

CITATION: Rizzi v. Mavros, 2007 ONCA 350
DATE: 20070508
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COURT OF APPEAL FOR ONTARIO

GILLESE J.A. (In Chambers)

BETWEEN:

DEBBIE RIZZI and DELIO RIZZI

Plaintiffs(Appellant/
Responding Party)

and

GEORGE MAVROS and THOMAS PARTALAS

Defendants(Respondents/
Moving Parties)

Douglas A. Wallace for the respondents/moving parties.

Karl Arvai for the appellant/responding party.

Heard: May 2, 2007

On a motion for an extension of time to file a notice of cross-appeal from the judgment of Justice T. David Little of the Superior Court of Justice, dated December 2, 2005.

ENDORSEMENT

[1] The respondents seek an order granting an extension of time to file a Notice of Cross-Appeal.

Background

[2] On April 2, 1995, Debbie Rizzi injured her right leg when she attempted to move some metal sheets that were stored in the laundry/storage room of the apartment building in which she lived. The apartment building is owned by the respondents.

[3] Ms. Rizzi later developed fibromyalgia. In an action brought against the respondents (the moving parties on this motion), Ms. Rizzi claimed damages for the injury to her leg and for fibromyalgia.

[4] Causation in respect of the fibromyalgia was a central issue at trial. The parties offered competing theories. Ms. Rizzi's theory was that the leg injury caused or materially contributed to the development of fibromyalgia and that she was entitled to full compensation for that condition. The respondents argued that Ms. Rizzi's pain complaints were caused by a pre-existing condition which started in her right wrist and, over a period of months just prior to the incident on April 2, 1995, increased in severity and extended up her arm and into her shoulder. It was this pain, the respondents contended, that continued to spread and led to the diffuse pain that Ms. Rizzi suffered.

[5] Expert evidence at the trial differed with respect to the cause of the fibromyalgia or diffuse pain. Some experts testified that the leg injury caused or contributed to the development of the fibromyalgia or diffuse pain. One defence expert testified that the appellant's pain complaints were more likely caused by the pre-existing condition than the leg injury.

[6] Counsel at trial disagreed about the test for causation. Counsel for the respondents urged that the instruction to the jury be based on the "but for" test. In the charge, however, the trial judge proposed a number of possible scenarios and then instructed the jury on the basis of the "material contribution" test.

[7] The jury found in favour of the appellant, including that her fibromyalgia or diffuse pain was caused or materially contributed to by the incident on April 2, 1995. They assessed general non-pecuniary damages of \$41,000, special damages of \$17,400, past income loss of \$175,000, future income loss of \$485,500 and future care costs of \$160,000. The jury found Ms. Rizzi to be 75% contributorily negligent for the accident.

[8] In a Notice of Appeal dated December 29, 2005, Ms. Rizzi appealed the quantum of general non-pecuniary damages and the assessment of contributory negligence.¹ In the Notice of Appeal, Ms. Rizzi asks that the judgment be varied or, alternatively, that a new trial be ordered.

¹ She sought leave to appeal the costs order by way of a supplementary notice of appeal dated January 26, 2006.

[9] The appeal was perfected in January 2007 and is scheduled to be heard on July 16, 2007.

[10] In February 2006, the respondents paid Ms. Rizzi \$185,000, on account of monies owing under the judgment. Ms. Rizzi has spent a considerable portion of those funds.

[11] The Supreme Court of Canada clarified the law of causation in *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7, 2007 SCC 7, released February 8, 2007. In *Resurfice*, the trial judge applied the “but for” test in determining causation but the Alberta Court of Appeal, relying on *Athey v. Leonati*, [1996] 3 S.C.R. 458, thought the “but for” test was unworkable and applied, instead, the “material contribution” test.

[12] The Supreme Court of Canada reversed the appeal decision and restored that of the trial judge. It reiterated that the basic test for determining causation is the “but for” test and that the test applies to multi-cause injuries. The Court stated that the “material contribution” test applies only in special circumstances. Special circumstances involve two requirements: first, it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test and, second, it must be clear that the defendant breached a duty of care owed to the plaintiff thereby exposing the plaintiff to an unreasonable risk of injury and the plaintiff must have suffered that form of injury.

[13] In *Barker v. Montfort Hospital*, [2007] O.J. No. 1417 (C.A.), released on April 18, 2007, this court relied on *Resurfice* and allowed an appeal from a trial decision in which the “material contribution” test had been applied. This court noted that the first special circumstance requirement of impossibility had not been established and, therefore, causation ought to have been decided on the “but for” test.

[14] On reviewing the above decisions, counsel for the respondents immediately sought and received instructions to cross-appeal on the issue of causation. A Notice of Cross-Appeal was served on the appellant’s solicitors on April 23, 2007.

[15] The respondents now seek leave for an extension of time to cross-appeal on the grounds that the trial judge erred in his instruction to the jury with respect to the law of causation. The appellant opposes the motion on three bases: (1) the recent decisions have not changed the law; (2) the trial judge correctly instructed on the issue of causation so there is no merit to the appeal; and (3) Ms. Rizzi would be prejudiced in a number of ways, including that she would be unable to repay monies already paid to her; permitting the cross-appeal to proceed could lead to the need for an adjournment and, thus, a delay in the hearing of the appeal; and, success on the cross-appeal increases the likelihood that a new trial will be ordered.

