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BONELLO V. GORES LANDING MARINA (1986) LIMITED

On August 4, 2007, the appellant Timothy Bonello participated in a game of tug-of-war on a campground owned and operated by Gores Landing Marina (1986) Limited (the "Marina"). Mr. Bonello's left arm was caught in a loop in the rope and he suffered a crush injury to his forearm that required amputation. He sued the Marina and Joseph Davies Sr., its principal. He later added Joseph Davies Jr. after learning of his role in finding the rope and making it available to the guests of a campground get-together where the tug-of-war occurred. The amended statement of claim asserted that the Marina and Mr. Davies Sr. were liable under the Occupiers' Liability Act, R.S.O. 1990, c. O.2, and for common law negligence, and that they were also vicariously liable for the negligent actions of Mr. Davies Jr.[1]

The motion judge granted summary judgment and dismissed the action against the Marina and Mr. Davies Sr., along with their third party actions against several individuals who had taken part in the tug-of-war.

For the reasons that follow, I would allow the appeal.

A. Factual and Procedural Overview

The Marina owned and operated a ten acre property at the southwest end of Rice Lake. It rented cottages, sites for vacation trailers, and boat slips. For some years the Marina sponsored "Jimmy Buffet Day" on the August long weekend. It eventually stopped sponsoring the event but the campground guests carried it on.

On August 4, 2007, the day's culminating contest was to be a tug-of-war. Mr. Davies Jr., who occupied a cottage and participated in the events of the day, was asked by the guests to provide a rope for the tug-of-war. He eventually found one in a shed on the property. The rope had several loops in it that the guests were unable to untie. They decided to use the rope anyway. The tug-of-war started with 20 or so trailer renters on one side, and 20 or so cottage renters on the other side, including both Mr. Bonello and Mr. Davies Jr.

Mr. Bonello put his left arm through one of the loops in order to get a better grip on the rope. As the guests pulled on the rope, the loop cinched on Mr. Bonello's forearm. Although he screamed and tried to stop the tug-of-war, the noise of the participants and the onlookers prevented him from getting their attention quickly enough to prevent the crush injury that eventually necessitated the amputation of part of his left forearm and his hand. He then sued the named defendants.

Mr. Davies Jr. did not defend the lawsuit. The other defendants did and issued third party proceedings against some of the guests who participated in the tug-of-war. The parties were examined for discovery, including Mr. Davies Jr. In January 2016, the Marina and Mr. Davies Sr. brought the summary judgment motion to have the main action dismissed against them. The motion was heard in August 2016.

At the argument of the motion, the moving parties successfully sought to exclude certain evidence from the motion judge's consideration. The order under appeal provides:

This Court orders that paragraphs 21 to 48 of the affidavit of Joan Scott are struck from the affidavit and not received as evidence on the motion, as is the discovery evidence of Joseph Davies Jr., Frank Buttigieg and Mike Buttigieg.

This Court orders that the main action against Mr. Davies, Sr. and Gores Landing Marina, and the third party proceedings arising therefrom are hereby dismissed.

In the result, only Mr. Davies Jr., who did not defend the action, remains a defendant. Pleadings were closed against him and he was deemed under r. 19.02(1) of the Rules of Civil Procedure, R.R.O 1990, Reg. 194, to admit the claims against him, but the admission is not binding on anyone else. It appears Mr. Davies Jr. is impecunious.

The issues

There are three issues on this appeal:

Is the order striking affidavit and examination for discovery evidence interlocutory, and therefore only appealable to the Divisional Court?

Did the motion judge err by excluding the discovery evidence of Mr. Davies Jr., Mike Buttigieg, and Frank Buttigieg?

Did the motion judge err in concluding that there was no genuine issue requiring a trial in relation to the Marina and Mr. Davies Sr.?

C. Analysis

I will address the issues in turn.

Is the order striking affidavit and examination for discovery evidence interlocutory, and therefore only appealable to the Divisional Court?

