CITATION: Hervieux v. Huronia Optical, 2015 ONSC 1810
BARRIE COURT FILE NO.: 14-0351
DATE: 20150319

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
DONALD HERVIEUX	)	
	)	M. Gibson, for the Appellant
Appellant	)	
	)	
– and –	)	
	)	
HURONIA OPTICAL, BEN PEZIK, and HURONIA EYE CLINIC	)	A. Kleinman, for the Respondent, Huronia Optical
	)	
Respondents	)	J. Arcuri, for the Respondent, Ben Pezik
	)	
	)	K. Boyd, for the Respondent, Huronia Eye Clinic
	)	
	)	
	)	
	)	**HEARD:** March 11, 2015

REASONS FOR DECISION

On appeal from the decision of Deputy Small Claims Court Judge V. Stabile dated February 21, 2014

MULLIGAN J.:

[1] The appellant, Donald Hervieux (Hervieux) appeals the decision of Deputy Judge Stabile, dismissing his claim against Huronia Optical, Ben Pezik, and Huronia Eye Clinic (the respondents). Hervieux began a Small Claims Court action claiming $25,000 in damages against the respondents, alleging negligent treatment leading to loss of vision in one eye. The parties attended two Settlement Conferences, and orders were made requiring Hervieux to provide expert reports within certain timelines. When he failed to do so, the respondents brought a motion seeking to have the action dismissed. The deputy judge dismissed the action on February 21, 2014, after a full hearing with respect to the issue of Mr. Hervieux's failure to deliver expert reports as required at the Settlement Conferences. The matter had not been set down for trial.

[2] Hervieux appeals the ruling dismissing his claim and seeks to have the matter returned to the Small Claims Court for a trial on the merits.

[3] The grounds for the appeal can be captured by reference to para. 8 of Hervieux's Factum:

> [8] The appellant [Hervieux] respectfully submits that the deputy judge erred in law by making findings on a pre-trial motion to strike regarding the sufficiency of the evidence for trial. In the alternative, the deputy judge erred in law by applying Rule 53 of the *Rules of Civil Procedure* to the evidence of treating physicians in Small Claims Court. The deputy judge compounded that error by effectively excluding the appellant's proposed expert evidence without conducting the analysis mandated by *R. v. Mohan.* In the result, the deputy judge erred in law by summarily dismissing a properly pleaded claim on a pre-trial motion to strike.

[4] The respondents opposed the relief sought, noting that Hervieux failed to produce the expert reports required of him by previous deputy judges at two Settlement Conferences. As the respondent stated at para. 4 of their Factum:

> In the absence of any expert evidence from the appellant, it was appropriate for Deputy Judge Stabile to infer that such evidence could not be obtained, and to dismiss the appellant's action as having no reasonable chance of success at trial.

Background

[5] A review of the background facts will provide context for the discussion that follows. Mr. Hervieux commenced his Small Claims Court action December 28, 2012. An initial Settlement Conference was held on March 1, 2013. The following order was made by the deputy judge at that hearing, "Proposed witness list and expert reports to be exchanged before May 31, 2013. All documents to be exchanged before May 31, 2013."

[6] A second Settlement Conference was held on May 31, 2013 before Deputy Judge Levison. One of the orders made at that conference was as follows, "Order for production of plaintiff's documents in this court extended to October 3, 2013, in the event the action is to proceed in this court."

[7] Mr. Hervieux attempted to set the matter down for trial on November 27, 2013, but was unable to do so administratively because he had not complied with the order of Deputy Judge Levison.

[8] In correspondence, the respondents continued to press Mr. Hervieux for the expert reports. On November 28, 2013, Mr. Hervieux wrote directly to the Small Claims Court, indicating:

> I will summons two optometrists, two ophthalmologists, and two other people from the health profession. ...I'm not certain whether a Settlement Conference would be the best form to select a trial

> date, as all parties will be able to agree at that time, or should I ask for a trial date from the Small Claims clerk?

[9] As noted, Mr. Hervieux was unable to set the matter down for trial administratively because he had not complied with the order of Justice Levison. He then wrote directly to the deputy judge, stating:

> However, I am advised that the simplest way to handle this claim is to subpoena the witnesses and experts that have examined my eye and who have treated me. Attached is my witness list and each will have a précis or statement once I have a secured trial date.

[10] The deputy judge responded to the Small Claims Court indicating:

> It would be appropriate that Mr. Hervieux re-attend after having obtained expert reports which he intends to rely on, and disclosing these to the other parties. ...If Mr. Hervieux intends to proceed in this court, it would be appropriate for him to make all disclosure as previously ordered and bring a motion to the court on notice to all parties to have it placed on the trial list.

