Divisional Court File No. 594/09

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

KAREN STEKEL and MAURICE STEKEL

Plaintiffs

- and -

TOYOTA CANADA INC., 1216809 ONTARIO LIMITED c.o.b. as Scarborough Lexus Toyota and TOYOTA CREDIT CANADA LTD.

Defendants

ENDORSEMENT OF JUSTICE GREER
(Typed from handwritten endorsement dated February 26, 2010)

HEARD February 26, 2010
Theodore P. Charney for the Plaintiffs, Moving Parties on the Motion for Leave
Peter J. Henein for the Defendants, Responding Parties on the Motion

The Plaintiffs move for leave to appeal the decision of Madam Justice Bellamy made September 2, 2009, on appeal from the Decision of Master Hawkins dated July 10, 2009. The Motion before the Master was on Undertakings and Refusals Motion arising out of the discovery on behalf of two of the Defendants, Toyota Canada Inc. and Scarborough Lexus Toyota.

The litigation arose out of an accident, which took place in Florida on April 5, 2005, when the Plaintiff Karen Stekel was driving her leased 2004 Toyota Lexus. Ms. Stekel lost control of the vehicle and collided with a tree, causing the vehicle to be rendered a total loss. The Plaintiffs put these Defendants on notice about the accident and litigation commenced. The Plaintiffs plead that the vehicle was defective because it had a tendency to suddenly hesitate and

accelerate causing the driver to lose control of the vehicle. They allege it had a history of such hesitation and lurching which was already reported and documented with the Defendants.

Toyota Canada assigned an engineer to inspect the vehicle in Florida before the litigation was commenced. (my emphasis) Following such inspection, say the Plaintiffs, the leased vehicle was returned to Toyota Credit Canada, as it was a total loss.

In the Statement of Defence, the Defendants pleaded that the Plaintiffs failed to preserve the vehicle and its components, parts and records "for this litigation" and did not provide information, or an opportunity to inspect the vehicle. The Defendants plead and rely upon the doctrine of spoliation.

Examinations for discovery of Toyota Canada Inc. took place on September 9, 2008 and acknowledged certain facts, including that it was aware of such customer complaints regarding this model and that it by this stage had conducted some engineering studies to investigate the problem; as well as a "drivability meeting" where they bring in a selection of vehicles and try to produce the problem for further investigation.

The witnesses at that discovery, refused to answer certain Questions including Q 403, Q 428, Q 231 and Q 247. Master Hawkins said Q 403, which was a refusal, "… seeks disclosure of the results of the 'diagnostic tests conducted by Mr. Coreia, an expert retained by the defence." He found the question to be proper as seeking disclosure of the "findings" of an expert within the meaning of rule 31.06(3) and he expanded on these reasons in para. 3 of the decision.

In addition, the Master found that part of Q 231 relating to the production by Mr. Coreia of notes, photographs and other documents Mr. Coreia or the company had which were created as a result of Coreia's inspection of the vehicle, should also be produced. He referred to rule 31.06(3) and *Award Developments (Ontario) Ltd v. Novoco Enterprises Ltd. (1992)*, 10 O.R. (3d) 186 (Gen. Div.)

On Appeal, Madam Justice Bellamy ("the Judge") allowed the appeal with respect to Q 231, 241 and 403. She dismissed the appeal with respect to Q 249 and 351.

Leave to Appeal from an Interlocutory Order of a Judge to the Divisional Court is set out in subrule 62.02(4). It is a 2 – part test to be met and leave may be granted if either part is met.

In my view, Leave should be granted on both grounds for the following reasons:

1. The Judge says that counsel for the defendants "made it clear that he was taking the position that the expert had been retained specifically in contemplation of litigation." In fact, the expert was retained before the litigation was commenced. The Defendants never produced an expert's report and have never said whether Coreia will be produced as a witness at trial or not. I agree with the Plaintiffs that questions of law are raised by the findings of the Judge about the "retainer" of the expert and whether counsel's statement that the documents relating to Coreia's investigation were created for the dominant purpose of litigation, according to subrule 31.06(3) of the Rules. Do such bald statements by counsel satisfy the evidentiary onus? See: *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*, [2007] O.J. No. 1190, 47 C.C.L.I (4^{th}) 288 (SCJ Master Dash) at para. 14, 15, and 19. See also: *Mamaca*, at [2007] O.J. No. 4899 (S.C.J.) on appeal from Master Dash respecting the two-step approach to the determination of litigation privilege.

2. The second issue of law arising out of this is did the Judge err in failing to take into account the application of the subrule 31.06(3)(b) requiring the party to undertake not to call the expert as a witness at trial? See: *Award Development (Ontario) Ltd. v. Novoco Enterprises Ltd.* in trust et al. (1992) 2 O.R. (3d) 186 at p. 3 and 4.

3. The third issue of law is raised as to whether the Plaintiffs should have access to the raw test data, field notes and records made by Coreia, given that the

Defendants have pleaded spoliation? The Plaintiffs say does this constitute a waiver of privilege by implication?

The Defendants say this was not addressed by the Judge and it is a distinct legal doctrine not related to waiver of privilege. It was, however raised by the Defendants in correspondence even before litigation was begun. While that issue is perhaps novel and not settled in the jurisprudence, it falls, within the ambit of subrule 26.02(4)(a).

4. The lawsuit is one involving product liability, a matter of importance to the profession. The Judge says in her reasons that the "litigation-privileged work product (which has not even been shared with the clients) and its production is "premature" to require it at this time. Discovery, the Plaintiffs say, is the very time such production must take place. The Judge erred in stating that the client had not received any information yet from Coreia, yet the documentation shows otherwise.

For these reasons Leave is granted to the Plaintiffs. If the parties cannot otherwise agree on Costs, I will receive brief written submissions from them in April, 2010 by April 15/10.

"Susan E. Greer J."

TYPED VERSION