

CANADA / JUDGMENT

Beaulac v. Golden

2011 BCSC 719

COURT

Supreme Court of British Columbia

DECIDED

3 May 2011

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2011 BCSC 719 Beaulac v. Golden IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Beaulac v. Golden, 2011 BCSC 719 Date: 20110503 Docket: S092553 Registry: Vancouver Between: Jean Victor Beaulac Plaintiff And: Dr. Jonathon G. Golden, Dr. Edward W. Hillary, Dr. Luay F. Dindo, Dr. Robert D. Forsyth, Dr. Jane Doe, Fraser Health Authority as Operator of Surrey Memorial Hospital, Teresa Bregg, William Claase, Aman Grewal, Walter Lo, Kelly Rezansoff, Sindy Samra, Her Majesty The Queen In Right of the Province of British Columbia, Scott Redick, Andrew Billing, Harpreet (Harry) Dherari and Ambulance Attendants 4 & 5 Defendants Before: The Honourable Mr. Justice N. Smith Oral Reasons for Judgment In Chambers Counsel for Plaintiff: G.J. Collette Counsel for the Defendants Dr. Jonathon Golden, Dr. Edward W. Hillary, Dr. Luay F. Dindo, Dr. Robert D. Forsyth: K.J. Jakeman Counsel for the Defendant Fraser Health Authority as operator of Surrey Memorial Hospital, Teresa Bregg, William Claase, Aman Grewal, Walter Lo, Kelly Rezansoff and Sindy Samra: L.N. Bakan, QC K. Low Counsel for the Defendant Harpreet (Harry) Dherari: E.J.A. Stanger R.J. Harper Counsel for the Defendants Scott Reddick, Andrew Billing and Her Majesty the Queen In Right of the Province of British Columbia: Richard J. Meyer Counsel for the Proposed Defendant Dr. Leon Earl Tregobov: H.P. Swanson Place and Date of Hearing: Vancouver, B.C. April 21, 2011 Place and Date of Judgment: Vancouver, B.C. May 3, 2011

- [1] THE COURT: This is an application to add a new defendant, Dr. Tregobov, in a medical negligence action in which there are a number of existing defendants. The allegation is that the plaintiff was treated in hospital for back pain and discharged without a diagnosis of septic arthritis having been made.
- [2] Dr. Tregobov was the radiologist who interpreted a CT scan and stated in his report that the "the changes could be due to septic arthritis". He then recommended a further MRI scan. The plaintiff was allegedly discharged without that scan being done and it now appears that the existing defendant, Dr. Golden, is taking the position that he never saw Dr. Tregobov's report, that he spoke to Dr. Tregobov but was not told of Dr. Tregobov's opinion that septic arthritis was a possibility to be investigated.

- [3] The applicable Rule 6-2(7)(c) is that a party can be added if there is an issue to be tried and it is just and convenient that the party be added. A party may be added notwithstanding the expiry of a limitation period, and it is common ground that the applicable limitation period for Dr. Tregobov has expired.
- [4] The factors I must consider here were set out in *Letvad v. Fenwick*, 2000 BCCA 630. In *Letvad* at para. 28 the Court of Appeal quotes from its earlier decision in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.) wherein Mr. Justice Finch said that the discretion to permit amendments afforded by Rule 24(1) and section 4(4) of the Limitation Act was intended to be completely unfettered, subject only to general rule that all such discretion should be exercised judicially. At para. 29 of *Letvad* the Court said: My understanding of the phrase completely unfettered in this context is that the discretion is not fettered by the relevant legislation, i.e., the Rule and the Limitation Act. It is, however, fettered to the extent that, as was held in *Teal*, it must be exercised judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities. It was held in *Teal* that the guidelines to which the chambers judge is required to have regard include these: -the extent of the delay; -the reasons for the delay; -any explanation put forward to account for the delay; -the degree of prejudice caused by the delay; and -the extent of the connection, if any, between the existing claims and the proposed new cause of action.
- [5] Dealing with the last one first there can be no doubt about the connection between the existing claims and the proposed new cause of action. The extent of the delay is significant in that the time for commencing an action against Dr. Tregobov and serving a writ would have expired almost a year ago. The next two, the reasons for the delay and explanation put forward to account for the delay, are significant in this case. Counsel for Dr. Tregobov argues that Dr. Tregobov's involvement was obvious and known from the beginning of this action in that it was clear from the records that Dr. Tregobov had interpreted the CT scan report. However, it appears that on the face of that document it gave no basis for a claim against Dr. Tregobov because as the plaintiff pled the case Dr. Tregobov's differential diagnosis was correct in that it suggested the possibility of what turned out to be the correct diagnosis and suggested further investigations that other defendants failed to perform. It appears that the plaintiff became aware through a proposed agreed statement of facts presented by counsel for Dr. Golden that Dr. Golden was taking the position that his communication with Dr. Tregobov was verbal only and that he never saw the report.
- [6] I have to say I am somewhat troubled by the fact that it was only a few weeks before trial that counsel for the plaintiff conducted an examination for discovery of Dr. Golden and confirmed that was in fact his position, but I think that is a strategic decision of counsel that comes barely within in the acceptable range. The delay should not be a reason to prejudice the plaintiff in the way that the plaintiff would be prejudiced if this application was not allowed.

- [7] As for the degree of prejudice to the Defendants caused by the delay, prejudice is always presumed from delay, but I note there is no affidavit from Dr. Tregobov suggesting any specific prejudice relating to his inability to present evidence or anything of that nature.
- [8] In all the circumstances, this is an appropriate case to exercise the discretion to add a defendant. Counsel for Dr. Tregobov relies upon *Forde v. Interior Health Authority*, 2007 BCSC 1706 to suggest that the pleadings do not state a proper cause of action against Dr. Tregobov, or the proposed pleadings do not, and characterize them as the kind of boilerplate pleadings that were rejected in *Forde*. While the proposed pleadings are not perfect and probably will require some further amendment, I do not think they are as vague as the proposed pleadings were in the *Forde* case.
- [9] The proposed amendments, first of all, identify in para. 6 Dr. Tregobov as a medical doctor specializing in diagnostic radiology. And para. 18 alleges that an X-ray and CT scan report were read by Dr. Tregobov. And then under the legal basis in para. 3(b) the particulars of negligence include failing to properly or adequately read the radiological studies or reports and/or failing to recognize or communicate to the appropriate medical personnel the differential diagnosis of septic arthritis in Mr. Beaulac's cervical spine. In my view that is a sufficient pleading to advise Dr. Tregobov of the claim against him. It is one that may well be subject to a demand for further particulars, but it is not so deficient that it should prevent the addition of a defendant in circumstances where it is otherwise just and convenient and indeed essential for the matter to be properly and fully litigated.
- [10] So the application to add Dr. Tregobov is granted and it follows that the trial set for May 30th of this year, less than a month from now, must be adjourned. Counsel can seek a new date from the registry. (DISCUSSION RE ORDER) THE COURT: The order will be that you are at liberty to file an amended statement of claim that further particularizes the claim against Dr. Tregobov and of course it can always be subject to an application to strike it depending on what it says. "N. Smith J."

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