

CITATION: Meady v. Greyhound Canada Transportation Corp., 2008 ONCA 468

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COURT OF APPEAL FOR ONTARIO

WINKLER C.J.O., ROSENBERG and FELDMAN JJ.A.

BETWEEN:

PAM MEADY, EVELYN SHEPHERD, CARRIE ANNE TAPAK,
DENNIS CROMARTY, THAYNE GILLIAT, FAYE EVANTS, SHELDON
CHRISTENSEN, a minor by his Litigation Guardian, CATHY DUCHARME,
ANTHONY CLOWES, TANYA CLOWES and BRIAN ELIZABETH CLOWES and
SHAUNA PAULINE CLOWES, minors by their Litigation Guardian, TANYA
CLOWES, BRIAN GORDON ADAMS, MICHAEL DAVID FLINN, JENNIFER
ESTERREICHER, JONATHAN THERIAULT, a minor by his Litigation Guardian
LYNE THERIAULT and LYNE THERIAULT

Plaintiffs (Appellants)

and

GREYHOUND CANADA TRANSPORTATION CORP., CONSTABLE COREY
PARRISH, CONSTABLE MARTIN SINGLETON, HER MAJESTY THE QUEEN IN
RIGHT OF ONTARIO, ALBERT ARNOLD DOLPH and SHAUN DAVIS

Defendants

and

DR. MARY ELLEN JAMES, GLENDA DABISZA and HEALTH PLUS REXALL
PHARMACY and HEALTH PLUS MEDICAL CLINIC

Third Parties (Respondent)

Christopher Hacio for the appellants

Matthew Sammon for the respondent, Dr. Mary Ellen James

Heard: January 17, 2008

On appeal from the order of Justice George P. Smith of the Superior Court of Justice, dated April 4, 2007, with reasons reported at [2007] O.J. No. 1850.

FELDMAN J.A.:

[1] This case, released concurrently with this court's decision in *Joseph v. Paramount Canada's Wonderland*, deals with the application of the special circumstances doctrine under the transition provisions of the new *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (the "new Act").

BACKGROUND

[2] The appellant plaintiffs were injured in a bus collision that occurred on December 23, 2000. The plaintiffs alleged that the collision was caused by the defendant, Shaun Davis, who seized the steering wheel of the bus while it was moving, causing it to crash. The plaintiffs commenced separate actions against Davis, Greyhound Canada Transportation Corp., Her Majesty the Queen in Right of Ontario (the "Crown"), and others in June 2001.

[3] Prior to the expiry of the two-year limitation period then prescribed by s. 206 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, the defendant Crown added the respondent, Dr. James, as a third party to the action. The Crown alleged that Dr. James was negligent in failing to provide proper medical care for Davis and in failing to advise him of the proper dosage and side effects of certain medication prescribed to him, which the Crown alleged caused or contributed to his actions causing the accident. All actions, including the third party claims, were ordered consolidated in December 2004.

[4] The relevant limitation period expired on December 23, 2002. In October 2006, the plaintiffs sought to add Dr. James as a party defendant to the action. Dr. James opposed the motion on two grounds: (1) that s. 21(1) of the new Act applied and its effect was to preclude the addition of a claim against a new party to an existing action after the expiry of the limitation period; and (2) that if s. 21(1) did not apply or did not have that effect, there were no special circumstances that would warrant adding Dr. James as a defendant, even though she was already a party to the action as a third party.

[5] The motion judge decided the motion on both grounds. He found that s 21(1) of the new Act applied and that it precluded the addition of Dr. James as a defendant. Section 21(1) states:

21(1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.

[6] The motion judge also found that if s. 21(1) did not apply, there were no special circumstances that would cause him to exercise his discretion to add Dr. James as a defendant after the expiry of the limitation period.

ISSUES

[7] The following issues are raised on the appeal:

- (1) What provisions of the new Act apply in the circumstances of this case?
- (2) Can the court continue to consider whether an extension of the limitation period can be granted based on the common law doctrine of special circumstances under s. 24, the transition provision of the new Act?
- (3) If so, is there any basis to interfere with the motion judge's decision that there were no special circumstances in this case?

ANALYSIS

(1) Which provisions of the new Act apply?

