CITATION: Robichaud et al v. Constantinidis et al, 2018 ONSC 4204
COURT FILE NO.: CV-14-00498203-0000
DATE: 20180705

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Yvette Robichaud and Sandra McAulay, plaintiffs

AND:

Kyriakos Constantinidis, Sofia Constantinidis, Coseco Insurance Company
Defendants

BEFORE: J. T. Akbarali J.

COUNSEL: Theodore P. Charney for the defendant Coseco Insurance Company

Akari Sano for the defendant Sofia Constantinidis

HEARD: July 04, 2018

ENDORSEMENT

Overview

[1] This action arises out of a motor vehicle accident in respect of which the plaintiffs claim damages. The defendant, Kyriakos Constantinidis, rear-ended the vehicle in which the plaintiffs were injured. Kyriakos Constantinidis was driving a car owned by the defendant, his mother, Sofia Constantinidis. Sofia Constantinidis has defended, in part, by claiming that her son was driving without her consent.

[2] Sofia Constantinidis's policy limits are not sufficient to cover the entirety of the plaintiffs' claimed damages. The defendant Coseco Insurance Company is the plaintiffs' insurer, which may be responsible if the uninsured or underinsured motorist coverage applies. Both Mrs. Constantinidis and Coseco have delivered jury notices in this action.

[3] A four week jury trial has been scheduled for the fall of 2019.

[4] In this motion, the defendant, Coseco Insurance Company has one goal – to separate the issue of consent from the damages determination. It believes it can establish that Kyriakos Constantinidis was driving with the consent of his mother, such that it can be extricated from this action entirely. As of July 3, 2018, the plaintiffs have agreed that if a determination is made that Kyriakos Constantinidis had the consent of his mother to drive the car, they will limit their claim to Sofia Constantinidis' policy limits and not seek contribution from Coseco under the underinsured motorist coverage.

[5] Coseco offers three options to separate the consent issue from the damages determination. First, I can bifurcate the jury trial. Second, I can strike the jury notices and bifurcate the non-jury trial. Third, I can order a mini-trial under r. 20. Sofia Constantinidis does not consent to any of the relief sought. The plaintiffs' counsel attended court to observe the motion but did not gown. I assume therefore that the plaintiffs take no position on the motion.

[6] There are three issues before me on this motion:

a. Should I order bifurcation of the trial to address the consent issue prior to the damages trial? This requires me to consider whether the court has jurisdiction to bifurcate a jury trial, and if so, whether this is an appropriate case for bifurcation.

b. If I have no jurisdiction to bifurcate the jury trial, should I strike the jury notices and bifurcate the non-jury trial?

c. Alternatively, can and should I order a mini-trial under rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194*?*

[7] For the reasons below, I conclude that I have no jurisdiction to bifurcate a jury trial. Nor is this an appropriate case in which to strike the jury notices. Finally, I conclude that I cannot order a mini-trial under r. 20.

Preliminary Objection to Certain Evidence

[8] As a preliminary matter, I note that Sofia Constantinidis advised me that she had brought a motion to strike portions of an affidavit filed by Coseco on this motion. The motion to strike appears not to have been confirmed. The motion materials were not before me and the matter was not on my list. Counsel raised with me the paragraphs to which she objected, which related to case conferences the parties attended with D. Wilson J. in advance of this motion. I have disregarded this evidence in my consideration of the issues on this motion.

Does the court have jurisdiction to bifurcate a jury trial without the consent of all parties?

[9] Coseco argues that the existing jurisprudence that provides that the court's inherent jurisdiction to bifurcate a jury trial has been ousted fails to take into account the current climate of civil litigation. It argues that I should revisit that law and find that I have inherent jurisdiction to bifurcate the jury trial.

