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COURT OF APPEAL FOR ONTARIO

RE: **JACOB MEUWISSEN, a minor by his Litigation Guardian DEBORAH MEUWISSEN and the said DEBORAH MEUWISSEN and MICAHEL MEUWISSEN (Respondents/ Plaintiffs) – and – STRATHROY MIDDLESEX GENERAL HOSPITAL and GARY PERKIN (Appellant/Defendant)**

BEFORE: **SHARPE, BLAIR and MACFARLAND JJ.A.**

COUNSEL: **Kirk F. Stevens and Dara M. Lambe for Gary Perkin**

Hans Engell for Strathoy Middlesex General Hospital

Donald Leschied and Stephen Marentette for Jacob Meuwissen et al

HEARD & RELEASED ORALLY: **December 18, 2006**

On appeal from the order of Justice Steven Rogin of the Superior Court of Justice dated January 11, 2006.

E N D O R S E M E N T

[1] Dr. Gary Perkin and the Strathroy Middlesex General Hospital appeal from the order of Rogin J. requiring the production of certain documents relating to an intended medical malpractice action.

[2] The motion for pre-action discovery was brought pursuant to rule 37.17. We are satisfied that the motion could not proceed under that rule as it is conceded that there was no urgency.

[3] We agree with the appellants that rule 30.04(5) does not contemplate an order for pre-action discovery. That rule is available to a "party" and accordingly, only applies where a proceeding has been commenced. See *T.D. Insurance v. Sivakumar* (2006), 80 O.R. (3d) 671 (C.A.). As the respondents had not commenced an action, they have no right to invoke rule 30.04(5).

[4] Similarly, rule 30.10 which provides for discovery against a non-party may be invoked only by a "party" which means that an action must have been commenced. Moreover, any form of production against the non-party must relate to a material issue which can only be determined by reference to the pleadings.

[5] English decisions according broader rights to pre-action discovery are based upon legislation and rules which find no equivalent in Ontario law.

[6] Pre-pleading, post-commencement of action production may be ordered in exceptional circumstances to enable a party to plead: see *Official Receiver of Hong Kong and Wing* (1986), 57 O.R. (2d) 216 (H.C.) at p. 219. However, in this case no action had been commenced and in any event, the respondents have not made out a case for such an exceptional order. They already have retained experts and there is no evidence that production is required for them to obtain an opinion.

[7] The motions judge did not find that pre-action production was required to enable the respondents to plead. Moreover, on this record, it would be impossible to make such a finding.

[8] There is no authority for the proposition cited by the motion judge in paragraph 5 of his reasons, namely, that "the intended plaintiffs in this case should be entitled at this time to disclosure of anything to which they would eventually be entitled." In our view, this proposition cannot be supported in law.

[9] The equitable remedy of a bill of discovery is preserved in Ontario law and does permit pre-action discovery in certain circumstances: see *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1 (C.A.). Properly conceived, the relief sought by the respondents should have been presented as an application for a *Straka* order. In any event, we are satisfied that with the information that the respondents have already obtained from the hospital and with the information obtained from the College of Physicians and Surgeons, they are in possession of ample information to formulate and plead their case and we see no basis for a *Straka* order. The order appealed from represents a significant departure from the ordinary procedure laid down by the rules of court relating to pleadings and discovery that is not required in the circumstances of this case.

[10] We agree with the appellants that the respondents were precluded by the *Regulated Health Professions Act 1991*, R.S.O. 1991 c. 18 s. 36(3) from adducing in evidence on the motion the report of the College of Physicians and Surgeons disposing of the complaint against Dr. Perkin and that accordingly, that portion of the evidence should be struck and removed from the court record.

[11] In view of our disposition of these issues, it is unnecessary for us to deal with the other issues raised by the appellants relating to privilege.

[12] For these reasons, the appeal is allowed and the order of motion judge is set aside. Costs to Dr. Perkin fixed at $10,000 and to the Strathroy Middlesex General Hospital fixed at $5,000, both figures inclusive of disbursement and GST.

"Robert J. Sharpe J.A."
"R.A. Blair J.A."
"J. MacFarland J.A."