The Test

[16] Although this motion involves a request for leave to file a cross-appeal, in my view, it is useful to consider the factors that apply when determining whether to exercise discretion and extend the time for filing a notice of appeal. Those factors are:

- 1) whether the (cross) appellant formed an intention to appeal within the relevant period;
- 2) the length of the delay and explanation for the delay;
- 3) any prejudice to the respondent;
- 4) the merits of the appeal; and
- 5) whether the “justice of the case” requires it.

See *Kefeli v. Centennial College of Applied Arts and Technology* (2002), 23 C.P.C. (5th) 35 at para. 14 (C.A.).

[17] However, I would echo the following comments of Laskin J.A. in *Bratti v. Wabco Standard Trane Inc. (c.o.b. Trane Canada)* (1994), 25 C.B.R. (3d) 1 at 3 (Ont. C.A.):

While appellate courts have considered a number of different factors in determining whether to grant leave to extend the time for appealing, the governing principle is simply whether the “justice of the case” requires that an extension be given.
[citation omitted]

Analysis

Intention to Cross-Appeal and Delay

[18] The respondents concede that they did not form an intention to appeal within the prescribed time period. They explain the approximately fifteen months of delay on the basis that, prior to *Resurfice*, conflicting appellate authority on causation made success on appeal very uncertain.

[19] I accept the explanation for the delay. Although *Resurfice* did not change the law of causation, it did clarify the law. The history of *Resurfice* demonstrates that there was confusion in this area following *Athey v. Leonati* – the trial judge applied the “but for” test but the Alberta Court of Appeal applied the “material contribution” test. If there were no confusion about the law of causation, it seems to me that the two levels of court would not have differed on which test applied. This court’s decision in *Barker* reinforces my view.

Prejudice

[20] I will address the three types of prejudice it is argued will ensue if the motion is granted: delay, exposure to a monetary loss and the possibility of a new trial.

[21] I am not persuaded that the proposed cross-appeal will cause a significant delay in the hearing of the appeal. The addition of the causation issue will not create the need for additional transcripts to be ordered. The existing and available material adequately supports the arguments of both parties on causation. Counsel for the appellant advises that he is very busy between now and the scheduled appeal date of July 16, 2007. Nonetheless, in my view, there is adequate time for the parties to file their materials on the cross-appeal so that the appeal could proceed as scheduled. If an adjournment is necessary, little delay should be occasioned as counsel for the respondent has advised that he would move expeditiously to perfect the cross-appeal.

[22] In terms of monetary prejudice, it appears that this type of prejudice “cuts both ways”. While the appellant faces the prospect of a reduced damage award and a possible obligation to repay sums already received if the cross-appeal is successful, the respondents also face exposure for increased amounts should the appeal be successful.

[23] As for the possibility of a new trial, the appellant says it is her fervent wish that the appeal will resolve the matter. However, it is clear that a new trial may be necessary as a result of the appeal alone. Indeed, the Notice of Appeal requests that as an alternate form of relief. Although the cross-appeal may increase the prospect of a new trial being ordered, that prospect already exists as a result of the appellant’s decision to appeal.

Merit of the Cross-Appeal

[24] In my view, the cross-appeal has considerable merit. I do not accept the appellant’s contention that the trial judge correctly instructed on the issue of causation. Instruction was given on the basis of “material contribution” and the jury findings were on that basis also. But, the necessary determination that special circumstances warranted application of the “material contribution” test had not been made. Until such a determination is made, it cannot be known which of the two causation tests ought to have been applied.

Justice of the Case

[25] Ultimately, however, it is fairness considerations that move me to grant the motion. Had the motion been for an extension of time to file an appeal, the result might have been different. In such a situation, the public interest in the finality of judgments may be paramount. But, this motion is not for an extension of time to file a notice of appeal; it is a motion to permit the filing of a notice of cross-appeal. Finality considerations do not come into play because this case has not been finally resolved; the appeal has yet to be heard.

[26] Moreover, the respondents face significant exposure should the appeal be successful. In the circumstances, they are entitled to have their concerns about the correctness of the judgment below addressed at the same time as the appellant's concerns about the correctness of the judgment are addressed. And, the panel hearing the appeal ought to be in a position to properly decide the appeal and ensure that a just result is arrived at. Addressing the concerns of only one side precludes such a result.

[27] In light of the merit of the cross-appeal, the competing considerations in respect of prejudice and these fairness concerns, the justice of the case compels me to grant the extension.

Disposition

[28] Accordingly, I would grant the motion and permit the respondents an extension of time to file a Notice of Cross-Appeal, such notice to be filed with seven days of the date of the release of these reasons. Although successful on the motion, as the respondents sought an indulgence of the court which was reasonably opposed by the appellant, I order costs to the appellant fixed at \$4,000, all inclusive.

“E. E. Gillese J.A.”