COURT OF APPEAL FOR ONTARIO

CITATION: Rolley v. MacDonell, 2020 ONCA 642
DATE: 20201013
DOCKET: C66200

Juriansz, Hourigan and Thorburn JJ.A.

BETWEEN

Mark Rolley, Jocelyn Rolley, Emily Rolley, Benjamin Rolley, Joseph Rolley, Tommy Paupst and Angel Paupst

Plaintiffs

(Respondents/Appellants by way of cross-appeal)

and

Dorothy MacDonell and Belair Insurance Company Inc.

Defendants

(Appellant/Respondent by way of cross-appeal)

Alan L. Rachlin, for the appellant/respondent by way of cross-appeal

Joseph Y. Obagi and Elizabeth A. Quigley, for the respondents/appellants by way of cross-appeal

Heard: September 30, 2020 by videoconference

On appeal from the judgment of Justice Sylvia Corthorn of the Superior Court of Justice, dated November 1, 2018 with reasons reported at 2018 ONSC 6517, 87 C.C.L.I. (5th) 56.

REASONS FOR DECISION

[1] This appeal is from the judgment dated November 1, 2018 in the respondents' action against the appellant and Belair Insurance Company Inc. arising from a motor vehicle accident. The respondent Mark Rolley, a pedestrian, was struck by a motor vehicle driven by the appellant, Dorothy MacDonell. The trial judge, after discharging the jury mid-trial, awarded the respondents damages totaling $2,023,016 plus interest, costs and disbursements.

[2] The appellant argues the trial judge erred by striking the jury, refusing to grant a mistrial, erred in her treatment of Mr. Rolley's application for Canada Pension Plan disability benefits, and erred by refusing to admit surveillance videos of Mr. Rolley. In oral argument the appellant did not advance the allegation in the notice of appeal that the cumulative effect of these rulings demonstrated bias on the part of the trial judge. In oral argument the appellant submitted these errors amounted to a miscarriage of justice.

[3] We are not persuaded there is any basis to interfere with the trial judge's exercise of her discretion to discharge the jury.

[4] The trial judge gave two reasons for discharging the jury, each of which provided a sufficient basis for doing so. First, as a result of counsels' gross underestimation of the length of trial, there would be a 44-day break in the calling of evidence. Second, in mid-trial the respondents reasonably changed their claim for attendant care after the appellant's late disclosure of an umbrella policy that

substantially increased the limits of her insurance coverage. The trial judge had an ample basis to conclude the timing of the late disclosure and its resulting effect on the strategic decisions made by the respondents immediately following the disclosure of that information would result in potential prejudice to the respondents in the eyes of the jury.

[5] We agree with the trial judge that the appellant's motion at trial for a mistrial was an attempt to re-argue the respondents' motion to discharge the jury and continue the trial with judge alone. This ground of appeal necessarily fails.

[6] We see no error in the trial judge's treatment of Mr. Rolley's application documents for CPP disability benefits as evidence of his condition at the point he completed them. It was the trial judge's role to assess and weigh all the evidence including the CPP application. We reject the appellant's argument that, as a matter of law, the CPP application had to be understood as showing Mr. Rolley suffered from a prolonged and continuing condition. We note the trial judge reduced the respondents' damages by 25 percent to address the possibility Mr. Rolley, had the accident not taken place, would have been in the same position as he found himself after the accident.

[7] Finally, we agree that the trial judge should have admitted the surveillance videos tendered as evidence by the appellant. Whether the surveillance evidence would have made a difference to the outcome thereby causing a miscarriage of

justice is a case specific contextual assessment: *Nemchin v*. *Green*, 2019 ONCA 634, 147 O.R. (3d) 530, at paras. 72-73. It is determinative that after viewing the videos, the trial judge assessed them as having "minimal, if any, probative value." The admission of the surveillance evidence would not have made a difference to the outcome and did not cause a miscarriage of justice.

[8] The appeal is dismissed. The respondents have withdrawn the cross-appeal. The respondents' costs are fixed in the amount of $51,540.66 as agreed by counsel.

"R.G. Juriansz J.A."
"C.W. Hourigan J.A.'
"J.A. Thorburn J.A."