2010 CarswellOnt 3975, 2010 ONCA 437, 100 O.R. (3d) 641, 263 O.A.C. 130, 321 D.L.R. (4th) 550, [2010] I.L.R. I-5018

Everding v. Skrijel

Antonia (Tami) Everding (Plaintiff / Appellant) and Ljutvo Skrijel (Defendant / Respondent)

Ontario Court of Appeal

Gloria Epstein J.A., K. Feldman J.A., and Robert P. Armstrong J.A.

Heard: November 20, 2009
Judgment: June 15, 2010
Docket: CA C50538

Proceedings: reversing *Everding v. Skrijel* (2009), 97 O.R. (3d) 155, 2009 CarswellOnt 3137 (Ont. S.C.J.); additional reasons at *Everding v. Skrijel* (2009), 2009 CarswellOnt 6042 (Ont. S.C.J.); and reversing *Everding v. Skrijel* (2009), 2009 CarswellOnt 6042 (Ont. S.C.J.)

Counsel: J. Sebastian Winny for Appellant

Wayne F. McCormick for Respondent

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Torts; Public

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Actions on insurance policies — When time begins to run

Plaintiff was involved in motor vehicle accident with defendant in May 2000, experiencing immediate pain — Plaintiff underwent various therapies in subsequent years, and experienced significant improvement of symptoms, but pain continued — Plaintiff's family doctor advised her by May 2004 that she suffered from chronic pain condition that could continue for indeterminate time — MRI of cervical spine in March 2006 revealed disc bulge at two locations — MRI provided objective proof of permanent injury, potentially sufficient to base claim that would meet statutory threshold and for which award would likely exceed $15,000 statutory deductible from non-pecuniary damages mandated in s. 267.5(7) ¶ 3 ¶ i of Insurance Act — Plaintiff commenced action in August 2007 — Plaintiff's claim was dismissed on summary judgment — Motion judge held action was statute-barred as of May 2006 as plaintiff knew or ought to have known by May 2004, when she was diagnosed with chronic pain, that she had claim that met requirements of s. 267.5(5)(b) of Act — Plaintiff appealed — Appeal allowed — In arriving at his conclusion regarding when plaintiff ought to have been aware that she had claim that potentially met statutory criteria, motion judge did not include $15,000 statutory deductible as one of those criteria — This omission constituted error — Motion judge also erred regarding onus requirements on summary

judgment motion — These errors led motion judge to conclude that discoverability of claim by plaintiff that met requirements of Act was not genuine issue for trial — That conclusion was not warranted on record.

Civil practice and procedure --- Summary judgment — Miscellaneous

Plaintiff was involved in motor vehicle accident with defendant in May 2000, after which she had continuing pain — Plaintiff commenced action in August 2007 — Plaintiff's claim was dismissed on summary judgment — Motion judge held action was statute-barred as of May 2006 as plaintiff knew or ought to have known by May 2004, when she was diagnosed with chronic pain, that she had claim that met requirements of s. 267.5(5)(b) of Insurance Act — Motion judge held plaintiff failed to "lead trump" in evidence on motion as her lawyer's affidavit did not disclose diagnosis of chronic pain, but relied on March 2006 MRI as determinative factor in discoverability analysis — Plaintiff appealed — Appeal allowed — In deciding when plaintiff ought to have been aware she had claim that potentially met statutory criteria, motion judge erred in not including $15,000 statutory deductible from non-pecuniary damages mandated in s. 267.5(7) ¶3 ¶ i of Act as one of criteria — Motion judge's criticism of plaintiff's solicitor for failing to mention chronic pain diagnosis was unwarranted and misconceived onus requirements on summary judgment motion — There was no attempt to hide evidence or mislead court — Full picture of history of diagnosis and treatment was disclosed in record — Affidavit was filed for purpose of putting best foot forward by explaining why court should find action was commenced within limitation period or that there was at least genuine issue as to when limitation period began — Conclusion that discoverability of claim by plaintiff that met requirements of Act was not genuine issue for trial was not warranted on record.