[11] As a result of Mr. Hervieux's failure to provide the expert reports, the respondents brought a motion to dismiss the action pursuant to the provisions of Rule 12 of the *Small Claims Court Rules.*

[12] Rule 12.02(1) provides:

> The court may, on motion, strike out or amend all or part of any document that,
>
> (a) discloses no reasonable cause of action or defence;
> (b) may delay or make it difficult to have a fair trial; or
> (c) is inflammatory, a waste of time, a nuisance or an abuse of the court's process.
>
> (2) In connection with an order striking out or amending a document under subrule (1), the court may do one or more of the following:
>
> (i) in a case of a claim, order that the action be stayed or dismissed;
>
> ...
>
> (iii) impose such terms as are just.

[13] There are two other rules that require scrutiny with respect to this matter. Rule 1.03(1) provides:

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits in accordance with section 25 of the *Courts of Justice Act.*

[14] Rule 18 provides guidance about expert reports for purposes of trial. Rule 18.02(2) provides:

> A document or written statement or an audio or visual record that has been served, at least thirty days before the trial date, on all parties who were served with Notice of Trial, shall be received in evidence unless the trial judge orders otherwise.

[15] It is not seriously disputed that expert evidence is required in order to support a claim for medical malpractice or negligence, even in Small Claims Court proceedings. Rule 18 provides that a report of an expert must be served at least thirty days before the trial.

[16] In this case, the deputy judges accelerated that requirement by making a disclosure order and an extension of that order at Settlement Conferences. However, those orders did not make any provision for what would occur in the event of default.

[17] The respondents then brought a motion to strike, pursuant to Rule 12.02. In my view, the deputy judge treated the motion as a summary judgment motion and considered the lack of an expert report at this stage of the proceedings as fatal to the appellant's claim, dismissing the action.

[18] The Court of Appeal considered the availability of a summary judgment motion within the Small Claims Court in *Van de Vrande v. Butkowsky,* 2010 ONCA, 230. As Rouleau J.A. stated for the Court at para. 11:

> I do not view the failure to provide for summary judgment motions as a gap in the *Small Claims Court Rules,* but rather a deliberate omission.

As the Court continued at para. 19:

> Conceptually, I view Rule 12.02 as being situated somewhere between Rules 20 and 21 of the *Rules of Civil Procedure.* It is not a summary judgment motion involving extensive affidavits and a requirement such as contemplated in Rule 20 of the *Rules of Civil Procedure* where the responding party must put his "best foot forward". ... It is a motion that is brought in the spirit of the summary nature of Small Claims Court proceedings and involves an analysis of whether reasonable cause of action has been disclosed, or whether proceedings should be ended at an early stage because its continuation would be "inflammatory", a "waste of time", or a "nuisance".

[19] There is nothing in the appellant's Statement of Claim that could be considered inflammatory, a waste of time, or a nuisance. The pleadings are perfectly straightforward. The "waste of time" argument arises not in the pleadings, but in the failure to provide an expert report in accordance with the order and the extension at the Settlement Conferences.

[20] In my view, it was a denial of natural justice to have the appellant's claim dismissed upon a Rule 12.02 motion. Mr. Hervieux was self-represented. Although he did not provide an expert report in accordance with the order at the Settlement Conference, he did not abandon his action. He attempted to set the matter down for trial, but was unable to do so administratively. He attempted to contact the Small Claims Court judge and showed some recognition that Rule 18 of the *Small Claims Court Rules* ordinarily would allow a plaintiff to file an expert report thirty days before trial.

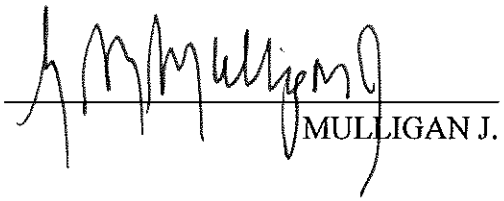
[21] In my view, the deputy Small Claims Court judge made an error of law and exceeded his jurisdiction in striking out the Statement of Claim pursuant to rule 12.02(1). The claim itself was not inflammatory, a waste of time, a nuisance, or an abuse of the court's process. Rather, it was the appellant's failure to produce an expert report, and by inference, his failure to put his best foot forward that led to the dismissal of the action. There were other tools available to the deputy Small Claims Court judge, such as giving the appellant a further opportunity to provide expert reports, including setting the matter down for trial, which would have established Rule 18 timelines upon the appellant.

Conclusion

[22] The appeal is granted. The matter is to be remitted back to the Small Claims Court for a hearing.

Costs

[23] The appellant has been successful upon this appeal. The parties are encouraged to settle the issue of costs. If costs are not settled, the appellant may make submissions on costs, not exceeding two pages, within twenty days of this endorsement. The respondents will then have a further ten days to reply.



MULLIGAN J.

Released: March 19, 2015