[8] The events that gave rise to the claims in this case occurred in December 2000. The plaintiffs commenced an action against a number of defendants within the applicable two-year limitation period under the *Highway Traffic Act*. On January 1, 2004, the new Act came into effect. The plaintiffs brought their motion to add Dr. James as a defendant in October 2006. Because the relevant events occurred before January 1, 2004 but the motion was brought after, the court must determine which provisions of the new Act apply.

[9] The new Act contains transition provisions in s. 24 that deal with the application of the new Act to claims based on acts or omissions that took place before the new Act came into effect, but in respect of which no proceeding was commenced before January 1, 2004. Subsections 24(2) and (3) provide:

24(2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.

24(3) If the former limitation period expired before the effective date, no proceeding shall be commenced in respect of the claim.

[10] In this case, the relevant events took place long before the new Act came into effect and, while the plaintiffs commenced a proceeding before the effective date, it was not a proceeding in respect of a claim against Dr. James. In order to determine whether s. 24 applies, it must first be determined what constitutes a “claim” and a “proceeding”.

[11] The term “claim” is defined in s. 1 of the new Act as “a claim to remedy an injury, loss or damage that occurred as a result of an act or omission”. This definition focuses on particular acts or omissions, even if more than one act or omission by more than one party contributed to the same injury. The term “proceeding” is not defined in the new Act. However, it is defined in rule 1.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as “an action or application”. Thus, the words “claims ... in respect of which no proceeding has been commenced” in s. 24(2) refer to claims resulting from particular acts or omissions by a particular party for which no court action has been commenced. This interpretation has been applied in several decisions of the Superior Court of Justice, including *Pallotta v. Marks*, [2005] O.J. No. 2963 (S.C.J.), in which Hoy J. noted at para. 23 that it would be inconsistent with the scheme of the new Act “for ‘proceeding’ in section 24(2) to be interpreted without reference to the person against whom the proceeding is made”. Accordingly, although the plaintiffs commenced a proceeding within the limitation period against certain defendants in respect of their acts or omissions, no proceeding was commenced by the plaintiffs in respect of the acts or omissions of Dr. James. Consequently, the transition provision, s. 24 of the new Act, applies.

[12] The motion judge applied s. 21(1) of the new Act. However, that section only applies to claims based on acts or omissions that occurred after January 1, 2004, the effective date of the new Act. It does not apply to claims governed by the transition provisions in s. 24.

[13] Section 24(3) is the relevant section in this case. It states that where the former limitation period expired before January 1, 2004, “no proceeding shall be commenced in respect of the claim.” As discussed above, because a claim relates to a specific act or omission of a particular party, this transition section has a similar effect to s. 21(1) by precluding the addition of a claim based on the act or omission of a new party after the limitation period has expired. In this case, the former two-year limitation period under the *Highway Traffic Act* expired before January 1, 2004. Thus, no proceeding could be commenced in respect of the plaintiffs’ claim against Dr. James by virtue of s. 24(3).

(2) Does the special circumstances doctrine apply?

[14] The next issue is whether the court retains discretion under the transition provision of the new Act to extend the former limitation period by applying the common law special circumstances doctrine to permit a claim to be brought after the expiry of the former limitation period.

[15] In *Joseph*, this court held that the common law doctrine of special circumstances cannot be used to extend the limitation period under the general, non-transition provisions of the new Act. The court concluded at para. 25 that if these provisions:

... were interpreted to include the extension of limitation periods generally by the common law doctrine of special circumstances under the Rules, the effect would be contrary to the purpose of the new Act by removing the certainty of its limitation scheme.

[16] This analysis was based on the conclusion that the new Act is intended to provide a comprehensive limitations scheme. Section 4 establishes a basic two-year limitation period from the date a claim is discovered, “[u]nless this Act provides otherwise”. A court is therefore required to find any exceptions to that basic limitation period elsewhere in the new Act. For example, s. 20 is an exception that provides:

20. This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

[17] In *Joseph*, this court held that s. 20, which refers to statutory extension provisions, does not extend to common law extension provisions such as the common law doctrine of special circumstances.

[18] The transition provision provides another such exception by defining how limitations are to be treated in transitional circumstances that bridge the former limitations regime and the new Act.

[19] Section 24(3) is definitive and makes no reference to an extension of the limitation period based on special circumstances. However, it refers to the former limitation period, not the new one. As noted in *Joseph*, the former limitation period was interpreted and applied in accordance with the common law developed in *Basarsky v. Quinlan*, [1972] S.C.R. 380, and under rule 5.04(2) of the *Rules of Civil Procedure* to allow the court to add a party to an action after the expiry of a limitation period where special circumstances existed and where there was no non-compensable prejudice to the

defendant: see e.g. *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (C.A.).