The respondents submit that this court has no jurisdiction to hear the appeal concerning para. 1 of the order under appeal, which excluded certain evidence from consideration, on the basis that it was interlocutory. They assert that the appellant should have sought leave to appeal from the Divisional Court under sections 6 and 19 of the Courts of Justice Act, R.S.O. 1990, c. C.43.

I would reject this submission.

In my view this court has jurisdiction to hear this appeal including the challenge to the motion judge's evidentiary ruling. Had para. 1 of the order been issued as a standalone order, it would have been interlocutory and the appeal would have been required to take the prescribed route to the Divisional Court. However, the paragraph is found in the order that granted summary judgment and was an inextricable part of the decision to grant judgment. The ruling was part of the evidentiary fabric of the motion and did not need to be in the order. Put differently, this is conceptually equivalent to a trial judgment in which the trial judge's evidentiary trial rulings are subsumed in the judgment but are nonetheless challengeable as grounds of appeal.

The bifurcated approach to the appeal advanced by the respondent would risk unduly complicating the appeal process from a summary judgment, contrary to the spirit of r. 20 and r. 1.04 of the Rules of Civil Procedure, and the jurisprudence.

The Supreme Court prescribed the court's preferred approach to summary judgment motions in Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87. Justice Karakatsanis stated at para. 2: "Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system." The culture shift called for by the Supreme Court requires courts to promote more efficient and less expensive access to justice, and seeks to avoid placing expensive roadblocks in the way of litigants.

There is no good reason to bifurcate the appeal, and doing so is not compelled by the Courts of Justice Act or the Rules. This court has jurisdiction to consider the appeal and, as a necessarily incidental or inextricably related matter, to address the motion judge's decision to exclude the evidence.

(2) Did the motion judge err by excluding the discovery evidence of Mr. Davies Jr., Mike Buttigieg, and Frank Buttigieg?

The appellants proffered discovery evidence of Mr. Davies Jr., Mike Buttigieg, and Frank Buttigieg on the summary judgment motion. The motion judge excluded the evidence at the request of the respondents. He did so on the basis of an interpretation of rr. 39.04 and 31.11 that led him to conclude: "On the hearing of a motion, while a party can use discovery evidence from an adverse party against that adverse party, the evidence is not useable against other adverse parties" (at para. 35). Since the motion had been brought by the Marina and Mr. Davies Sr., the motion judge concluded that the discovery evidence of the other parties not involved in the motion had to be struck.

This issue takes its context from the Amended Statement of Claim, which is quoted at para. 60 of the motion judge's reasons. It includes several allegations about the defendants that implicated Mr. Davies Jr., who took the rope for the tug-of-war from a storage shed owned by the Marina and gave it to the guests:

they failed to inspect the rope for the existence of dangerous conditions or defect;

they prepared and or distributed a rope which they knew or ought to have known was faulty, and was not fit for the purpose for which it was intended;

they failed to take all reasonable precautions to ensure that the equipment system would function properly without causing injury;

they failed to make a proper inspection of the rope prior to starting the tug-of-war to ensure that the participants could participate in safety;

they failed to warn the Plaintiff that the subject rope was not fit for its intended purpose;

such further and other particulars of negligence, as shall become known to the Plaintiffs.

The motion judge set the procedural context for the evidentiary issue at para. 36:

On the summary judgment motion in the main action, Mike Buttigieg, Frank Buttigieg, and Mr. Davies, Jr. did not file affidavits for either party to the main action nor were they summonsed as witnesses by either party. Had they delivered affidavits, then they could have been cross-examined pursuant to rule 39.02 and their evidence would have been evidence at large for the purposes of the summary judgment motion. Had they been summonsed as witnesses, their evidence would have been available for use at the hearing pursuant to rule 39.03.

The appellant summarizes, in my view fairly, the excluded evidence they proffered in support of the argument that the Marina and Mr. Davies Sr. were vicariously liable for the actions of Mr. Davies Jr.:

Davies Jr. stated on examination for discovery that he was in charge of Gores Landing when his father was not around. He was considered his father's substitute decision-maker, and had ready access to his father when he was off the property. Tenants regularly spoke to him about matters of general concern relating to Gores Landing. He was a well-known authority figure to the patrons.

