

CANADA / JUDGMENT

Holland v. Marshall

2009 BCCA 199

COURT

British Columbia Court of Appeal

DECIDED

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2009 BCCA 199 Holland v. Marshall COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Holland v. Marshall, 2009 BCCA 199 Date: 20090506 Docket: CA036649 Between: Jonathon David Holland, by his Custodial Parent and Guardian Ad Litem, Zsuzsanna Holland, and the said Zsuzsanna Holland Appellants (Plaintiffs) And Dr. Linda Maureen Marshall, Cariboo Memorial Hospital and Health Centre - Interior Health Authority, The College of Physicians and Surgeons of British Columbia, Dr. Glenn A. Fedor, Dr. Roger A.G. Hicks, Dr. Susanne Judy Bannerman, Dr. Paul R. Sobkin, Dr. Noel J. Donnelly and Dr. Albert S. Kelly Respondents (Defendants) Before: The Honourable Madam Justice D. Smith (In Chambers) Z. Holland Appearing In Person K. Douglas Counsel for the Respondent Physicians C. Wiseman On Behalf of the Law Society of British Columbia B. Mackey On Behalf of the Attorney General for British Columbia Place and Date of Hearing: Vancouver, British Columbia April 14, 2009 Place and Date of Judgment: Vancouver, British Columbia May 6, 2009 Reasons for Judgment of the Honourable Madam Justice D. Smith: Overview of Applications

- [1] The appellant, Jonathon David Holland, filed a Notice of Appeal from a November 3, 2008 order (the "Order"), that dismissed his motion for an adjournment of the respondents' application for a summary trial of his medical malpractice action, pursuant to R. 18A of the Rules of Court. On November 4, 2008, the respondents obtained an order pursuant to R. 18A that was dispositive of Mr. Holland's action. The respondents now apply for directions from this Court as to whether the appellant must secure leave to appeal the Order. If this Court determines that leave to appeal is required, the respondents submit that leave should be denied.
- [2] A second motion before the Court was brought by Ms. Holland, the appellant's mother, and Mr. Charles A. Bryfogle, the appellant's stepfather, seeking leave to appear as "agents and designated representatives" for the appellant, whom they claim is a legally disabled person. No court, however, has declared Mr. Holland to be under a legal disability; nor has any evidence been tendered to support that contention. The majority of the materials filed in support of Ms. Holland's and Mr. Bryfogle's application relate to their attempts to challenge the constitutionality of the various court orders refusing to permit Ms. Holland to act on behalf of her son. Factual Background

- [3] The appellant was born on April 18, 1987. The respondents were physicians overseeing his birth. When the appellant was 17, Ms. Holland brought an action on behalf of herself and the appellant, claiming damages based on injuries the appellant allegedly sustained during his birth. It was her position that those injuries were caused by the respondents' negligence and resulted in the appellant suffering from attention deficit disorder, attention deficit hyperactivity disorder, oppositional defiance disorder and brain damage.
- [4] Ms. Holland's personal claim in the action was dismissed as being statute barred: 2006 BCSC 1588. That order was upheld on appeal: 2008 BCCA 468. As a result of those orders, Ms. Holland was no longer a party to the action. Only the appellant's action remained unresolved.
- [5] The respondents applied to have his claim dismissed pursuant to R. 18A of the Rules of Court via the summary trial process. On November 3, 2008, the appellant sought an adjournment of the respondents' summary trial application. His application was dismissed.
- [6] The respondents' R. 18A application was heard on November 4, 2008. The appellant did not file any materials in response to the application. Nor did he attend the hearing. In the result, his action against the respondents was dismissed in oral reasons for judgment pronounced November 4, 2008 (4 November 2008), Penticton 26039 (S.C.).
- [7] The appellant filed a Notice of Appeal from the Order. The respondents submit that the Order falls within the definition of an interlocutory order as set out in s. 7(1)(b) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 and therefore Mr. Holland requires leave to appeal. The respondents further submit that if this Court finds that the Order is interlocutory, it should not grant leave to appeal as the Order was not "clearly wrong" and the issue is now moot given that the summary trial application has been determined. See *Borowski v. The Attorney General of Canada*, [1989] 1 S.C.R. 342. The Chambers Judge's Reasons for Judgment for the Order
- [8] On November 3, 2008, Madam Justice Ross heard Mr. Holland's motion to adjourn the respondents' summary trial application on the basis that he had not been able to retain legal counsel. She reviewed the relevant history of the litigation in paras. 2-14 of her reasons for judgment. A summary of that chronology is provided below.
- [9] In 2002, Ms. Holland retained a law firm to commence the action against the respondents. Counsel advised her that she would require an expert opinion with respect to the issues of standard of care and causation. No such opinion was obtained and counsel did not pursue the action on her behalf. It was not until January 7, 2005, that Ms. Holland personally filed the writ and statement of claim commencing the action. The action included a claim on behalf of herself and on behalf of the appellant. Shortly thereafter, counsel for the respondents advised Ms. Holland that they intended to have the action determined by way of summary trial.