[10] In *Kovach (Litigation Guardian of) v. Kovach*, 2010 ONCA 126, 100 O.R. (3d) 608, at paras. 24-25, the Court of Appeal held that it is a well-entrenched principle, embodied in s. 108(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, that a litigant has the inherent right to have issues of fact or of mixed fact and law decided by a jury. The court held that the language of the section supports the notion that a party may require the issues to be tried by a single jury. Section 108(3) provides an exception to this principle, under which the court may order issues of fact to be tried, or damages assessed, or both, by a judge alone. But the Court of Appeal held that there was no legislative gap to be filled by the exercise of the court's inherent jurisdiction, and

no jurisdiction to sever an issue of fact or mixed fact and law for determination before trial where there is a valid jury notice subsisting.

[11] The Court of Appeal found that there is no jurisdiction to order bifurcation in a jury trial unless all the parties consent. In reaching its decision, the Court of Appeal expressly rejected the relevance of the case management rule, relying in part on r. 6.1.01, and concluding that the rule signals that bifurcation is not generally a good idea unless the parties consent: paras. 33-34.

[12] *Kovach* was decided after r. 6.1.01 of the *Rules of Civil Procedure* came into effect, although the decision under appeal had been rendered before the rule came into effect. That rule provides that the court may order a separate hearing on one or more issues in a proceeding "with the consent of the parties".

[13] Rule 6.1.01 was recently considered by the Divisional Court in *Bondy-Rafael v. Potrebic* 2015 ONSC 3655, 128 O.R. (3d) 767. The majority of the court held that the rule is clear and comprehensive and requires consent as a precondition to the motion judge having any discretion to exercise: para. 38.

[14] Corbett J. dissented in *Bondy* holding that r. 6.1.01 should be read as a slight expansion of the court's inherent jurisdiction to control its own process: para. 43.

[15] The appellant relies on Corbett J.'s dissent, and points to more recent Superior Court of Justice decisions that may be eroding the majority's decision. For example, in *Duggan v. Durham Region Non-Profit Housing Corporation*, 2018 ONSC 1811, J. Wilson J. upheld a decision of Master Short ordering bifurcation of liability issues from damages in a non-jury trial. She concluded that the *ratio decidendi* of *Bondy* should be narrowly read as applying only to the question of the court's jurisdiction to bifurcate jury trials. She went on to find that the *Carter* test, set out in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 may apply. That test allows trial courts to reconsider settled rulings of higher courts where a new legal issue is raised and where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. The fundamental shift averted to in her reasons is the *Hryniak* decision: paras. 58, 60-63, 65, 68.

[16] Coseco argues that the culture shift heralded by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 has fundamentally shifted the parameters of the debate, and warrants a reconsideration of the law in *Kovach* and *Bondy*.

[17] Coseco makes a compelling policy-based argument in support of the use of the court's inherent jurisdiction to control its process allowing it to bifurcate even jury trials without consent of all parties. In particular, it argues that courts should emphasize the finding of efficiencies to make justice more practical and accessible, recognizing that conventional trials are not always proportional or required. Coseco argues that making use of efficiencies like bifurcating trials may promote settlement, and allow the court to better manage its resources in the post-*Jordan* era.

[18] Coseco's policy-based argument resonates with me, as does the dissent of Corbett J. in *Bondy*. In *Hryniak*, at paras. 1-2, the Supreme Court of Canada called ensuring access to justice

"the greatest challenge to the rule of law in Canada today". The Court called for a "culture shift…in order to create an environment promoting timely and affordable access to the civil justice system." This includes moving the emphasis away from the conventional trial in favour of proportional procedures based on the needs of an individual case. The Court wrote:

> The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just. Summary judgment motions provide one such opportunity.

[19] As is clear from the above quote, the Court's call for a culture shift was not limited to summary judgment. Rather, it called more broadly for a culture shift to balance procedure and access to justice. In my view, there is no reason why, in those exceptional cases where a bifurcated trial can result in the "just, most expeditious and least expensive determination" of a civil proceeding on its merits, the trial should not be bifurcated. I do not see why it should make a difference whether the trial is a jury trial or a non-jury trial. I do not see why, in the appropriate case, a bifurcated trial, or a bifurcated jury trial, is not "a new model of adjudication that can be fair and just" to balance procedure and access to justice.

