# COURT OF APPEAL FOR ONTARIO

CITATION: Rogerson v. Grey Bruce Regional Health Centre, 2024 ONCA 303
DATE: 20240424
DOCKET: COA-22-CV-0389

Harvison Young, Coroza and Gomery JJ.A.

BETWEEN

Tyson David Rogerson, an infant, by his litigation guardian
Candice Rogerson, Candice Rogerson and David William Shade

Plaintiffs (Appellants)

and

Grey Bruce Regional Health Centre,
Dr. Brendan James Mulroy, Dr. Nkiruka Nwebube*,
Brenda Scott, Jane Doe, Jane Smith, Lori Dorion,
Cassandra Camsell, Joshua Ranger, Dr. Elyse Savaria* and
Grey Bruce Health Unit

Defendants (Respondents*)

John J. Adair, Jordan V. Katz and Duncan Embury, for the appellants

Peter Kryworuk and Jacob Damstra, for the respondents

Heard: April 4, 2024

On appeal from the judgment of Justice John R. Sproat of the Superior Court of Justice, dated September 28, 2022.

## REASONS FOR DECISION

[1] Tyson Rogerson and his adoptive parents appeal the judgment dismissing their medical malpractice action against Dr. Elyse Savaria and Dr. Nkiruka Nwebube.

**Background**

[2] The trial judge reviewed the evidence at length, and we need not do so again here.

[3] Tyson suffered a catastrophic brain injury on December 18, 2007, when he was only 16 days old. He was assaulted by his biological mother, Cassandra Camsell. The parties agree that Tyson's damages exceed $13,000,000.

[4] Dr. Savaria was Ms. Camsell's family physician prior to Tyson's birth. She saw both Ms. Camsell and Tyson together three times prior to the assault, including the day before it happened. Dr. Nwebube was a paediatrician who also saw Tyson and Ms. Camsell on December 17, 2007. Dr. Savaria referred them to Dr. Nwebube because she was concerned that Tyson was not gaining weight fast enough. Dr. Nwebube suggested either that Tyson be readmitted to hospital so that his feeding and weight gain could be monitored, or that Ms. Camsell return with him in three days for further follow up. Ms. Camsell chose the latter.

[5] The appellants' central argument at trial and on this appeal is that Dr. Savaria and Dr. Nwebube should have reasonably suspected that Tyson was at risk of injury if he remained unsupervised in his mother's care, and that they breached their duty of care to him by failing to report this concern to the local Children's Aid Society (the "CAS") as then required under s. 72 of the

*Child and Family Services Act*, R.S.O. 1990, c. C.11. Ms. Camsell was only 19 years old when Tyson was born. She had a difficult childhood and adolescence, during which she had been diagnosed and treated for mental health issues. Dr. Savaria prescribed a low dose of a medication, Seroquel, to stabilize her mood during her pregnancy. Ms. Camsell was also referred to, and participated in, public health assessments and programs before and after Tyson's birth. Despite this history, reports by Dr. Savaria and various public health professionals flagging that Ms. Camsell would need support at home, and Tyson's suboptimal weight gain, neither of the respondents alerted the CAS that Tyson might be in danger. Had either of them done so, according to the appellants, the CAS would have intervened immediately and this intervention would have prevented the assault.

[6] The trial judge rejected most of the appellants' arguments regarding the standard of care and their causation arguments in their entirety. He found that Dr. Savaria conducted appropriate mental health assessments of Ms. Camsell and that she did not breach the standard of care by failing to contact the CAS prior to or after Tyson's birth. He held that Dr. Savaria should have provided Dr. Nwebube with a summary of Ms. Camsell's mental health history on December 17, 2007, but that this additional information would not have caused Dr. Nwebube to take any different steps than she did. The trial judge found that Dr. Nwebube took an adequate mental health history of Ms. Camsell and that she did not breach the standard of care in failing to make a s. 72 report on December 17, 2007. In any

event, even if either of the respondent physicians had made such a report, the trial judge found that the CAS would not have intervened in a way that would have prevented the assault.

