

**DATE: 20040301**  
**DOCKET: C39871**

**COURT OF APPEAL FOR ONTARIO**

**RE:                   HELEN-MARIE MADER (Appellant) – and – WARREN W.  
HUNTER and MOTORS INSURANCE CORPORATION  
(Respondents)**

**BEFORE:           BORINS, FELDMAN and GILLESE JJ.A.**

**COUNSEL:       David G. Lavkulik and Jennifer Hetherington  
for the appellant**

**Susannah M. Travers  
for the respondent, Warren W. Hunter**

**J. Claude Blouin and George Kanellakos  
for the respondent, Motors Insurance Corporation**

**HEARD:           February 25, 2004**

**On appeal from the order of Justice Bonnie J. Wein of the Superior Court of Justice  
dated January 31, 2003.**

**ENDORSEMENT**

**Released Orally:   February 25, 2004**

[1]     This is an appeal by Helen-Marie Mader from the order of Wein J. giving effect to an order by Mossip J. dismissing her claim against the respondents Hunter and Motors Insurance Corporation. This claim arises from a motor vehicle accident in which Hunter collided with the rear of the appellant's vehicle. Motors Insurance Corporation is the appellant's insurer and is joined in this action in respect to a claim for statutory accident benefits.

[2]     When the claim was issued the appellant was represented by counsel. Subsequently, however, she represented herself on several interlocutory motions and when she was examined for discovery. Ultimately, the motion judge dismissed this action on the ground that the appellant had not fulfilled the undertakings which she had

given on her examination for discovery. The majority of the undertakings related to evidence concerning her medical condition. Because of the appellant's failure to make reasonable efforts to fulfill the undertakings and given "the long history" of the case, the motion judge dismissed the appellant's motion to set aside an earlier order of Mossip J. dismissing the appellant's claim. The respondents provided no evidence before the motion judge that they would be prejudiced were the appellant to be permitted to proceed to trial.

[3] In our view, in the exercise of her discretion the motion judge failed to balance the interests of the appellant in respect to the prejudice that she would sustain if the action were dismissed against any prejudice to the defendants were the action to be permitted to go to trial.

[4] The court is always reluctant to dismiss a potentially meritorious claim on grounds that do not address its merits. Unless the defendant can demonstrate prejudice in the sense that to grant the plaintiff the indulgence he or she seeks will prejudice the defendant's ability to defend the claim, the indulgence will usually be granted on appropriate terms. Applying what this court said in *Byers (Litigation Guardian of) v. Pentex Print Masters Industries Inc.* (2003), 62 O.R. (3d) 647, in our view, the justice of the case requires that the order of the motion judge be set aside and that an order be substituted setting aside the order of Mossip J. dismissing the appellant's claim. In the circumstances of this case, denying the appellant a further adjournment in the absence of any prejudice to the respondents and in the absence of a consideration of the potential merits of the plaintiff's claim, in our view, was contrary to the interests of justice.

[5] With respect to the plaintiff's motion for the admission of fresh evidence, in our view most of the proposed fresh evidence was available, or with reasonable diligence could have been available, before the motion judge. Therefore, on that basis we decline to admit the evidence. However, we have taken into account the proposed evidence that since the dismissal of her claim, appellant's counsel, as the respondents concede, has fulfilled the majority of the undertakings.

[6] Therefore, the appeal is allowed and the order of the motion judge is set aside. There will be an order substituted setting aside the order of Mossip J. dismissing the appellant's claim.

[7] We award no costs of the motion to introduce fresh evidence, and award costs of the appeal to the appellant on a partial indemnity basis fixed at \$7,500 and GST.

"S. Borins J.A."

"K. Feldman J.A."

"E. E. Gillese J.A."