[20] However, despite my view that it would be desirable for courts to have the power to bifurcate trials in the appropriate case without the consent of all parties, I am bound by the decisions of *Kovach* and the majority decision in *Bondy*, notwithstanding the doctrine in *Carter*.

[21] In particular, Corbett J.'s dissent in *Bondy* considers the Supreme Court of Canada's decision in *Hryniak*. *Hryniak* is not a fundamental shift that occurred after the *Bondy* decision.

[22] *Hryniak* was not available to the Court of Appeal in *Kovach*, but the court did consider the case management rules and the goals of case management in reaching its conclusion in that case – a conclusion that was confirmed by the majority decision in *Bondy*.

[23] There will be cases where there is tension between the efficient hearing of a dispute and a party's right to a single trial. The jurisprudence to date favours the right of a party to insist on a single trial, and particularly a single jury trial, over the efficiency of the process and the related access to justice benefits. I am bound by these decisions.

[24] Accordingly, I find that I have no jurisdiction to bifurcate a jury trial without the consent of the parties.

Should the jury notices be struck?

[25] I next turn to the question of whether the jury notices ought to be struck. In my view, they should not be.

[26] Coseco argues that it is appropriate to strike the jury notices because the implied consent is a complex legal issue that is not appropriate for determination by a jury.

[27] I note the decision of the Court of Appeal in *McDonald-Wright (Lit. Guard.) v. O'Herlihy*, 2007 ONCA 89, 220 O.A.C. 110, at para. 13, where the court reiterated that a judge must have substantial reasons to displace a litigant's *prima facie* right to a trial by jury.

[28] In *Hunt (Litigation Guardian) v. Sutton Group Incentive Realty*, 2002 O.J. No. 3109, 60 O.R. (3d) 665, at para. 72, the Court of Appeal held that it is a trial judge's duty to determine the legal principles to be applied to a case and to instruct the jury with respect to those principles.

[29] The question of whether Sofia Constantinidis gave her consent to her son to drive the car in question is, in large part, a question of fact that will depend on credibility assessments and assessments of human relationships and family dynamics. These questions of fact are appropriate for a jury.

[30] I disagree that the legal framework of implied consent is too difficult for a jury. The trial judge will provide proper instruction as is her duty.

[31] In any event, I agree with Sofia Constantinidis that it is more appropriate to adopt a "wait and see" approach, as the trial judge did in *McDonald-Wright*, a decision endorsed by the Court of Appeal: paras. 11-16. Issues that may seem to be complex before trial may appear differently as the evidence unfolds. My determination not to strike the jury notices herein does not bind the trial judge, from whom relief may be sought if appropriate.

[32] I also disagree that the anticipated length of the trial demands bifurcation. Length is only one factor among many that might be relevant. Here, most of the trial is expected to deal with damages, not the consent issue, which is the one which Coseco claims is too complex for a jury. However, in this case, Coseco has been candid that it only seeks to strike the jury notice in aid of its attempt to bifurcate the trial. In my view, this is not a proper basis on which to strike a jury notice.

[33] The high threshold required to displace a litigant's right to a jury trial has not been met.

[34] Given this conclusion, it is not necessary for me to consider whether I have the jurisdiction to bifurcate a non-jury trial without the consent of all parties.

Appropriate for Bifurcation

[35] Had I decided that I had jurisdiction to bifurcate a jury trial, or that I could strike the jury notices and bifurcate the non-jury trial, I would have concluded that this is an appropriate case in which to bifurcate the issue of consent from the damages trial.

