

CITATION: Silvestri v. Hardy, 2009 ONCA 400
DATE: 20090514
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COURT OF APPEAL FOR ONTARIO

Weiler, Gillese and Epstein JJ.A.

BETWEEN

Lucia Silvestri, Carlo Silvestri, and Alisa Silvestri and
Victoria Silvestri, minors under the age of 18 years, by their
Litigation Guardian, Lucia Silvestri

Plaintiffs (Appellants)

and

Robert Adelbert Hardy Jr., Alta Lift Truck Services Inc., John
Doe and Lombard Canada Ltd.

Defendants (Respondents)

Allan Rouben and Tara Sciara, for the appellants

Lorne Honickman, for the respondents, Robert Adelbert Hardy Jr. and Alta Lift Truck
Services Inc.

Heard: May 5, 2009

On appeal from the order of Justice Nick Borkovich of the Superior Court of Justice,
dated November 26, 2008.

By the Court:

The Issue

[1] In oral argument before us, the jurisdiction of the Ontario courts to try this claim was conceded. We refer to the appellants throughout as the plaintiffs and the respondents as the defendants. The issue before us is whether the motion judge erred in holding that Ontario was not the forum with the closest connection to the plaintiffs' action and in ordering that their action in Ontario be stayed in favour of Michigan.

Facts

[2] On May 23, 2007, the plaintiff, Lucia Silvestri, was driving on Highway I-96 in Grand Rapids, Michigan. A vehicle being driven by the defendant, Robert Hardy Jr., and owned by the defendant, Alta Lift Truck Services ("Alta"), collided with Silvestri's vehicle. Silvestri claims that the collision occurred when Hardy attempted to merge into the lane in which she was travelling. Hardy's position is that he had changed lanes because a car driven by an unknown driver, the defendant John Doe, was rapidly approaching his rear, and Hardy wished to avoid being hit by Doe's vehicle.

[3] Silvestri brought an action against the Hardy, Alta and Doe defendants for negligence in causing the accident. Silvestri also brought suit against Lombard Canada Ltd., as she held an insurance policy with Lombard, and sought uninsured coverage, due to the fact that Doe cannot be identified. Damages were also sought under the *Family Law Act* by Silvestri's husband, Carlo, and her two minor children, Alisa and Victoria.

[4] Because Silvestri understood that liability was going to be admitted, Lombard was let out of the action. The action was never discontinued against John Doe. It now appears that liability is very much in issue and the plaintiffs will have to bring Lombard back into the action but have not yet done so.

[5] Hardy and Alta brought a motion to stay the proceeding, claiming that the court did not have jurisdiction to hear the case, and that if it did have jurisdiction, Ontario was a *forum non conveniens*, as Michigan was a more appropriate venue.

[6] The motion judge held that Ontario had jurisdiction to hear the case but, after considering the factors in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.) ("*Muscutt*"), he held that Michigan was the most convenient forum for the action. In his brief endorsement, he noted that liability was a serious issue in the case, and that the defendants had six witnesses respecting liability, all of whom resided in Michigan. He also noted that Michigan law would apply to both liability and damages, which would necessitate expert evidence on Michigan law if the action were to be heard in Ontario. He exercised his discretion and granted a stay.

Analysis

[7] Three principles animate the exercise of judicial discretion concerning *forum non conveniens*. They are: 1) to displace the plaintiffs' choice of forum, a more appropriate forum must be clearly established; 2) the balancing of the relevant factors typically used

to assess the connections to each forum should aim to achieve the twin goals of efficiency and justice; and 3) the motion judge should not adopt an aggressive approach to fact finding. Where the more convenient forum cannot be decided by relying exclusively on uncontested or agreed-upon facts and the motion judge must address the competing versions of the facts, the judge should accept the plaintiffs' version so long as it has a reasonable basis in the record: see *Young v. Tyco International of Canada Ltd.* (2008), 92 O.R. (3d) 161 (C.A.), at paras 28-33. In addition, where an Ontario resident sues a defendant in Ontario as well as defendants who reside outside the province, the real and substantial connection test should not be applied to the claim against the latter as if it were a separate lawsuit from the claims against the Ontario defendants: see *McNichol Estate v. Woldnik* (2001), 150 O.A.C. 68 (C.A.), discussed in *Muscutt*, at paras. 67-68.

[8] The motion judge's reasons indicate that he did not apply the above principles. He does not appear to have given any weight to the plaintiffs' choice of forum. There is no recognition by him that the standard to displace the plaintiffs' choice of jurisdiction is a high one. Instead, his reasons reflect only a consideration of hardship on the defendants if the action was tried in Ontario. He does not consider hardship to the plaintiffs.

[9] Nor did the motion judge consider the claim as a whole. Due to the fact the Michigan defendants take the position the accident was caused by an unidentified driver, the plaintiffs will have to sue an Ontario defendant, their own insurer, Lombard. The action against Lombard can be maintained only in Ontario. If the action against the

Michigan defendants is heard in Michigan, the Ontario plaintiffs will have to bring two separate lawsuits with the possibility of conflicting decisions. If the Michigan defendant Hardy's position on liability is accepted in the Michigan courts, the plaintiffs' claim will be dismissed. When suing Lombard in Ontario under the unidentified motorist coverage, if Hardy is found 1% liable then the plaintiffs will also be out of court. There is a possibility for conflicting decisions if the action is tried in Michigan. Such a procedure would not promote efficiency and justice.

[10] These errors in principle require us to address the non-exhaustive list of seven factors identified as relevant to determining the forum with the closest connection and to conduct our own balancing exercise. Our comments respecting each factor follow.

1. The location of the majority of the parties

[11] On the issue of liability, the four plaintiffs are resident in Ontario. The Ontario plaintiffs have some connection to Michigan in that two or three times a year for a period of approximately one month each time, their daughter receives treatment for her cerebral palsy in Michigan. She does not have the benefit of an insurer to cover the costs of litigation in Michigan.

[12] The defendants, Alta and Hardy, have no connection with Ontario. Nor do their other four witnesses.

2. The location of key witnesses and evidence

[13] On the issue of liability the location of the witnesses is split. On the issue of damages, however, the witnesses (the physician, physiatrist, occupational therapist, and lay witnesses) will be mainly, if not exclusively, from Ontario.

3. Contractual provisions that specify applicable law or accord jurisdiction.

[14] As we explain below in the fifth factor (applicable law), this factor is not pertinent.

4. Avoidance of a multiplicity of proceedings.

[15] This factor has already been discussed by us above in commenting on the principle of efficiency and justice. Although the defendants submit that the claim against Lombard is purely speculative, given the defendants' position that the accident was caused by John Doe, we cannot agree. This is not a situation of underinsured motorist coverage as in *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.) ("*Gajraj*").

5. