CITATION: Scalabrini v. Khan, 2019 ONSC 5509
COURT FILE NO.: CV-14-511485
DATE: 20190924

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FABIO SCALABRINI AND CINZIA SCALABRINI, Plaintiffs/Respondents on Appeal

AND:

MAFIZUL KHAN, PARVEEN AKTHER and
APOLLO FLEET MANAGEMENT SERVICES INC. Defendants/Appellants on Appeal

BEFORE: Kimmel J.

COUNSEL: *Daniel Klein*, for the Plaintiffs/Respondents

Sean McGarry, for the Defendants/Appellants

HEARD: September 18, 2019

ENDORSEMENT AND REASONS FOR DECISION (APPEAL FROM MASTER'S DECISION)

[1] The defendants appeal from Master Short's order of April 10, 2019, that granted leave to add the plaintiff's wife, Cinzia Scalabrini ("Cinzia"), as a plaintiff and to amend the statement of claim to add claims by Cinzia against the defendants for general and special damages pursuant to s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("FLA"). The statement of claim was issued on September 4, 2014. The action had been listed for trial in June of 2019 before this motion was brought, after which the trial was adjourned on consent to June of 2020.

[2] The defendants opposed the leave motion on the same two primary grounds upon which they argued their appeal to set aside the master's order, namely that:

a. Cinzia's FLA claims are statute barred under s. 5 of the *Limitations Act, 2002*, S.O. 2002, c. 24, leave having been sought to bring them in a notice of motion dated November 20, 2018, in respect of a motor vehicle accident that occurred more than four years earlier on June 12, 2014, in the absence of a reasonable explanation on proper evidence upon which the court could determine that Cinzia's discovery of these claims could have been delayed until within two years of when she brought her motion seeking leave to assert them (the "Limitation Ground"); and

b. Cinzia's claims for medical injuries she suffered as a result of the mold problem in the Scalabrini's house are too remote and not actionable as a matter of law under s. 61 of the FLA (or at all) as against the defendants who are the alleged driver/owners of the motor vehicle involved in the collision with the plaintiff's vehicle on June 12, 2014 (the "Tort Ground").

[3] The defendants contend that the master made errors in law in respect of both grounds that entitle me to hear and decide this appeal *de novo*:

a. On the Limitation Ground, the errors in law are said to arise from the master's failure to "assess the record to determine whether, as a question of fact, there is a reasonable explanation on proper evidence as to why [Cinzia] could not have discovered the claim through the exercise of reasonable diligence" to inform the discoverability analysis (*Arcari v. Dawson*, 2016 ONCA 715, 134 O.R. (3d) 36, at para. 10), in the absence of which the presumption of discoverability under s. 5(2) of the *Limitations Act* should have prevailed to bar her claims as a matter of law; and

b. On the Tort Ground, the error in law is said to arise from the master's failure to address this ground in his reasons at all, having regard to the functional purpose of reasons which the Court of Appeal has indicated are necessary to allow for meaningful appellate review. See *Diamond Auto Collision Inc. v. The Economical Insurance Group*, 2007 ONCA 487, 227 O.A.C. 51, at paras. 11-12.

[4] The absence of any reference in the master's reasons to the Tort Ground (at all), and in connection with the Limitation Ground, to any indication that he assessed the record for any reasonable and proper evidentiary support for the date of discoverability coming within two years of when the plaintiff brought her motion, I agree that the proper standard of review of the master's decision is one of correctness. See *Zeitoun v. Economical Insurance Group*, (2008) 236 O.A.C. 76, at paras. 40-42

[5] On the discoverability issue, the defendants also contend that the master made a further reversable palpable and overriding error by misapprehending the evidence if his decision is to be read as "inferring" that the first date upon which Cinzia actually or ought reasonably to have discovered her claims was within two years of when she sought leave to assert them.

[6] Having considered both grounds of appeal, the submissions of the parties, and the record below, the appeal is dismissed for the reasons that follow.

The Limitation Ground of Appeal

[7] The appellants rely on the Court of Appeal's decision in *Morrison v. Barzo*, 2018 ONCA 979, 144 O.R. (3d) 600, at para. 3, dealing with a motion to add defendants in a medical malpractice action:

> Briefly, in my view the motion judge applied the wrong test in dismissing the motion. First, she did not make findings of fact as to when the appellants knew of the matters listed in s. 5(1)(a) of the Limitations Act, 2002, S.O. 2002, c. 24 Sch. B (the "Limitations Act") in relation to their claims against the respondents, or under s. 5(1)(b) as to when they ought reasonably to have known of such matters. She was required to make these findings on the evidentiary record before concluding that that the appellants' claim against the respondents had been "discovered" more than two years before the motion was brought and that the limitation period had already expired against the respondents.

[8] The respondents argued that the test in *Morrison* is not applicable to a case such as this one where it is a plaintiff rather than defendant for whom leave is sought to be added. I see no basis for applying a different limitations test for leave to add a plaintiff than for leave to add a defendant. However, I do see a difference in the required findings and proof that would be needed to support a decision to deny leave to add a plaintiff (or defendant) on limitation grounds than would be needed to grant leave in the face of a limitations argument. If the master in this case had decided that Cinzia's claims were statute barred and could not proceed, the Court of Appeal's directive in *Morrison* that there be a finding that her claims had been discovered more than two years before the motion was brought makes sense because that decision would put an end to her claims.

[9] However, the opposite finding (that the claims had been discovered within two years before the motion was brought) is not necessary to support a decision to allow her claims to proceed to an adjudication on their merits. In deciding not to dismiss the motion for leave to add Cinzia, the master in this case properly directed himself to the test in the case of *Conflitti v. Dhaliwal*, 2010 ONSC 3218, 98 R.F.L. (6th) 167, at para. 19, as follows:

> In summary, the motions judge or master must examine the evidentiary record before it is determined if there is an issue of fact or of credibility on the discoverability issue. If the court determines that there is such an issue, the plaintiff should be added with leave to the defendants to plead a limitations defence. If there is no such issue, as for example where the evidence before the motions court clearly indicates that the essential facts that make up the cause of action against the defendants were actually known to the proposed plaintiff or her solicitor within two years of the date of the accident, the motion should be refused. (*Aguonie, supra*). [Emphasis added.]

[10] The *Conflitti* case draws the distinction of the different assessments required to support a decision to deny as opposed to grant leave to amend. If a clear finding of fact can be made that the claim was not brought in time, then the motion is refused. Conversely, where the record raises an issue about when the claim was discovered, the motion is allowed and the discoverability issue goes to trial.

[11] In this case, the master referred in passing to the admittedly sparse evidence in the record but focussed on the example provided in *Conflitti* of whether there was evidence that clearly indicated actual knowledge outside of the limitation period. His assessment of the record appears to have been focussed on this question and supports his conclusion that this was not such a case

(of clear evidence of actual knowledge outside of the limitation period). This is evident from paragraphs 27 and 28 of his reasons.

[12] However, where there is no clear evidentiary basis for dismissing the motion, the test in *Conflitti* still requires an assessment of the evidentiary record and a determination of whether issues of fact or credibility exist on the discoverability question before leave will be granted. I agree with the submission of the appellants that, because s. 5 of the *Limitations Act* presumptively assumes that the claim is out of time if brought more than two years after the accident, there is an evidentiary burden on the plaintiff to put in some evidence to at least raise a question of fact or credibility that its discovery was delayed until within two years of bringing the motion.

[13] This evidentiary burden ties into the Court of Appeal's discoverability test from the *Arcari* case, which requires an assessment of the record to determine whether there was "a reasonable explanation on proper evidence as to why she could not have discovered the claim through the exercise of reasonable diligence" in addition to the identification of some issue of fact or credibility that would merit further consideration before leave to amend will be granted.

[14] The appellants contend that a proper examination of the record by the master in this case would have disclosed that even this low evidentiary burden was not met by the respondents. While the master does say that he reviewed the record and noted that it was admittedly sparse (at para. 28 of his reasons), there is no indication in the master's reasons of any assessment of the sufficiency of the evidence or the explanation provided to satisfy this aspect of the test.

[15] The appellants argued that the record disclosed two possible ways in which Cinzia's discovery of her claims might have been delayed and they contend that neither are supported by sufficient evidence. The first possibility is that Cinzia did not become aware of the mold until some later date. The second is that she did not become aware of the effects of the mold on her (her medical symptoms) until some later date. The master focussed on the second – the timing of Cinzia's discovery of her symptoms. I too will focus on this second possibility because the existence of the mold on its own would not meet all of the discoverability requirements under s.5(1)(a) of the *Limitations Act*.

[16] The appellants argue that the absence of any reference in the master's reasons to the consideration of whether the record discloses a reasonable explanation on proper evidence of Cinzia's delayed discovery of any symptoms from the mold, and specifically whether it discloses a possible discoverability date that is within two years of when she brought her motion, amounts to an error in law for his failure to apply the complete and correct test. On this basis, the appellants have invited me to consider the record and the issue *de novo*.

[17] The master adopted and relied in his reasons (at paras. 12 and 13) upon a statement in an affidavit from plaintiff's counsel in which she said that: "It was not until the proposed Plaintiff began to experience health concerns on account of the mold growing in her house, that the full extent of her own injuries became apparent, as well as the extent of her expenses incurred for the benefit of her husband, housekeeping services performed in place of her husband, and losses in care, guidance and companionship became apparent." I have also considered other statements made by the plaintiff's lawyer, that:

a. [t]his [assertion that it was only after Cinzia began to experience health concerns that the full extent of her injuries, expenses, and losses became known] was conveyed to the Defendants' Lawyer at the Plaintiff's Continued Examination for Discovery on May 29, 2018 (at para. 9 of her affidavit);

b. A mold inspection was ordered to be conducted at the Scalabrini's home on or about October 1, 2018, on account of the emergence of their health concerns (at para. 6 of her affidavit);

c. The full extent of the FLA claim of the proposed Plaintiff could not be identified until the mold in the house had been discovered on or before October 1, 2018 (at para. 11 of her affidavit);

d. I do verily believe that only through reasonable diligence and the passing of time, could Scalabrini and Cinzia discover the new information regarding Cinzia's claim. At the time of the issuance of the Statement of Claim, Cinzia could not have known the extent and severity that Scalabrini's injuries and impairments would affect her (at para. 8 of her supplementary affidavit).

[18] The appellants argue that the evidence does not come from Cinzia or purport to be based on information from Cinzia and it is thus not proper evidence. I disagree. The lawyer's affidavits can be fairly read on the basis that the information about Cinzia's claims did come from her. I was not advised of any impediment that was put in the way of the appellants examining Cinzia on the motion if they had wanted to. Aside from this procedural point, the appellants argue that the affidavits do not address the critical question of when Cinzia began to experience the health concerns attributed to the mold growing in her house, which is said to account for the delayed discovery of her FLA claims.

[19] Master Short concluded at paragraph 37 of his reasons as follows:

> I am satisfied that there is a reasonable possibility that the Proposed Plaintiff could not have known the full extent and severity that her husband's injuries would have upon her. It was not until the Proposed Plaintiff began to experience health concerns on account of the mold growing in her house, that the full extent of her own injuries became apparent, as well as the extent of her expenses incurred for the benefit of the Plaintiff, housekeeping services performed in place of the Plaintiff, and losses in care, guidance and companionship became apparent.

[20] The master refers in his reasons to various cases in the FLA claims context that address the discoverability question in motor vehicle cases where *Insurance Act* deductibles and/or thresholds are relevant to the consideration of one of the elements of s. 5(1)(a)(iii) discoverability, namely whether an FLA claim is an appropriate means of seeking a remedy, having regard to the nature and extent of the injury, loss, or damages. See e.g. *Wilson v. Arseneau*, 2012 ONSC 2879, 111 O.R. (3d) 56. These cases suggest that, until the full extent of the injuries and effects are known, the FLA claims may not be significant enough to pursue. The master found support in this and various other cases in this area for his conclusion that the discoverability of the FLA claims should go to trial (at paras. 25-36 of his reasons).

[21] The master's reasons and the evidence and case law that he relies upon support a conclusion of delayed discoverability, but do not address the timing of it. The plaintiff's lawyer's affidavits establish that at some point before October 1, 2018, the nature and extent of the effects of the mold and Cinzia's claim was discovered. That is not controversial – but the appellants argue that the affidavits do not address the key point of when and how this discovery came about and whether it occurred within the two years before Cinzia brought her motion.

[22] While not expressly stated, in my view, the evidence of the plaintiff's lawyer supports the reasonable inference that it is possible that this delayed discovery of Cinzia's symptoms, and the full extent of the mold problem upon which her s. 61 FLA claims are predicated, occurred sometime in 2018, which is well within two years of when Cinzia's motion was brought. As well, while the evidence is sparse, I am satisfied that it is proper and does provide a reasonable explanation for why the claim was not discovered earlier.

[23] The appellants argued that, if the master was presumed to have drawn this inference that I have drawn in the face of the contrary discovery evidence from the plaintiff that they filed on the motion, that would constitute a palpable and overriding error. I disagree. In my view, the relevance of the plaintiff's contrary discovery evidence in the context of this motion is to provide a basis for the motions judge or master to determine that there is an issue of fact or of credibility on the discoverability issue. Based on the test established in *Conflitti* (at para. 19), "[i]f the court determines that there is such an issue, the plaintiff should be added with leave to the defendants to plead a limitations defence". That is what I understand Master Short's order to have intended. To be clear, and although there is no express reference in his order of April 10, 2019, for leave to the defendants to file an amended defence and to raise a limitations defence, I am so ordering on this appeal.

The Tort Ground of Appeal

[24] The Tort Ground of appeal raises what is in essence a question of law about whether Cinzia's claims for medical injuries she suffered as a result of the mold problem in the Scalabrini's house are actionable under s. 61 of the FLA (or at all) as against the defendants who are the alleged driver/owners of the motor vehicle involved in the collision with the plaintiff's vehicle on June 12, 2014.

[25] The Tort Ground of appeal is primarily associated with the allegation in paragraph 16.1 of the Amended Statement of Claim that: "As well Cinzia has suffered medically as a result of the mold problem that arose in the house as a result of Scalabrini's injuries and impairments" and her claim in paragraph 1.1 for both special and general damages under the FLA.

[26] On a plain reading of the Amended Statement of Claim however, Cinzia's s. 61 FLA claims are not limited to this tort claim for medical injuries. I note this because Cinzia's s. 61 FLA claims are not all part of the Tort Ground of Appeal. Although there are no particulars, she does claim at paragraph 16.1 what can be described as traditional FLA claims for the loss of the benefit of "support, care, service, comfort, guidance and companionship that would normally be provided by Scalabrini, ...loss of services and a financial loss as a result of the Collision...[and she] advances a claim for her damages for her loss of this past and future support, care, comfort, guidance and companionship, loss of services and financial losses, pursuant to s. 61 of the [FLA]."

[27] How those more traditional FLA claims will be linked up to her plea at paragraph 9.1 about the alleged physical and financial incapacity of Fabio and/or Cinzia Scalabrini to fix the mold problem (which is what she attributes all of her late-discovered FLA claims to) will be a matter for the plaintiffs to establish at trial. I do not pass any judgment on the likelihood of those claims overcoming the limitations defence or otherwise succeeding, but merely note that they have been pleaded and will no doubt be subject to challenge and all available defences raised by the appellants at trial.

[28] I turn now to the less traditional FLA tort claim for Cinzia's own medical injuries she is alleged to have suffered as a result of the mold problem in the Scalabrini home. In the absence of any reasons from the master, the standard of review for the Tort Ground of appeal is correctness which in this case, where it was not addressed at all in the court below, must be viewed at the highest level of the correctness of the outcome of the master's decision which was to grant leave. Both counsel agreed that the test that applies to this Tort Ground, namely whether Cinzia's claims for medical injuries she suffered as a result of the mold problem in the Scalabrini's house are actionable under s. 61 of the FLA (or at all), is the same test as applied on a Rule 21.01(1)(b) motion to strike a statement of claim on the ground that it discloses no reasonable cause of action. The threshold is established to be very low for this: whether the claim has no reasonable prospect of success. Motions to strike are approached generously and err on the side of allowing novel but arguable claims to proceed to trial.

[29] In reflecting upon the arguments after the hearing I have some trepidation about this Tort Ground and whether it was properly before the master in the first place. On the one hand, if the argument is really one of whether the proposed amended pleading discloses a cause of action, that is an issue that Rule 21 requires a judge to decide. While that does not excuse the absence of any reasons from the master on this point which was very clearly raised and argued before him, it may provide an after-the-fact validation of his failure to deal with this issue. On the other hand, the parties have now spent the time and money to argue this issue twice, so I am going to deal with it in keeping with the principles of Rule 1.04. This procedural irregularity (of whether the point could have been decided by the master) does not have any impact on how I have approached my analysis of this Tort Ground of appeal, particularly since I am unencumbered by any reasons and the standard of review is correctness which enables me to approach it *de novo*.

[30] Section 61 of the FLA establishes certain categories of persons (family members of the person injured or killed by the fault or neglect of a defendant) who are entitled to recover their own pecuniary losses resulting from that injury or death. It provides a non-exhaustive list of examples of damages that might be recoverable, most of which are for recovery of expenses or lost income but one of which allows for compensation for loss of guidance, care, and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred. In the latter respect I think it is fair to say that typically these are based on the family member being deprived of the opportunity to enjoy the relationship with the person injured or killed and to enjoy and any advantages and support that had been previously associated with that relationship.