[36] The application of the 14 factor test laid out in *Bourne v. Saunby* (1993), 23 C.P.C. (3d) 333 leads to the conclusion that bifurcation would be appropriate in this case. In particular, I note:

a. The issue sought to be bifurcated – whether Sofia Constantinidis consented to her son driving the car – is discrete. It could likely be tried in two or three days based on evidence that would not need to be repeated during the much longer damages

trial. The evidence led on consent would not assist in better appreciating the evidence to be led in the damages trial.

b. The determination of consent would extract one of the defendants – Coseco or Ms. Constantinidis – from the action given the plaintiffs' position that they would not seek underinsured motorist coverage from Coseco if Coseco were successful on the consent issue. The extrication of one defendant from the lengthier damages trial would reduce costs significantly to that defendant and reduce the plaintiffs' costs exposure. It would simplify the damages trial and possibly shorten it.

c. It is reasonably possible that bifurcating the trial would promote settlement. For example, depending on the result of the consent issue, the plaintiffs would know the policy limits they were faced with, which information is practically important to the question of settlement.

d. The damages trial is over a year away. There is sufficient time for the consent issue to be determined without jeopardizing the trial date if the parties litigate diligently.

[37] In my view, had I the jurisdiction to bifurcate, this would be the exceptional case where there is good reason to depart from the normal practice requiring that liability and damages be tried together.

Should I order a mini-trial under r. 20?

[38] I turn finally to Coseco's request that the court order a mini-trial under r. 20. It seeks to bring a motion for summary judgment and call the oral evidence of Kyriakos Constantinidis on the motion. Coseco notes that Mr. Constantinidis is unlikely to cooperate with Coseco to file affidavit evidence, which would likely be against the interests of his mother. Mr. Constantinidis has been noted in default in the proceedings. The evidence shows he has a history of evading service. While he eventually presented himself to be examined for discovery, he did so only after an order was obtained that he do so and a contempt motion brought arising out of his failure to comply with the order compelling him to attend discovery. He has been uncooperative, and perhaps obstructive, in these proceedings to date.

[39] Coseco argues that I have jurisdiction to order a mini-trial. In *Hryniak,* at para. 70, the Supreme Court of Canada expressly provided for judges to consider the timeliness and appropriateness of motions for summary judgment in advance of the hearing, and allowed for directions to be given under r. 1.05 where appropriate as to "the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed". Coseco relies on r. 1.05 to ground my jurisdiction to direct a mini-trial under r. 20 with *viva voce* evidence.

[40] Rule 1.05 provides that when making orders under the *Rules*, the court may impose such terms and give such directions as are just.

[41] Rule 20.02 provides guidance with respect to the requirements of affidavits filed for use on a summary judgment motion. Rule 20.04(2.1) gives the judge hearing the motion expanded fact-finding powers which the judge may exercise "unless it is in the interest of justice for such powers to be exercised only at a trial". These powers include weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence.

[42] Rule 20.04(2.2) specifically addresses the mini-trial. It provides that a judge may, for the purposes of exercising the expanded fact-finding powers in r. 20.04(2.1), "order that oral evidence be presented, by one or more parties, with or without time limits on its presentation". The default in the *Rules* is thus that summary judgment motions will proceed on affidavit evidence unless an order for oral evidence is made.

[43] In *Hryniak*, at para. 66, the Court described the roadmap to a motion for summary judgment. A judge hearing a summary judgment motion must first determine if there is a genuine issue requiring a trial based only the evidence before her without resort to the new fact-finding powers. If there appears to be a genuine issue requiring a trial, the judge may, at her discretion, use the expanded fact-finding powers provided their use is not against the interest of justice. There is clearly a two-stage process in which the motion judge must engage.

[44] Thus, r. 20.04(2.1) and (2.2) invest the motion judge with discretion to determine whether to exercise the expanded fact-finding powers, and whether to order oral evidence for purposes of exercising those powers.