**Analysis**

[7] The appellants contend that the trial judge made reversible errors by misapprehending and misapplying the criteria for a mandatory report under s. 72 of the *CFSA*; by making findings on causation ungrounded in the evidence; and by improperly failing to fully consider the appellants' expert evidence. We do not agree.

[8] This court cannot interfere with a trial judge's decision in the absence of an error of law or a palpable and overriding error of fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 27-28. An error "is palpable if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is overriding if it has affected the result": *Hydro-Quebec v. Matta*, 2020 SCC 37, [2020] 3 S.C.R. 595, at para. 33, *citing H.L. v. Canada (Attorney General),* 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 55-56 and 69-70; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33 (emphasis omitted).

[9] Based on the reasons for judgment, the trial judge did not misapprehend s. 72 by imposing too high a threshold for a duty to report or by failing to consider

what the respondent physicians should have reasonably suspected, as opposed to what they actually did or did not suspect.

[10] The respondents acknowledged at trial that if they had a duty to report under s. 72 and yet failed to do so, this would be a breach of their duty of care. At the beginning of his reasons, the trial judge accurately summarized the criteria for a mandatory s. 72 report in the circumstances of this case:

> Section 72 of the *CFSA* provides, in relevant part, that if a person has "reasonable grounds to suspect" that "there is a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child" or "resulting from that person's failure to adequately care for, provide for, supervise or protect the child" then that person has a duty to forthwith report the suspicion and the grounds for it to the CAS.

[11] The appellants contend that this summary was insufficient. They say that the trial judge should have referred to the goals of the child protection legislation that compel a broad interpretation of the duty to report, based on the reasoning in *Young v. Bella*, [2006] 1 S.C.R. 108, at paras. 48-49, and the low threshold for triggering that duty articulated in *B.K.2 v. Chatham-Kent Children's Services*, 2016 ONSC 1921, at para. 51. They criticize the trial judge's failure to refer again to the "risk" language in s. 72 in his analysis of the respondent physicians' alleged breaches shows that he applied the wrong standard.

[12] A judge is presumed to be aware of the law. In assessing whether correct legal principles were applied, a judge's reasons should be afforded a "functional

and contextual reading", taking into account the evidence and the issues at trial and the reasons as a whole: *R. v. GF*, 2021 SCC 20, [2021] 1 S.C.R. 801, at paras. 69, 74.

[13] The trial judge was aware of the low threshold for reporting. This threshold is inherent in the "reasonable grounds to suspect … a risk" standard he cited. The judgment moreover followed a 24-day trial during which both the scope of the reporting requirement in s. 72 and the potential for a risk of physical harm to Tyson were critical issues and the focus of much competing expert evidence and argument by the parties.

[14] The trial judge did not, as suggested by the appellants, disregard expert evidence when he concluded that Dr. Savaria had no obligation to make a s. 72 report. He expressed the view that he did not require expert evidence to determine whether a set of facts gave rise to a s. 72 duty but that the standard of care of a family physician required compliance with s. 72. He then noted that his finding that Dr. Savaria met the standard of care was supported by the evidence of the respondents' expert, Dr. Thomas Stanton, whose opinion he accepted. Although he did not explicitly reject the evidence of the appellants' expert, Dr. Geoffrey Morris, he observed that Dr. Morris' opinion was based on the inaccurate premise that Dr. Savaria did not assess Ms. Camsell's mental health.

[15] Nor did the trial judge apply the wrong standard or otherwise err in assessing Dr. Nwebube's conduct. His reasons show that he considered not only Dr. Nwebube's subjective belief but also the reasonability of that belief. He found that she did not have child protection concerns on December 17 and that she furthermore had no duty to make a CAS report. He mentioned factors indicating that there was no reasonable ground for suspicion that Tyson was at risk, including his steady weight gain since birth; Dr. Nwebube's observations of his parents' care and concern; and Ms. Camsell's inquiries about extra help at home to ensure that she could care for Tyson while managing other tasks. The trial judge concluded that there was nothing to indicate that Tyson was at possible risk in going home with Ms. Camsell and returning in three days.

[16] The appellants contend that the trial judge erred in concluding that, although Dr. Savaria breached the standard of care by failing to disclose Ms. Camsell's mental health history to Dr. Nwebube, this was of no consequence. Again, we disagree.

