Case Name:

Lesniowski v. H.B. Group Insurance Management Ltd.

Between
Justyna Lesniowski, moving party, and
HB Group Insurance Management Ltd., et al., responding parties

[2003] O.J. No. 5263
Court File No. 01-CV-207180CM
Toronto Divisional Court 711/03

Ontario Superior Court of Justice
Epstein J.

Heard: December 16, 2003.
Judgment: December 19, 2003.
(18 paras.)

Practice - Discovery — Examination — Persons entitled to attend

This was a motion by the insured for leave to appeal to the Divisional Court from the order that the insurance adjuster and the representative of the insurer be at liberty to attend each other's examinations for discovery in this matter. The action arose out of a single car accident in which the insured was seriously injured. Five days after the accident, the insurance adjuster had forwarded a letter to the insured that contained statements to the effect that an investigation had determined that she was responsible for the accident. The insurer and the adjuster had since admitted that these statements were inaccurate. In her action, the insured claimed that her being provided with the false statements resulted in her suffering material harm. A central issue in the action was the circumstances surrounding the sending of that letter. On the date the adjuster and the insurer's representative were to be examined for discovery, their counsel refused to allow either to be examined unless each witness was allowed to sit in and observe the other's examination. The Case Management Master concluded that in these circumstances, the insured had met the onus of showing why the adjuster and the representative should be excluded from each other's examination since the major issue in the action, the alleged systemic practices of the insurer, could substantially depend on the testimony of the witnesses whose testimony was in question. The insurer successfully appealed the ruling. In disposing of the appeal the judge found that the evidence in the record before him did not support the conclusion that the adjuster and the representative should be denied the right to be in attendance at the examinations of the co-defendants.

HELD: Motion dismissed. The onus was on the party seeking exclusion and that party had to demonstrate that the ends of justice required it. This was precisely the test the appeals judge used. It was therefore clear that there was no reason to doubt the correctness of his decision. Further, there was no conflict in the law that required resolution

Counsel:

Derek L. Smith for the plaintiff, moving party.
Ted Charney, for the defendants, responding.

¶ 1 **EPSTEIN J.** (endorsement):— This is a motion for leave to appeal to the Divisional Court from the interlocutory order of Echlin J. dated October 20, 2003 whereby he set aside the order of Case Management Master Dash and ordered that the defendants, Catherine Chung, (an insurance adjuster) and Ullsse-Meden (a representative of the defendant, H.B. Group Insurance Management Ltd. and Ms. Chung's supervisor) be at liberty to attend each other's examinations for discovery in this matter.

¶ 2 The action arose out of a single car accident that took place on March 12, 2000. The plaintiff was seriously injured. Following the accident she spent weeks in St. Michael's hospital in a coma. Five days after the accident, Ms. Chung, on behalf of the other defendants, forwarded a letter to the plaintiff that contained statements to the effect that the defendants had conducted an investigation and had determined that the plaintiff was responsible for the accident. The defendants have admitted that these statements are inaccurate. In this action the plaintiff claims that her being provided with the false statements resulted in her suffering material harm. A central issue in the action will be the circumstances surrounding the sending of the letter.

¶ 3 On the date the defendants were to be examined for discovery, defendants' counsel refused to allow either Ms. Chung or Ms. Ullsse-Meden to be examined unless each witness was allowed to sit in and observe the other's examination.

¶ 4 In his reasons for denying the defendants the opportunity of sitting in on each other's examinations, Master Dash observed that the plaintiff had made serious allegations against the defendant insurer and insurance adjuster to the effect that there was a pattern of conduct designed to dissuade insured individuals involved in single car accidents from advancing claims and that the defendants have denied these allegations, saying that the letter was sent in error.