[45] The jurisprudence with respect to whether a judge should exercise her expanded fact-finding powers in cases where there is a jury notice is unsettled. In *McDonald v. John/Jane Doe*, 2015 ONSC 2607 at paras. 38-42, Dunphy J. queried whether the court ought to employ the toolbox of r. 20.04(2.1) when to do so might deprive a party of their substantive right to trial by jury. He held that, before engaging in the second level of analysis in the summary judgment roadmap, a judge must determine whether the interests of justice require a trial, and the existence of a jury notice is a relevant, though not conclusive, factor in that analysis. This conclusion is consistent with that of Edwards J. in *Mitusev v. General Motors*, 2014 ONSC 2342 at para. 91. However, in *Mehlenbacher v. Cooper*, 2017 ONSC 3434, Howard J. held that whether a jury notice has been served has no bearing on a summary judgment motion.

[46] In *Anjum v. John Doe*, [2015] O.J. No. 4576, Myers J. was the case conference judge to whom a request for directions in connection with a summary judgment motion had been made. The case involved a plaintiff who had sustained catastrophic injuries in a car accident in which he claimed the vehicle that caused the accident did not stop. His insurer denied there was another car involved and sought to proceed by way of summary judgment motion in advance of the four to six week jury trial that had been scheduled.

[47] Myers J. directed that the motion for summary judgment be heard with *viva voce* evidence. He concluded that ordering a summary judgment motion was not bifurcation, but an alternate process.

[48] Myers J. considered that the plaintiff in this process might find himself deprived of a jury trial on liability. He held that there is no right to a trial in civil matters. A party's entitlement to a trial or to a jury trial are subject to the terms of the statutes and rules under which these processes are created and governed. Myers J. noted the direction in *Hryniak* that where a judge is satisfied that it is in the interests of justice to proceed summarily for all or part of an action, proceeding in that manner better fulfils the goals of the civil justice system than does a slower and more expensive trial.

[49] In my view, whether a mini-trial is appropriate in the face of a jury notice really only hints at the true problem with the relief sought by Coseco.

[50] At this point in the process, there is no notice of motion for summary judgment. There is no motion record. I am asked to direct a mini-trial on a theoretical motion when I am not likely to be the motion judge.

[51] Fundamentally, the roadmap to summary judgment motions and the powers set out in r. 20.04(2.1) and (2.2) require the motion judge to purposefully choose to exercise her expanded fact-finding powers. In so choosing, and in the absence of appellate authority on the topic, the motion judge may or may not find the existence of a jury notice to be a relevant factor. The motion judge may or may not conclude that oral evidence is required. But, these decisions are the motion judge's decisions to make. In my view, the operation of r. 20.04(2.1) and (2.2) reserve the discretion to determine whether to exercise the expanded fact-finding powers, and whether to require oral evidence as a consequence of so doing, to the motion judge.

[52] I appreciate that *Hyrniak* and r. 1.05 provide a basis upon which a party may seek directions in advance of the summary judgment motion. However, in describing the directions that may be given, the Supreme Court of Canada did not include directions with respect to the expanded fact-finding powers. With respect to Myers J. who did the opposite in *Anjum*, in my view, my jurisdiction to give directions does not allow me to usurp the motion judge's discretion with respect to whether and how to exercise the expanded fact-finding powers. By directing a mini-trial, I would be doing exactly that.

[53] I agree with Coseco that the jury notice does not oust its ability to bring a summary judgment motion. It is free to do so if it wishes. I understand it has a practical problem, in that Mr. Constantinidis is unlikely to cooperate with it against the interests of his mother to prepare affidavit evidence on the issue of consent. I understand that this leaves Coseco in the undesirable position of likely being unable to put its best foot forward on the summary judgment motion, and, in view of my decision on the bifurcation issues, unable to seek to extricate itself from the lengthy damages trial when it believes it could establish that it has no liability based on the discrete, gate-keeping issue of consent. I understand Coseco's submission that the process that is available to it frustrates the goals of access to justice and is not a proportional process. In my view, regrettably, I do not have the jurisdiction to remedy the difficult position in which it finds itself.

Costs

[54] The parties agree that the successful party on this motion shall be entitled to costs of $5,000 inclusive of HST and disbursements. Ms. Constantinidis is the successful party. In accordance with their agreement, Coseco shall pay $5,000 to her within thirty days.

Akbarali J.

Date: July 05, 2018