[17] As this court held in in *Sacks v. Ross*, 2017 ONCA 773, 417 D.L.R. (4th) 387, at para. 46, when determining what would have happened but for a defendant's omission:

> [T]he trier of fact is required to attend to the fact situation as it existed in reality the moment before the defendant's breach of the standard of care, and then to imagine that the defendant took the action the standard of care

> obliged her to take, in order to determine whether her doing so would have prevented or reduced the injury.

[18] This is effectively the analysis undertaken by the trial judge here.

[19] The trial judge considered what Dr. Nwebube would have done had she received additional mental history from Dr. Savaria. He found that, even if this had caused her to ask Ms. Camsell more questions, Dr. Nwebube would not have obtained any materially different information about any potential risk to Tyson than she already had on December 17, 2007. She would instead have obtained the same information as other professionals who had interacted with Ms. Camsell over the preceding two weeks, including: Ms. Lanktree, a social worker who assessed Tyson and Ms. Camsell on December 3; Nurse Fawcett, a public health nurse who conducted a home visit and spent further time with Ms. Camsell and Tyson at a neonatal program on December 6 and 13 respectively; and Dr. Savaria, who saw Ms. Camsell with Tyson on December 10, 13 and 17. These individuals each recognized that Ms. Camsell needed support at home but did not consider Tyson to be at any immediate risk. As a result, the trial judge concluded that, "even if Dr. Nwebube had obtained Ms. Camsell's full mental health history, and conducted a detailed mental health assessment of her, she would not have had child protection concerns" and would not have been obliged to make a s. 72 report.

[20] The trial judge's determination about what additional information Dr. Nwebube might have obtained on December 17, and what she would have

done with this information, are findings of fact based on the whole of the evidence at trial. They warrant deference in the absence of a palpable and overriding error.

[21] The appellants contend that their paediatric expert, Dr. Ronik Kanani, was the only subject-matter expert whose evidence directly addressed Dr. Nwebube's obligation to make a s. 72 report had she been in possession of Ms. Camsell's full mental health history. In cross-examination, however, Dr. Kanani acknowledged that Ms. Camsell's mental health history alone would not have been a sufficient basis to trigger a duty to report. He further conceded that there was no indication that Ms. Camsell's mental health had affected her ability to care for Tyson when Dr. Nwebube saw them on December 17.

[22] Finally, even if this court accepted the appellants' arguments on the issues already canvassed, the appeal would fail given the trial judge's findings about what would have happened had a s. 72 report been made. To succeed in their action, the appellants had to prove that, had either Dr. Savaria or Dr. Nwebube alerted CAS to Tyson's situation, the CAS would have either immediately removed Tyson from Ms. Camsell's care or required that she be subject to full-time supervision. The trial judge found that the appellants had not proved this. He explicitly rejected the evidence of the appellants' expert, Carolyn Buck, that the CAS would have intervened on an urgent basis. He found that her opinion was premised on an inaccurate and incomplete understanding of the facts. Based on the testimony of the respondents' expert, Rod Potgieter, and evidence about Ms. Camsell's

circumstances on December 17, 2007, the trial judge concluded that "any CAS involvement would have been minimal and not enough to prevent the injury to Tyson".

[23] The appellants take issue with the trial judge's stated reasons for rejecting Ms. Buck's evidence, arguing that he misrepresented or misunderstood some of her testimony. An appellate court will defer to a trial judge's interpretation of the evidence as a whole and to their assessment of expert evidence: *Calin v. Calin*, 2021 ONCA 558, at para. 35; *Hacopian-Armen Estate v. Mahmoud*, 2021 ONCA 545, at paras. 66-72; *Homes of Distinction (2002) Inc. v. Adili,* 2022 ONCA 64, 16 C.L.R. (5th) 1, at para. 9. Having reviewed Ms. Buck's evidence, we are not persuaded that the trial judge made any palpable and overriding error in rejecting it.

[24] The appeal is accordingly dismissed, with all-inclusive costs of $60,000 to the respondents, as agreed by the parties.

"A. Harvison Young J.A."
"S. Coroza J.A."
"S. Gomery J.A."