2016 ABQB 565, 2016 CarswellAlta 1945, [2016] A.W.L.D. 4879, 272 A.C.W.S. (3d) 18

2016 ABQB 565
Alberta Court of Queen's Bench

Jarrett v. Flannery

2016 CarswellAlta 1945, 2016 ABQB 565, [2016] A.W.L.D. 4879, 272 A.C.W.S. (3d) 18

Samuel Randy Jarrett and Sara Jarrett (Plaintiffs) and Dr. John Flannery, Dr. Frankie Fraulin, Calgary Regional Health Authority, Owner and Operator of the Rockyview General Hospital and the Foothills Hospital, the Rockyview General Hospital and the Foothills Hospital (Defendants)

C. Scott Brooker J.

Judgment: October 7, 2016
Docket: Calgary 9901-04291

Counsel: John E. Davidson, Q.C., for Plaintiffs
Alison Gray, for Defendant
Roxanne Davis, for Third Party

Subject: Civil Practice and Procedure; Evidence; Public; Torts

Related Abridgment Classifications

Health law
V Malpractice
V.2 Negligence
V.2.c Standard of care

Headnote

Health law --- Malpractice — Negligence — Standard of care — Appeals

Plaintiff was rendered quadriplegic in motor vehicle accident, and underwent surgery with defendant doctor for ulcers — During hospitalization and recovery at home, defendant nurses dressed plaintiff's ulcers — Plaintiff developed infection of bone in right leg, which was diagnosed as osteomyelitis infection and required amputation, during which surgeon found packing material in ulcer on plaintiff's leg — Plaintiff commenced negligence action against defendant doctor and health authority owner of hospital and employer of nurses — At defendants' motion for summary judgment, they adduced expert evidence on standard of care and causation, and plaintiff adduced none — Master granted defendants' motion and summarily dismissed plaintiffs' claim — Plaintiffs brought appeal from master's decision — Defendants brought cross-application to dismiss appeal as out of time — Cross-application granted; appeal dismissed — R. 6.14 of Alberta Rules of Court required appeal to be filed and served within 10 days of date order or judgment was entered and served — Order was served on plaintiffs by email sent to address provided for service, with confirmation received by sending agent — Appeal was effected by email 24 days after service of order, thus outside 10-day period — There was no application for extension of time, presumably because plaintiffs could not satisfy test — Appeal was out of time and had to be dismissed.

Table of Authorities

Cases considered by *C. Scott Brooker J.*:

Bahcheli v. Yorkton Securities Inc. (2012), 2012 ABCA 166, 2012 CarswellAlta 940, 21 C.P.C. (7th) 371, 524 A.R. 382, 545 W.A.C. 382, 65 Alta. L.R. (5th) 127, 43 Admin. L.R. (5th) 74 (Alta. C.A.) — referred to

Cairns v. Cairns (1931), [1931] 3 W.W.R. 335, 26 Alta. L.R. 69, [1931] 4 D.L.R. 819, 1931 CarswellAlta 52 (Alta. C.A.) — followed

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Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — considered

P. Burns Resources Ltd. v. Locke, Stock & Barrel Co. (2013), 2013 ABQB 129, 2013 CarswellAlta 379 (Alta. Q.B.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 6.14 — considered

R. 6.14(3) — considered

R. 6.14(5)(b) — considered

R. 11.21(1) — considered

APPEAL by plaintiffs from master's decision summarily dismissing action; CROSS-APPLICATION by defendants to dismiss appeal as out of time.

***C. Scott Brooker J.*:**

Introduction

1 This is an appeal by the Plaintiffs from a decision of Master J.L. Mason granting summary judgment to the Defendants and thereby dismissing the Plaintiffs' action against the Defendants. There is also a cross-application by the Defendants to strike the Plaintiffs' appeal as being out of time.

Facts

2 As a result of a motor vehicle accident in 1996 Mr. Jarrett was rendered a quadriplegic. Dr. Flannery, a specialist in physical medicine and rehabilitation, treated Mr. Jarrett following the accident and up until April 1998.

3 In early 1997 Mr. Jarrett developed bilateral trochanteric pressure ulcers as a result of which he underwent a variety of procedures and surgeries. These included surgery on his right hip on January 22, 1998 and surgery on his left hip on March 10, 1998. These surgeries were done by Dr. Fraulin.

