COURT OF APPEAL FOR ONTARIO

CITATION: Mujagic v. Kamps, 2015 ONCA 360
DATE: 20150520
DOCKET: M44355, M44948

Doherty, Gillese and Lauwers JJ.A.

BETWEEN

Mirsada Mujagic, Armela Mujagic and Belmir Mujagic

Plaintiffs (Moving Parties)

and

Annette Kamps and State Farm Mutual Automobile Insurance Company

Defendants (Responding Party)

Rodney M. Godard, for the moving parties

Kieran C. Dickson, for the responding party

Heard: In writing

Motion for reconsideration of a decision of the court refusing leave to appeal, dated February 6, 2015.

Doherty J.A.:

[1] Counsel for the moving parties brings a motion asking this court to reconsider the refusal to grant leave to appeal from the judgment of the Divisional Court. Counsel submits that this court's decision in *Westerhof v. Gee Estate*, 2015 ONCA 206, [2015] O.J. No. 1472, released after leave to appeal

was refused, has significantly changed the interpretation of rule 53.03. Counsel submits that, in light of the interpretation of rule 53.03 provided by this court in *Westerhof*, the trial judge improperly excluded important opinion evidence from two of Ms. Mujagic's treating physicians. Counsel asks for a fresh opportunity, armed with *Westerhof*, to convince a panel of this court that leave to appeal should be granted.

[2] Ms. Mujagic was in a car accident in 2001. She eventually sued. The action was tried in 2011. The defence did not deny that Ms. Mujagic suffered from significant pain and disability associated with spine and neck problems. The defence argued, however, that those problems were not caused by the 2001 car accident. Causation was a central issue at trial. The jury found the defendant 30 per cent responsible for the accident, but awarded zero damages. Ms. Mujagic represented herself at the trial.

[3] Ms. Mujagic unsuccessfully appealed to the Divisional Court: *Mujagic v. Kamps*, 2014 ONSC 5504. She sought leave to appeal from that decision to this court. Leave was refused on February 6, 2015. *Westerhof* was released on March 26, 2015, and Ms. Mujagic commenced this motion very shortly thereafter.

[4] The motion raises two questions:

- Does this court have jurisdiction to reconsider the motion for leave to appeal?

- If the court has jurisdiction, should it order a reconsideration of the motion for leave to appeal?

Jurisdiction

[5] Neither party has taken out an order dismissing the motion for leave to appeal. Generally speaking, there is no jurisdictional impediment to the court reconsidering its decision when no order has been taken out and entered: *Holmes Foundry Ltd. v. Village of Point Edward*, [1963] 2 O.R. 404 (C.A.), at p. 407; *Montague v. Bank of Nova Scotia* (2004), 69 O.R. (3d) 87 (C.A.), at para. 34; *Aviva Canada Inc. v. Pastore*, 2012 ONCA 887, 300 O.A.C. 355, at para. 9; *First Elgin Mills Development Inc. v. Romandale Farms Ltd.*, 2015 ONCA 54, 381 D.L.R. (4th) 114, at para. 7.

[6] Counsel for the respondent has, however, referred the court to rule 61.16(6.1). That rule, brought into force in July 2014 (see: O. Reg. 43/14, ss. 19, 21), applies to motions in the Court of Appeal. It reads:

> Subject to rules 37.14 and 59.06, an order or decision of a panel of an appellate court may not be set aside or varied under these rules.

[7] The use of the phrase “order or decision” is instructive and renders the taking out of an order irrelevant to the power to reconsider a decision governed by rule 61.16. The inclusion of the word “decision” reflects the practical reality

that orders are often not taken out when motions are dismissed in the Court of Appeal.

[8] As rule 61.16(6.1) applies to this motion, the moving parties must bring themselves within rules 37.14 or 59.06 for this court to have jurisdiction to set aside or vary its decision refusing leave to appeal. Rule 37.14 has no application in the circumstances of this case. The moving parties do, however, rely on rule 59.06 and specifically rule 59.06(2)(a), which provides:

> A party who seeks to,
>
> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
>
> …
>
> may make a motion in the proceeding for the relief claimed.