- [10] In December 2006, the respondents filed their R. 18A summary trial application. In March 2007, the R. 18A application was adjourned in order to permit the appellant to retain counsel. The appellant never did retain counsel. What followed thereafter were numerous interlocutory proceedings and appeals of the orders from those proceedings relating to Ms. Holland's request to act as litigation guardian for the appellant.
- [11] After the appellant reached his age of majority, Ms. Holland attempted to continue to act as his litigation guardian. She claimed that he was legally disabled but provided no evidence to support that claim. Her application for an order to act as the appellant's guardian ad litem in the action was dismissed, with directions for the appellant to advance his claim on his own behalf or through counsel: 2008 BCSC 333. This Court denied Ms. Holland leave to appeal that order: 2008 BCCA 456. It also denied her application for an extension of time to vary the order denying her leave to appeal: (7January 2009), Vancouver CA35990.
- [12] Between March 2007 and October 2008, the respondents continued to press their intention to proceed with their R. 18A application. On November 3, 2008, the appellant had still not retained counsel and had not obtained an expert's report on the issues of standard of care and causation. In these circumstances, Ross J. declined to grant the appellant's application for a further adjournment finding that it would not be in the interests of justice to do so.
- Discussion
- [13] In the motion filed by Ms. Holland and Mr. Bryfogle, Ms. Holland describes herself as the appellant's "litigation guardian and agent". In spite of the above noted orders, Ms. Holland continues to maintain that the appellant is under a legal disability and that she must, therefore, act as his litigation guardian. In my view, that issue has been settled and Ms. Holland has no standing to speak on behalf of the appellant.
- [14] In the motion, Mr. Bryfogle describes himself as the appellant's "stepfather, agent and designated representative." However, Mr. Bryfogle is not a party to the action and, therefore, also lacks standing to appear on the appellant's behalf. More importantly, Mr. Bryfogle is subject to an injunction obtained by the Law Society for British Columbia on June 9, 2006, that prohibits and enjoins him "from commencing, prosecuting or defending a proceeding in any court in his own name or in the name of another, without leave of the court, other than in representing himself as an individual party to a proceedings, acting without counsel, solely on his own behalf": 2006 BCSC 1092 (Chambers), application to adduce new evidence and appeal dismissed at 2007 BCCA 511. As well, on April 2, 2007, in another proceeding, Mr. Bryfogle was declared a vexatious litigant and pursuant to s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443 and was ordered to obtain leave of the court before he could institute any legal proceeding in any court: 2007 BCSC 457.
- [15] However, Mr. Bryfogle is not prohibited from applying for leave to appear as Mr. Holland's agent. As he was not available to speak to his application, the motion was adjourned generally.