4 Throughout his hospitalization and recovery at home, Mr. Jarrett's ulcers were dressed with packing material by hospital nurses, home care nurses and even, on occasion by Mr. Jarrett's wife.

5 Unfortunately, Mr. Jarrett ended up developing an infection in the bone of his right leg - diagnosed as an osteomyelitis infection of the bone. This resulted in the necessity of a right femoral amputation on August 7, 1998 performed by a Dr. De Souza. During the course of that amputation, Dr. De Souza discovered packing material in an ulcer on that leg.

6 In March 1999 Mr. and Mrs. Jarrett commenced an action for negligence against Dr. Flannery, Dr. Fraulin and the predecessor of the Calgary Regional Health Authority ("CRHA") owner of the defendant hospitals and employer of the nurses both in the hospitals and home care delivery.

7 At the application before the Master, counsel for the Plaintiffs conceded that there was no claim against Dr. Flannery and accordingly the claim against Dr. Flannery was dismissed. That dismissal is not the subject of this appeal.

8 Prior to the hearing before the Master, counsel for Dr. Fraulin filed an expert report by Dr. Edward Tredget, a plastic surgeon. In that report, Dr. Tredget opines that Dr. Fraulin's treatment of Mr. Jarrett met the standard of care. He thought it very unlikely that the packing was left in the wound during Dr. Fraulin's surgeries. Rather, he opined that

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it was likely that the packing material was left in the wound during a dressing change in the days or weeks prior to Mr. Jarrett being admitted to hospital for sepsis on July 12, 1998.

9 The CRHA filed an expert report by Virginia Salter, a registered nurse. In that report Nurse Salter provided her expert opinion on the standard of care of nurses at the relevant time and opined that the nursing care received by Mr. Jarrett met the standard of care.

10 The CRHA also filed the expert report of Dr. Grant Silver, an expert in infectious diseases. He opined that the osteomyelitis in Mr. Jarrett predated the January 22, 1998 surgery and that Mr. Jarrett's osteomyelitis was not *caused* by the packing material found in the wound.

11 The Plaintiffs did not provide any expert evidence before the Master setting out what the appropriate standard of care was for the doctor or nurses, that the standard of care had been breached or opining that the osteomyelitis and resulting amputation was caused by any breach of duty or standard of care on the part of any of the Defendants.

12 On October 22, 2014 Master Mason, in a well-reasoned and comprehensive judgment, dismissed the Plaintiffs action.

13 On November 19, 2014 Ms. Gray, counsel for the defendant doctors, provided Mr. Davison, counsel for the Plaintiffs, with a draft order of Master Mason's decision for his approval. Mr. Davison advised Ms. Gray that he would be unable to respond until the week of December 1, 2014. It would appear that he did not respond that week and on December 9th counsel for the doctors sent the draft order to Master Mason for endorsement. Master Mason did so and the order ("Summary Judgment Order") was filed on January 21, 2015.

14 On January 22, 2015 Ms. Gray emailed a copy of the Summary Judgment Order to Mr. Davison as well as his assistant, Ms. Kunkel at their proper email addresses. Ms. Gray did not, however, get a delivery receipt with respect to those emails.

15 On February 12, 2015 Ms. Gray sent another email to Mr. Davison advising, *inter alia*, that she had served him with a copy of the Summary Dismissal Order on January 22, 2015 and providing another copy of that order. She also pointed out to Mr. Davison that the appeal period had expired in relation to that order. A delivery receipt was received confirming delivery was received dated February 12th at 4:01pm.

16 On March 9, 2015 the Plaintiffs filed and served an appeal of the Summary Judgment Order. Service of the appeal was done by email.

17 On August 25, 2015 the Defendants filed an application for an order dismissing the Plaintiffs' appeal as being out of time.

18 On October 16, 2015 the Plaintiffs filed an affidavit of Samuel Randy Jarrett to which he attached *inter alia* an opinion letter of Dr. John A. Gordon, orthopaedic surgeon.

19 The summary judgment application was heard on October 7, 2014 and judgment given on October 22, 2014.

Issues

20 There are two issues to be decided:

1. Is the appeal out of time?

2. Should the appeal be allowed?

Analysis

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1. Is the appeal out of time?

21 Rule 6.14 of the *Rules of Court* provides that an appeal from a Master's order must be filed and served within 10 days after the order or judgment is entered and served.