[9] Counsel for the moving parties submits that the change in the jurisprudence effected by *Westerhof* amounts to a "fact arising" after the decision refusing leave to appeal was made. I cannot accept that submission. The distinction between fact and law is well-established. Facts come from evidence, including new testimony and exhibits. Law comes from statute books and case law. The law is applied to the facts to produce a result. Rule 59.06(2)(a), by its plain meaning, speaks to "facts arising or discovered" and not to jurisprudential changes. New facts, like all facts, are found in evidence, not in the statute books or case law.

[10] There is relatively little case law on this exact issue, perhaps because the language of the rule is so clear. The limited case law is against the moving parties. In *Trainor v. Canada*, 2011 ONCA 794, [2011] O.J. No. 5741, this court noted, at para. 3, that a change in jurisprudence is not a new fact for the purposes of rule 59.06. The Divisional Court took the same position when the matter went back to that court: see *Trainor v. Canada*, 2012 ONSC 3450, [2012] O.J. No. 2665, at para. 5. The Federal Court of Appeal, considering a somewhat differently worded rule, came to the same conclusion in *Metro-Can Construction Ltd. v. Canada*, 2001 FCA 227, 203 D.L.R. (4th) 741. Justice Rothstein observed, at para. 4, that interpreting the phrase "a matter that arose or was discovered" (the language of the operative Federal Court rule) to include changes in the law "would create unacceptable uncertainty for litigants and the public who must be satisfied that, once a judgment is rendered, it is final."

[11] I agree with counsel for the respondent's submission that rule 61.16(6.1) applies to a motion to reconsider this court's decision refusing leave to appeal. The moving parties cannot bring themselves within either rule 37.14 or rule 59.06. This court therefore has no jurisdiction to set aside or vary its prior decision refusing leave to appeal.

The Merits

[12] Although I would dismiss the motion on jurisdictional grounds, I think the motion would fail on its merits in any event. Even where the court has power to reconsider a decision because an order has not been taken out, that power will be exercised sparingly and only where it is clearly in the interests of justice: e.g. see *First Elgin Mills Development*, at para. 7.

[13] There are three reasons why the interests of justice would not favour reconsidering the refusal of leave in this case. First, the moving parties had the opportunity to challenge the correctness of *Westerhof* on the motion for leave to appeal. This court's decision in *Westerhof* was on reserve at the time of the leave motion. The moving parties chose not to make that challenge, but instead advanced a different argument in their factum. Motions for reconsideration are not the venue for new arguments that could have been made on the initial motion.

[14] Second, even if this court applied the interpretation of rule 53.03 provided in *Westerhof*, it is far from clear on the record before this court that the plaintiff was entitled to elicit opinions from her treating physicians about any causal connection between the car accident and her injuries without meeting the notice requirements of rule 53.03. It may well be that *Westerhof* would have no impact on the admissibility of that evidence.

[15] Third, and I think most importantly, there is nothing filed on the motion for reconsideration to suggest that either treating physician had the expertise required to give an opinion on the causation issue, or that either had an opinion on the causation issue. One of the treating doctors was a psychologist. It seems to me unlikely that he could make any meaningful contribution to the question of the causal link, if any, between Ms. Mujagic's accident and her subsequent neck and back injuries and pain. The other treating physician, a physiatrist, did not see Ms. Mujagic until approximately five years after the accident. There is nothing to suggest he was in a position to give an opinion on the causation question.

[16] I would not order a reconsideration of the decision refusing leave even if this court had the jurisdiction to make that order.

The Alternative Relief Claim

[17] Counsel for the moving parties asked this court to extend the time for delivery of an application for leave to appeal to the Supreme Court of Canada, should this court decline to reconsider its earlier decision refusing leave. This court would appear to have jurisdiction to grant the requested extension: *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 59(1).

[18] The Supreme Court of Canada, as the court of last resort, has total control over its own docket in civil matters. Except in the most unusual circumstances, questions relating to access to that court should be addressed by that court. The

moving parties have not advanced any persuasive reason for this court to make an order in respect of a proceeding in the Supreme Court of Canada. I would not make any order extending the time for delivery of an application for leave to appeal to the Supreme Court of Canada.

Disposition

[19] I would dismiss the motion with costs, if requested. If counsel cannot agree on the quantum, they may make written submissions of three pages or less within 14 days of the release of these reasons.

Released: "MAY 20 2015" "DD"

"Doherty J.A."
"I agree E.E. Gillese J.A."
"I agree P. Lauwers J.A."