pursue their personal injury action. As the motion judge observed, based on the dismissal and A.M.'s communication, the respondent assumed legitimately that the case against it was over.

[42] I see no error in the motion judge's decision not to set aside the administrative dismissal. Further, I agree with the motion judge that in the circumstances of this case, the principle of finality was important.

F. DISPOSITION

[43] For these reasons, I would dismiss the appeal and award costs to the respondent in the sum of $12,500, inclusive of disbursements and HST.

"K. van Rensburg J.A."
"I agree E.E. Gillese"
"I agree B.W. Miller J.A."