[20] It is clear that a potential extension was available under the former limitation period if special circumstances were found to exist. The court's discretion to extend the period derived from the common law, as interpreted in conjunction with rule 5.04(2), rather than from any statutory provision. In this court's recent decision in *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, 2008 ONCA 320, Juriansz J.A. held that where the former limitation period preserved by s. 24(3) contained a statutory discretionary extension provision that was specifically repealed by s. 25 of the new Act, the repeal of the discretionary extension meant that it was not available to be used when applying the former limitation period under s. 24.

[21] This can be contrasted with the situation in *Guillemette v. Doucette* (2007), 88 O.R. (3d) 90 (C.A.), which dealt with the applicability of the limitation provision contained in s. 4 of the *Solicitors Act*, R.S.O. 1990, c. S.15. That section contained both a 12-month limitation period and a specific discretion for the court to extend the period under "special circumstances". The limitation portion of s. 4 was repealed by the general operation of s. 19 of the new Act, but the discretion to extend the limitation period was not repealed and remained effective under s. 20 of the new Act. The court held that if the transition section applied, the unrepealed statutory extension provision remained available under s. 24 to extend the former limitation period where appropriate.

[22] This case is more similar to *Guillemette* in that the common law doctrine of special circumstances was not repealed by the new Act. Therefore, it continues to form part of the former limitation period. As in *Guillemette*, by incorporating the former limitation period, s. 24(3) includes all aspects of that period that were not repealed by the new Act, including the ability to extend the limitation period if there are special circumstances for doing so. This interpretation is consistent with Weiler J.A.'s comment in *York Condominium Corp. No. 382 v. Jay-M Holdings Ltd.* (2007), 84 O.R. (3d) 414 at para. 39 (C.A.), that although the transition provision "may be regarded as generous, it is part of the [new] Act's attempt to ensure that, with respect to pre-existing situations, access to justice be preserved".

[23] In my view, such an interpretation is also consistent with the comprehensive nature of the new Act. Section 24(3) "provides otherwise" within the meaning of s. 4 by making the former limitation period applicable to some claims otherwise governed by the new Act. There is no basis to conclude that in causing the former limitation period to apply, the legislature did not intend to include all aspects of the operation of that period, including extensions based on special circumstances. In that way, the transition provision differs from the general provisions of the new Act, which do not incorporate the former limitation period or the common law extension that was previously available.

[24] For these reasons, I conclude that the court can continue to apply the common law special circumstances doctrine, where appropriate, to extend a former limitation period when the transition provision, s. 24 of the new Act, applies.

(3) Were there special circumstances in this case?

[25] The motion judge considered whether there were special circumstances in this case that would allow him to extend the former limitation period to permit the plaintiffs to add a claim against Dr. James to the existing proceeding. He concluded that there were no such circumstances in this case. He found that the plaintiffs and their counsel made a deliberate decision before the expiry of the limitation period not to include Dr. James as a party defendant. This was a considered decision based on legal and practical factors. The motion judge observed that the plaintiffs and their counsel had changed their minds about suing Dr. James, but had not explained the reason for the change. He concluded that such a change of mind does not amount to special circumstances, even if there was no non-compensable prejudice to Dr. James.

[26] I see no basis to interfere with the motion judge's decision that there are no special circumstances in this case warranting an extension of the limitation period. As that decision is discretionary, this court will not interfere where the judge considered all the relevant factors and made no error of law or of perception of the facts.

CONCLUSION

[27] Therefore, while the motion judge erred in applying s. 21(1) of the new Act, and in holding that the transition provision did not apply in this case, his conclusion that the proceeding was barred was ultimately correct. Under s. 24(3), *prima facie* no claim could be brought against Dr. James after January 1, 2004. The former limitation period could only be extended based on special circumstances. The motion judge concluded that there were no special circumstances in this case and there is no basis to interfere with that conclusion.

[28] For these reasons, I would dismiss the appeal with costs fixed at \$7,000, inclusive of G.S.T. and disbursements.

Signed: “K. Feldman J.A.”
 “I agree Winkler C.J.O.”
 “I agree M. Rosenberg J.A.”

RELEASED: "MR" June 12, 2008