Civil practice and procedure --- Costs — Miscellaneous

Plaintiff brought action for damages for injuries suffered in motor vehicle accident — Plaintiff's claim was dismissed on summary judgment, and costs were awarded to defendant — Plaintiff appealed — Appeal allowed — Order granting summary judgment dismissing action was set aside, with costs of appeal fixed at $8,000 inclusive of disbursements, plus GST — As order granting summary judgment was set aside, plaintiff was also entitled to her costs below on partial indemnity scale.

Cases considered by *K. Feldman J.A.*:

Peixeiro v. Haberman (1997), 30 M.V.R. (3d) 41, 151 D.L.R. (4th) 429, 103 O.A.C. 161, 217 N.R. 371, 1997 CarswellOnt 2928, 1997 CarswellOnt 2929, [1997] 3 S.C.R. 549, 46 C.C.L.I. (2d) 147, 12 C.P.C. (4th) 255 (S.C.C.) — considered

Voisin v. Hartin (2000), 2000 CarswellOnt 5052, [2000] O.T.C. 931 (Ont. S.C.J.) — considered

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

s. 267.5(5) [en. 1996, c. 21, s. 29] — considered

s. 267.5(5)(b) [en. 1996, c. 21, s. 29] — considered

s. 267.5(7) [en. 1996, c. 21, s. 29] — considered

s. 267.5(7) ¶ 3 ¶ i [en. 1996, c. 21, s. 29] — considered

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

s. 4 — referred to

s. 5(1) — considered

s. 5(1)(a)(iv) — considered

s. 5(2) — considered

s. 24(1) "former limitation period" — referred to

s. 24(5) ¶ 1 — referred to

APPEAL by plaintiff from judgment reported at *Everding v. Skrijel* (2009), 97 O.R. (3d) 155, 2009 CarswellOnt 3137 (Ont. S.C.J.), dismissing plaintiff's claim, and from judgment reported at *Everding v. Skrijel* (2009), 2009 CarswellOnt 6042 (Ont. S.C.J.), concerning costs.

***K. Feldman J.A.*:**

1 The appellant's claim for damages for injuries suffered in a motor vehicle accident was dismissed on summary judgment on the basis that the action was commenced outside the limitation period. The issues on appeal are whether the motion judge erred by failing to consider the $15,000 statutory deductible from general damages as a factor in the discoverability of the claim, and whether he erred in the application of the onus of proof on the summary judgment motion.

Facts

2 The appellant was the front seat passenger in a car that was in a low-speed collision on May 24, 2000. She experienced immediate pain from the base of her skull to her left shoulder-blade, which continued up to the time of the motion. She consulted her family doctor and over the years following the accident underwent various therapies including physiotherapy, massage therapy, chiropractic treatment, painkillers and antidepressants. She experienced significant improvement of her symptoms to 80% of normal within the first year and a half. She also obtained employment in a very responsible career where she has advanced over the years since the accident.

3 In May 2001, she consulted a lawyer who advised her that with soft-tissue injury, she had no case unless there was some visible or objective injury.

4 Despite her progress, the appellant's pain continued throughout the period and in September 2005, an MRI scan of the cervical spine was suggested and booked for March 2006. That scan revealed a disc bulge at two locations. Although the appellant's family doctor had advised her by May 2004 that she suffered from a chronic pain condition that could continue for an indeterminate time, the MRI result provided objective proof of permanent injury, potentially sufficient to base a claim that would meet the statutory "threshold" and for which an award would likely exceed the $15,000 statutory deductible.

5 The appellant consulted her current lawyers and commenced this action on August 1, 2007, against the respondent, the driver of the other car involved in the collision.

6 The respondent moved for summary judgment on the basis that the action was statute barred as of May 2006, because the appellant knew or ought to have known by May 2004, when she was diagnosed with chronic pain, that she had a claim that met the requirements of s. 267.5(5)(b) of the *Insurance Act*, R.S.O. 1990, c. I.8: permanent serious impairment of an important physical, mental or psychological function.