¶ 5 Against this background the Master found H.B. Group Insurance and Ms. Chung to have the same interest and that part of Ms. Chung's and Ms. Ullsse-Meden's evidence will cover the same ground. The Master went on to say that credibility will be in issue since the plaintiff and the defendants have different versions as to the significance of the letter. According to the Case Management Master, the major issue in the action, the alleged systemic practices of the defendant may substantially depend on the testimony of the witnesses whose testimony is in question.

¶ 6 The Master concluded that in these circumstances, the plaintiff had met the onus of showing why the defendants should be excluded from each other's examination.

¶ 7 Echlin J. approached the motion de novo based on his findings that the Master had made certain errors, including putting the defendants in the position of having to demonstrate why they should be able to be in attendance at each other's examinations, taking judicial notice of certain practices in the profession and determining a point of law as between conflicting authorities in a situation where the Master should have referred the matter to a Judge.

¶ 8 Justice Echlin's decision to proceed de novo was not challenged in the argument on the leave application. In the circumstances, I find no error in this approach.

¶ 9 In his analysis the learned motion's judge started with a recitation of the well-known principles applicable to the entitlement of a party to attend at the examinations for discovery of other parties. Justice Echlin correctly started with the proposition that there is an inherent right of a party to attend a co-party's examination for discovery and the onus of establishing the need for exclusion is on the party

seeking it. See: Baywood Paper Products Ltd. v. Paymaster Cheque-Writer (Can.) Ltd. (1986), 57 O.R. (2d) 229 (Dist. Ct.).

¶ 10 Justice Echlin then observed that the exclusion of a party from an examination for discovery should be ordered rarely, only in exceptional cases.

¶ 11 The learned motions judge then went on to review the Ontario cases that contained examples of instances where it was found that such exceptional circumstances existed. While these cases deal with a number of different reasons, such as evidence that testimony will be tailored or witnesses will be intimidated, they all relate to one important issue, namely, that the ends of justice required exclusion. See: ICC International Computer Consulting & Leasing Ltd. v. ICC Internationale Computer and Consulting GmbH (1988), 66 O.R. (2d) 187 (H.C.).

¶ 12 Justice Echlin, in disposing of the defendants' appeal from this part of the Master's order, found that the evidence in the record before him did not support the conclusion that the defendants should be denied the right to be in attendance at the examinations of the co-defendants. The nature of one party's potential evidence or relationship to another party (in this case employee and supervisor) was not enough to constitute cause for exclusion. Justice Echlin said, "[t] here must be more than the possibility of cause [to justify exclusion] ... there must be a real and substantial probability".

¶ 13 Leave to appeal is granted where there is good reason to doubt the correctness of the order made and the matter is of importance beyond the interests of the parties alone; or where there are conflicting cases on the point and the leave judge finds it to be desirable that leave be granted. In each case there is an element of public interest required

¶ 14 Because this is a case of the exercise of discretion, it is not enough to find a case where the discretion has been exercised differently on similar facts; rather there must be a difference in the principles applied.

¶ 15 I have reviewed the many cases that counsel brought to my attention, dealing with the issue of a party's right to attend the examinations for discovery of another party. There does not appear to be any conflict in the principles to be applied in deciding whether a case for exclusion has been made out. The onus is on the party seeking exclusion and that party has to demonstrate that the ends of justice require it.

¶ 16 This is precisely the test Echlin J. used. It is therefore clear that there is no reason to doubt the correctness of his decision. Further, I do not find there to be any conflict in the law that requires resolution.

¶ 17 These findings alone are sufficient to dispose of this application. I would add, however, that I do not see an element of public interest that is required to satisfy the second part of the tests contained in the rule. The law to be applied to a dispute as to the right of parties to attend each other's examinations is well settled. If the party seeking exclusion can satisfy the court that the ends of justice require it then the court should exercise its discretion in favour of exclusion. There is no reason to refer this issue to a full panel of the Divisional Court.

¶ 18 For these reasons the motion for leave to appeal is dismissed. Costs may be addressed in written submissions within twenty days and response in a further twenty.

EPSTEIN J.

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