- [16] In regard to the respondents' application for directions as to whether leave to appeal the Order is required, it is readily apparent, in my view, that the Order is interlocutory in nature and, therefore, leave to appeal is required.
- [17] Section 7(1)(b) of the Court of Appeal Act defines an interlocutory order as including an order made under the Supreme Court Rules on a matter of practice or procedure. The granting of an adjournment is a matter of practice or procedure. It addresses the administrative timing of the trial of an action. If an order falls within s. 7(1)(b) definition of an interlocutory order, it is not necessary to decide whether it is final or interlocutory in effect, therefore, leave to appeal is required: 424376 B.C. Ltd. v. Jensen, 2003 BCCA 157 (Chambers).
- [18] Furthermore, under the common law test for determining whether leave to appeal is required, the Court must identify the true nature of the Order. In this case, the Order was incidental to the principle object of the action. It did not finally dispose of the substantive rights of the parties in the action. Therefore, the Order was clearly interlocutory, for which leave to appeal is required. See *Forest Glen Wood Products Ltd. v. British Columbia (Minister of Forests)*, 2008 BCCA 480, 85 B.C.L.R. (4th) 330, affirming *Hayes Forest Services Limited v. Weyerhaeuser Company Limited*, 2008 BCCA 120, 291 D.L.R. (4th) 49 at para. 50; *Peter Kiewit Sons Co. v. North Pacific Roadbuilders Ltd.*, 2006 BCCA 439 at para. 8; and *Le Soleil Hospitality Inc. v. Louie*, 2008 BCCA 293, 257 B.C.A.C. 299 at paras. 6 and 9.
- [19] The test governing whether leave to appeal should be granted is well settled. The party seeking leave to appeal must address the following four conditions: (i) whether the point on appeal is of significance generally; (ii) whether it is of significance to the action; (iii) whether the appeal is prima facie meritorious; and (iv) whether the appeal will unduly hinder the progress of the action: *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A. Chambers), *McLachlin J.A.* (as she then was). The overarching concern is the interests of justice: *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538, 72 B.C.L.R. (4th) 341 (*Saunders J.A. in Chambers*) at para. 2; *Vancouver (City) v. Zhang*, 2007 BCCA 280 (*Saunders J.A. in Chambers*) at para. 10.
- [20] The purpose of requiring leave to appeal is "to weed out cases that do not warrant the time and attention of the Court": *Barker v. Hayes*, 2007 BCCA 51, 64 B.C.L.R. (4th) 90 (*Smith J.A. in Chambers*) at para. 14. In my view, this proposed appeal falls into that category.
- [21] The management of a trial, including the granting or refusing of applications for adjournments, falls largely within the exercise of a trial judge's discretion. This Court will not lightly interfere with a trial judge's exercise of discretion in the case management of a trial, unless it is shown to be clearly wrong: *GEAC Canada Ltd. v. Prologic Computer Corp.*, [1989] B.C.J. No. 826 (C.A.).

- [22] A review of the chronology of the respondents' attempts to have their R. 18A determined in the face of the appellant's failure to take the necessary steps to advance his action, does not, in my view, raise any issue that would indicate the trial judge was "clearly wrong" in making the Order.
- [23] The appeal from the Order is now moot; "there is no longer a live controversy or concrete dispute" (Borowski at para. 15) as a final order has been granted in the action that disposes of the substantive rights of the parties. The appeal does not raise any issue of significance to the practice or to the action. It is frivolous in that it has no chance of success and therefore is without merit. In my view, the interests of justice do not support the appellant's application for leave to appeal.

Conclusion

- [24] In the result, there shall be an order that the appellant requires leave to appeal the Order, and a further order denying him leave to appeal the Order.
- [25] The application of Ms. Holland and Mr. Bryfogle to appear as "litigation guardian and agent" and "agent and designated representative", respectively, for the appellant is adjourned generally. "The Honourable Madam Justice D. Smith"

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