7 The motion judge agreed with the respondent. In so doing, he did not address the issue of the $15,000 deductible. He also concluded that the appellant had failed to "lead trump" in her evidence on the motion because her lawyer's affidavit on the motion did not disclose the family doctor's diagnosis of chronic pain in May 2004, but relied on the later MRI as the determinative factor in the discoverability analysis..

Issues

(1) Did the motion judge err by failing to treat the $15,000 statutory deductible from non-pecuniary damages as a factor in the discoverability of a claim?

(2) Did the motion judge err in his application of the onus of proof on a motion for summary judgment?

Issue 1: Is the ability to achieve an award that exceeds the $15,000 statutory deductible a factor in the discoverability of a claim for damages arising from an automobile accident under s. 267.5(5) of the Insurance Act?

8 Subsections 267.5(5) and (7) of the *Insurance Act* provide:

(5) Despite any other Act and subject to subsection (6), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61 (2) (e) of the *Family Law Act*, from bodily injury or death arising directly or indirectly from the use or operation of the automobile, unless as a result of the use or operation of the automobile the injured person has died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important physical, mental or psychological function. 1996, c. 21, s. 29.

(7) Subject to subsections (5), (12), (13) and (15), in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the court shall determine the amount of damages for non-pecuniary loss to be awarded against a protected defendant in accordance with the following rules:

1. The court shall first determine the amount of damages for non-pecuniary loss for which the protected defendant would be liable without regard to this Part.

2. The determination under paragraph 1 shall be made in the same manner as a determination of the amount of damages for non-pecuniary loss in an action to which this section does not apply and, in

particular, without regard to,

i. the statutory accident benefits provided for under subsection 268 (1),

ii. the provisions of this section that protect protected defendants from liability for damages for pecuniary loss, and

iii. the provisions of paragraph 3.

3. Subject to subsections (8) and (8.1), the amount of damages for non-pecuniary loss to be awarded against the protected defendant shall be determined by reducing the amount determined under paragraph 1 by,

i. in the case of damages for non-pecuniary loss other than damages for non-pecuniary loss under clause 61 (2) (e) of the *Family Law Act*, the greater of,

A. $15,000, and

B. the amount prescribed by the regulations, and

ii. in the case of damages for non-pecuniary loss under clause 61 (2) (e) of the *Family Law Act*, the greater of,

A. $7,500, and

B. the amount prescribed by the regulations.

4. If fault or negligence on the part of the person entitled to damages for non-pecuniary loss contributed to those damages, the award for damages shall be reduced under paragraph 3 before the damages are apportioned under section 3 of the *Negligence Act*. 1996, c. 21, s. 29; 2002, c. 22, s. 120 (3).

9 The respondent submits that because the "threshold" for an action is described in s. 267.5(5), the $15,000 deductible from any non-pecuniary damage award that is mandated in subsection (7)3.i should not be considered a condition precedent to the discoverability of a claim that is potentially significant enough to meet the statutory requirements of the Act. I reject this submission.

10 This issue was fully considered and addressed by Gillese J., when she was a judge of the Superior Court, in the case of *Voisin v. Hartin*, [2000] O.T.C. 931 (Ont. S.C.J.). She explained at para. 32:

> The rationale underlying the discoverability principle is that the law ought not to preclude an action before a person is able to sue on it. In my view, this rationale requires me to take into account the effect of the $10,000 [now $15,000] requirement. It would be fundamentally unfair to require the plaintiff to bring an action in which he could not expect to recover anything because his claim could not surpass the $10,000 exemption.

11 I agree with this analysis. Clearly it is not the policy of the law or the intent of the limitations provisions

to require people to commence actions before they know that they have a substantial chance to succeed in recovering a judgment for damages. These provisions of the *Insurance Act* were enacted as part of a scheme that provides compensation with no-fault benefits for injuries that are not considered to be serious or permanent, but allows actions to proceed where the injuries are sufficiently significant that a substantial monetary award is likely to be recovered. Consequently, the test for the discoverability of the existence of such a claim for limitation purposes must be in accordance with this same policy.