In the summer of 2007, when he was approximately 35 years old, Davies Jr. was residing in a cottage at Gores Landing, free of charge. He spent the majority of his summers at Gores Landing (which is only open seasonally).

Davies Jr. assisted his father with tasks at Gores Landing, including doing repairs and upkeep on the cottages and landscaping, in consideration for his access to the cottage.

Davies Jr. was present for Jimmy Buffet Day in 2007, actively participated in the events, and socialized with his friends and other patrons.

On August 4, 2007, Davies Jr. was drunk. Nevertheless, when asked to provide a rope for tug-of-war, he promptly "scoured" the grounds until he found a rope belonging to Gores Landing in a storage building.

Davies Jr. was familiar with the rope, which had been previously used for rope swings, among other things.

Davies Jr. did not examine the rope, nor did he turn his mind to examining it, before supplying it for use in the tug of war.

The fact that the rope had loops in it was pointed out to Davies Jr., as was the fact that the loops could not be removed in advance of the tug-of-war. Davies Jr. took no steps to implement safety measures or issue a warning before the competition commenced.

Following Timothy's injury, Davies Jr. immediately stepped forward to call 911. Once contact with 911 was made, Davies Jr. went to the road to flag down the ambulance, and when he arrived he directed it to the area where Timothy was waiting.

The evidence put forward by the responding party to a summary judgment motion is governed by r. 39, of which r. 39.04 regarding the use of discovery evidence is particularly relevant to this case. It provides:

39.04 (1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. [Emphasis added.]

This is to be contrasted with r. 31.11 which governs the use of discovery evidence at trial. Rule 31.11(1) provides:

31.11 (1) At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of,

(a) the adverse party; . [Emphasis added.]

With respect to the use of discovery transcripts on a motion, r. 39.04 states: "rule 31.11 (use of discovery at trial) applies with necessary modifications".

The motion judge took a strict approach to the use of the discovery evidence of Mike Buttigieg, Frank Buttigieg, and Mr. Davies, Jr. and allowed the wording of r. 31.11(1)(a) (the adverse party) to override the wording of r. 39.04(1) (an adverse party's examination for discovery or the examination for discovery of any person examined … in addition to, the adverse party) and refused to apply r. 39.04. He said at paras. 34-35:

The problem with this evidence is that it can only be read in as evidence against the adverse party that was examined for discovery. In other words, for example, the discovery evidence of Mr. Davies, Jr. that is incorporated by reference is not evidence at large as against Mr. Davies, Sr.

On the hearing of a motion, while a party can use discovery evidence from an adverse party against that adverse party, the evidence is not useable against other adverse parties. The use of discovery evidence is limited to be the party who gave the evidence; that is, it cannot be read in against any party other than the party who gave it: Urbacon Building Groups Corp. v. Guelph (City), 2013 ONSC 5773 (Ont. S.C.J.); Cain v. Peterson (2005), 24 C.P.C. (6th) 298 (Ont. S.C.J.); MacEachern v. Rennie (2009), 80 C.P.C. (6th) 1 (B.C.S.C.). [Emphasis in original.]

I note that the authorities cited by the motion judge were all trial cases where r. 31.11 (or its equivalent) would apply with full rigour.

In my respectful view, this approach fails to comport with Rule 39.04 and the motion judge erred by concluding that the discovery evidence of Mr. Davies Jr. and the other witnesses was inadmissible on the summary judgment motion.

The motion judge took an overly technical approach to the admission of the discovery evidence on the motion. He said at, para. 37, he had read the evidence and added that he did not "understand why the Defendants objected to the evidence other than on technical grounds." However, he then permitted those technical grounds to underpin his decision. Respectfully, this was an error

I accept that the weight to be attached to the discovery evidence of an adverse party other than the adverse party who

brings a summary judgment motion may vary depending upon the context.