[31] There are many cases decided under s. 61 of the FLA and I have not been provided with a survey of them that would allow me to make any broad sweeping generalizations about what was, or was not, intended to be covered by it. On a plain reading of the words of this section of the FLA,

I am not able to say that a tort claim for a subsequent medical condition suffered by an FLA claimant said to be due to the incapacity of the main plaintiff is clearly foreclosed.

[32] Neither party could find a case on point, as to whether a tort claim for a subsequent medical condition suffered by an FLA claimant due to the incapacity of the main plaintiff, is actionable. The appellants rely on general arguments of foreseeability in the context of causation to support their argument that this claim by Cinzia for her own medical injuries due to the mold in the Scalabrini's house is too remote. On this question of causation, the appellants point to the Supreme Court of Canada's decision in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at paras. 11-13, and the remoteness inquiry that asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (quoting from Allen M. Linden & Bruce Feldhusen, *Canadian Tort Law*, 8th ed (Markham, Ont: LexisNexis Butterworths, 2006), at p. 360).

[33] The appellants also rely on the case of *Ray v. Bates*, 2015 BCCA 216, 77 B.C.L.R. (5th) 64 (at para. 12) for the point that "the chain of causation will be broken where an independent voluntary human action intervenes between the negligent act and the injury." They contend that even if it might have been foreseeable that an ongoing roof repair project of Mr. Scalabrini's might have to be completed by someone else at some cost if his injuries prevented him from completing that project, the Scalabrini's failure to make any timely arrangements for this work to be done with the result that rain was able to get inside their house and cause mold is an independent act that breaks the chain of causation with the defendants, and that any loss, damage, and injury flowing from the leak and the Scalabrini's failure to repair the roof in a timely way could not have been reasonably foreseeable.

[34] These arguments of foreseeability and causation raise interesting considerations. However, given that these claims arise under a statutory scheme that does not expressly address the question of foreseeability, I am not prepared to say definitively that it is relevant to a s. 61 FLA claim or that its absence would be determinative of that claim. Furthermore, foreseeability, while objectively determined, is a question of fact. It is not appropriate for me to decide it on a pleadings motion.

[35] At this stage, in the absence of any clear authority on point and in the face of the broad and permissive wording of s. 61 of the FLA, I am not prepared to find that this claim has no reasonable prospect of success. In keeping with the philosophy that motions to strike are approached generously and that we should err on the side of allowing novel but arguable claims to proceed to trial, I find that this is such a claim and should be allowed to proceed to trial.

Disposition and Costs

[36] Having concluded that the master's decision to grant leave to amend the statement of claim to add Cinzia and her claims to the action was correct, the appeal is accordingly dismissed. The defendants are granted leave to file an amended statement of defence to the Amended Statement of Claim and to raise limitations defences as well as any other available defences that they have, of causation and foreseeability or otherwise. I did not receive submissions on the timing for the delivery of an amended statement of defence, but I was told that there are discovery dates being

held in November and I am mindful that there is a new trial date in 2020 so I am allowing 30 days for the amended statement of defence.

[37] At the conclusion of the hearing counsel each provided me with their cost outline. The appellants seek partial indemnity costs of $4,421.42 and the respondents seek partial indemnity costs of $2,041.10.

[38] The master granted the respondents who were successful below their partial indemnity costs of the motion in the amount of $3,200.00, all inclusive. I was told that the parties did not have an opportunity to make full costs submissions.

[39] I am mindful of the fact that ordinarily when a plaintiff seeks leave to amend a statement of claim after pleadings have closed, and (as in this case) after the matter had been set down for trial, it is not unusual for the plaintiffs to be ordered to pay costs to the defendants even if leave is granted, if not for the motion then at least for their costs of having to amend the defence and conduct further discoveries that will no doubt be less efficient than if the party added had been named from the outset.

[40] I recognize that the delayed discoverability question removes some of the "blame" from the plaintiffs for having to make amendments at this late date, but leave to amend is an indulgence that they have been afforded. Their proposed amended claims are not without complexities and were not put forward in the most straightforward manner (for example, requiring inferences to be made on the Limitations Ground and a parsing of the Amended Statement of Claim on the Tort Ground).

[41] In the exercise of my discretion under Rule 57.01 and s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c C.43, I am not awarding any costs of this appeal to the plaintiffs/respondents even though they were successful. I do not consider that the appellants would have reasonably expected, or should in fairness be required, to bear any more costs than they have already been ordered to pay on the motion below in connection with these late amendments to the statement of claim.

Kimmel J.

Date: September 24, 2019