22 Rule 11.21(1) of the *Rules of Court* provides:

> A document, other than a commencement document, may be served by electronic method on a person who has specifically provided an address to which information or data in respect of an action may be transmitted, if the document is sent to the person at the specified address, and
>
> (a) the electronic agent receiving the document at that address receives the document in a form that is usable for subsequent reference, and
>
> (b) the sending electronic agent obtains or receives a confirmation that the transmission to the address of the person to be served was successfully completed.

23 In this case, service of the Summary Judgment Order was affected pursuant to Rule 11.21(1) on Mr. Davison on February 12, 2015. The Order was sent to an email address provided by Mr. Davison for the purpose of service in this action; the Order was sent and received in a form usable for subsequent reference; and the sending agent (ie. Ms. Gray's computer and email system) obtained confirmation that the transmission was successfully completed (ie. the delivery receipt. (Adopting defence counsels' argument at para 30 of their brief).

24 Service of the notice of appeal was effected (also by email) on March 9, 2015 some 24 days after service of the Order appealed and thus outside the 10 days mandated by Rule 6.14.

25 There is no application before me to extend the time for service, presumably because the Plaintiffs cannot satisfy the test for granting an extension set out in *Cairns v. Cairns*, [1931] A.J. No. 76 (Alta. C.A.).

26 I conclude, therefore, that this appeal is brought out of time and must be dismissed. Despite this finding, however, I think it useful to consider and determine the appeal on its merits and thus will do so.

2. Should the appeal be allowed?

27 Rule 6.14(3) of the *Rules of Court* provides:

> (3) an appeal from a master's judgment or order is an appeal on the record of proceedings before the master and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.

28 The standard of review to be applied to an appeal of a master's decision is correctness: *Bahcheli v. Yorkton Securities Inc.*, 2012 ABCA 166 (Alta. C.A.) at para 30.

29 The appeal of the master's decision is essentially a *de novo* hearing: *P. Burns Resources Ltd. v. Locke, Stock & Barrel Co.*, 2013 ABQB 129 (Alta. Q.B.).

30 Here, in addition to the evidence that was before the Master, there is the additional evidence found in the affidavit of Mr. Jarrett, filed on October 16, 2015. Counsel for Defendants object to the court considering this late filed evidence for a number of reasons. First, it was filed and served long after the one month after service of the notice of appeal time limit mandated by Rule 6.14(5)(b). Second, it was not filed and served by the third Friday before the week in which the special hearing date falls, as required by QB Civil Practice Note 2. Third, that part of Mr. Jarrett's affidavit which attaches Dr. Gordon's expert opinion as well as Dr. De Souza's Operative Report and notes contravenes the Court Order of Justice Mahoney of April 18, 2013 which stated that the Plaintiffs were to provide the Defendants with their expert

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reports no later than August 1, 2013. It also contravenes the Order of Justice Horner dated July 31, 2013 which extended that deadline to October 1, 2013 solely in respect of the expert report of a plastic surgeon.

31 In my opinion, all of these objections are valid.

32 In addition, the attempt to introduce expert evidence by attaching it as an appendix to Mr. Jarrett's affidavit cannot be permitted. Such evidence is clearly hearsay and is therefore inadmissible on that basis as well.

33 However, even if I were to ignore all of these objections and hearsay and consider the material of Dr. De Souza and Dr. Gordon, it does not provide any qualified expert opinion evidence as to the standard of care of the nurses or Dr. Fraulin nor that any of them had breached the applicable standard of care. Nor does it provide any qualified evidence that the conduct of these Defendants was a significant cause of Mr. Jarrett's infection and subsequent amputation.

34 Accordingly, there is no new admissible evidence to consider on this appeal. I am left with the same evidence as was before the Master.

35 Master Mason, as I have already noted, gave detailed reasons and analysis for her decision. I agree with her analysis and conclusions and I adopt them.

36 Further, her reasons and analysis are consistent with the decision of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para 5 that "...summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims".

37 In the final analysis, the Plaintiffs have no expert evidence that any of the Defendants failed to meet the applicable standard of care. Moreover, there is no evidence that the packing material found in the leg at the time of the amputation was a cause of Mr. Jarrett's osteomyelitis or the amputation There is no issue here which requires a trial. The Plaintiff's' claim has no real chance of success. This is an appropriate case for summary judgment in favour of the Defendants.

Conclusion

38 The cross-application by the Defendants is allowed. The Plaintiffs' appeal is dismissed with costs. The Plaintiffs' action against all Defendants is dismissed.

Cross-application granted; appeal dismissed.

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