If the motion judge is invited to use the discovery of another adverse party as evidence establishing liability, he or she may well conclude that the evidence falls short of what is required. On the other hand, where the relevant issue on the motion is whether there is sufficient evidence in the record to establish that "there is a genuine issue requiring a trial" under r. 20.02(2), the motion judge may well conclude that the discovery evidence is sufficient.

The excluded discovery evidence at issue established that the vicarious liability of the Marina and Mr. Davies Sr. for any negligence on the part of Mr. Davies Jr. was a genuine issue requiring a trial. This triggered the motion judge's discretion to consider exercising the powers in r. 20.04 as an alternative to a full trial or simply finding that a trial was required.

By excluding from his consideration the evidence that purported to establish Mr. Davies Jr.'s negligence and the vicarious liability of the Marina and Mr. Davies Sr., the motion judge was left with the respondents' bald assertions in the notice of motion for summary judgment that "Joseph Davies Jr. has no connection with Gores Landing", and in Mr. Davies Sr.'s affidavit that he was the only employee of the Marina. I note that embedded in this position is the erroneous legal proposition that the Marina and Mr. Davies Sr. could only be vicariously liable for the actions of Mr. Davies Jr. if he were an employee of the Marina. Vicarious liability can arise as the result of other less formal relationships, including agency, as the statement of claim alleges.

Did the motion judge err in concluding that there was no genuine issue requiring a trial in relation to the Marina and Mr. Davies Sr.?

In order to render judgment in this case, the motion judge was obliged to address three substantive issues on the pleadings and the evidence:

1. Were the Marina and Mr. Davies Sr. liable to Mr. Bonello under the Occupiers' Liability Act?

2. Were the Marina and Mr. Davies Sr. liable to Mr. Bonello under the principles of common law negligence?

3. If so, were the Marina and Mr. Davies Sr. vicariously liable to Mr. Bonello for Mr. Davies Jr.'s negligence?

I now turn to consider the motion judge's treatment of the appellant's causes of action.

(a) The Occupiers' Liability Act

The motion judge clearly found that the Marina and Mr. Davies Sr. were not liable to Mr. Bonello under the Occupiers' Liability Act. He found, at para. 59, that the Marina and Mr. Davies Sr. had met the standard of reasonableness under the Act, a finding he repeated at para. 61 and again at para. 69 following a lengthy exposition of occupiers' liability cases.

(b) The Negligence Claim

The appellant argues that the motion judge erred in failing to consider Mr. Bonello's negligence claim in common law, beyond the strictures of occupiers' liability. As noted earlier, the Amended Statement of Claim includes several allegations about the defendants that implicated Mr. Davies Jr., who took the rope for the tug-of-war from a storage shed owned by the Marina and gave it to the guests.

The respondents assert the motion judge did consider Mr. Bonello's negligence claim. They point to his express reference to negligence at para. 60, and to his conclusion at para. 69:

The Defendants could not have reasonably foreseen that the rope for the tug-of-war would be taken from its supply shed and even if they had purposefully provided the rope, they could not have reasonably foreseen that the participants in the tug-of-war would not properly prepare the rope for the tug-of-war or have the rudimentary safety equipment necessary to officiate the event.

I disagree with the respondents. These findings were made in the context of the occupier's liability claim and do not address the possibility that the Marina and Mr. Davies Sr. could be vicariously liable for the actions of Mr. Davies Jr., who found the rope, provided it to the guests, and participated in the tug-of-war, and arguably should have foreseen the risk of injury arising from the use of the rope. I observe that the motion judge did not consider further or in any detail the particulars of negligence referred to in the pleading.

(c) The Vicarious Liability Claim

The motion judge was alive to the vicarious liability issue. He set the scene in paras. 49-50:

Mr. Davies, Jr., whose role and relationship with Gores Landing Marina is a disputed matter, was asked to provide a rope. He provided a rope from a shed on the property. The rope, which belonged to Gores Landing Marina, had been used for children's swings.