12 *Voisin* was decided in 2000, applying the discoverability principle from the Supreme Court of Canada decision in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), before that principle was codified and defined in the *Limitations Act 2002* S.O. 2002, c. 24, Sch. B. The *Peixiero* analysis applies to determine whether the plaintiff discovered her claim before January 1, 2004. On the basis that she did not, then applying transition s. 24(5) 1. of the *Limitations Act 2002*, the Act applies to the circumstances of this case. Section 4 provides the basic limitation period of two years from the day the claim was discovered for all claims (unless otherwise provided in the Act). Section 5 of the Act defines discoverability for the purposes of the Act as follows:

> 5.(1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

13 The requirement of ss. 5(1)(a)(iv), the propriety of a proceeding as a means to obtain a remedy, enhances the cogency of the discoverability analysis in *Voisin* when applied under the new *Limitations Act, 2002*.

14 In this case, in arriving at his conclusion regarding when the appellant ought to have been aware that she had a claim that potentially met the statutory criteria, the motion judge did not include the $15,000 deductible as one of those criteria. In my view, this omission constituted an error.

Issue 2: Did the motion judge err in his application of the onus on a motion for summary judgment?

15 The appellant was examined for discovery prior to the motion being brought. The respondent relied heavily on the appellant's evidence on discovery as the basis for his motion including the fact that the appellant had been advised by her family doctor of the chronic pain diagnosis before May 2004. The appellant filed her own affidavit as well as the affidavit of her solicitor in response, which latter affidavit clearly explained the the-

ory of the appellant regarding discoverability, which was that until the MRI scan in March 2006, the appellant had no objective evidence that she indeed had suffered a "permanent serious impairment of an important physical, mental or psychological function." He explained further that the $15,000 deductible must be considered in a jury case, as juries often award less than $15,000 for soft tissue/whiplash cases. Finally, a plaintiff must consider whether the statutory deduction could have the effect of reducing the claim to the jurisdiction of the Simplified Procedure or the Small Claims Court.

16 The motion judge criticised the solicitor for failing to mention in his affidavit the earlier diagnosis of chronic pain by the appellant's family doctor, and concluded that this omission constituted a failure by the appellant to "lead trump" or to "put her best foot forward".

17 In my view, this criticism of the solicitor was unwarranted and misconceives the onus requirements on a summary judgment motion. There was no attempt to hide evidence or to mislead the court. The full picture of the history of the diagnosis and treatment of the appellant's injuries, including the diagnosis of chronic pain, was disclosed in the record. The solicitor's affidavit was filed for the express purpose of putting the appellant's best foot forward by explaining why the court should conclude that the action was commenced within the limitation period or that there was at least a genuine issue for trial as to when the limitation period commenced on the facts of the case.

18 The solicitor was responding to the position that the chronic pain diagnosis in May 2004 constituted the commencement point of the limitation period. His response was that the appellant did not discover that her condition was significant enough in seriousness, permanence and in quantifiable damage ($15,000 minimum), until she learned the results of the MRI scan over two years later.

Conclusion

19 These two errors by the motion judge led him to the conclusion that the discoverability of a claim by the appellant that met the requirements of the *Insurance Act* was not a genuine issue for trial. That conclusion was not warranted on the record.

20 I would allow the appeal and set aside the order granting summary judgment dismissing the action, with costs of the appeal fixed at $8000 inclusive of disbursements, plus GST. As the order granting summary judgment is set aside, the appellant is also entitled to her costs below on the partial indemnity scale. If the parties cannot agree, then the amount of those costs shall be fixed by the motion judge.

***Robert P. Armstrong J.A.*:**

I agree.

***Gloria Epstein J.A.*:**

I agree.

Appeal allowed.

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