Unfortunately, Mr. Davies, Jr. supplied a rope which had several loops or knots along its length.

As I have already explained, the improperly excluded evidence, which was summarized earlier, offers some support for the argument that the Marina and Mr. Davies Sr. were vicariously liable for the actions of Mr. Davies Jr. As there is a triable issue as to vicarious liability, I would allow the appeal and set aside the judgment dismissing the appellant's action.

Disposition

I would allow the appeal, set aside the order under appeal, and leave the parties free to pursue their claims including, if so advised, other motions for summary judgment, without being bound by any of the determinations made in the decision under appeal.

I would fix costs of this appeal payable by the respondents to the appellant in the amount of $20,000 inclusive of disbursements and taxes. I would reverse the order for costs made below and require the respondents to pay the amount awarded below to the appellant.

ANGUS V. PORT HOPE (MUNICIPALITY)

The Municipality of Port Hope was wholly successful on the appeal and cross-appeal (the "appeal"). In the ordinary course, it would be entitled to its costs of the Application and appeal. The parties have agreed on the amount of those costs - $53,319.11 for the Application and $40,000 for the appeal.

However, the parties have not been able to agree on entitlement. Mr. Angus submits that this is an appropriate case in which no costs should be awarded. His submission rests on his contention that: the matter was brought by him as a representative of all residents of the former Hope Township, now Ward 2 of Port Hope; it was a matter of public interest: and, the issues raised were novel.

We do not accept this submission.

Mr. Angus did not act in a representative capacity. He acted to vindicate the private financial interests of Ward 2 ratepayers, of whom his wife was the largest residential taxpayer. Further, the issues raised do not have a significant and widespread societal impact. Moreover, their resolution depended on the application of well-known legal principles to a sui generis, fact-specific contract.

In our view, in these circumstances, it would be unjust to require the Port Hope taxpayers to bear the financial burden of this lawsuit, commenced by a single citizen in its community.

Accordingly, we order costs of the Application and the appeal to the Municipality in the agreed-on sum of $93,319.11, all inclusive.

R. V. OLIVEROS-CALLEJAS

The appellant seeks leave to appeal the sentence imposed by the trial judge, arguing that the trial judge erred in rejecting the joint submission on sentence of counsel.

We reject this argument. In our view, there is no basis to interfere with the trial judge's decision to "jump" the joint submission on sentence. The trial judge did not err in the approach she followed or in the test she applied in rejecting the joint submission.

On the third day of trial, in the middle of the complainant's cross-examination, the appellant plead guilty to attempted murder of the complainant, who was his spouse. The Crown and defence agreed that a sentence of seven years was appropriate.

On the day originally reserved for sentencing, the trial judge advised counsel that she was troubled by the joint submission and invited them to make further submissions.

The appellant did not seek to withdraw his guilty plea when made aware of the trial judge's concerns.

The Crown characterized the sentence as at the lower end of the range and explained that it had considered the admission of guilt, the fact that the complainant was content with the proposed sentence, and the fact that the appellant would be deported, which would provide peace of mind to the complainant.

The trial judge concluded that the joint submission was contrary to the public interest and it would bring the administration of justice into disrepute. She rejected the joint submission and imposed a sentence of 10 years' incarceration.

The trial judge recognized and endorsed why a joint submission is a valuable and important part of the criminal justice process and that there is a high threshold for rejecting a joint submission.

She provided clear and cogent reasons for departing from the joint submission. She noted that the joint submission was in fact below the appropriate range identified by this court for attempted murder in a domestic context and identified seriously aggravating factors: the appellant had a prior record for assaulting the complainant and was bound by the terms of a non-association order at the time of the offence; and the attack was particularly horrific and the complainant was lucky to have survived.

While the trial judge did not employ the wording in the subsequently decided R. v. Anthony-Cook, [2016] 2 S.C.R. 204, the joint submission was so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

Accordingly, while leave to appeal sentence is granted, the appeal is dismissed.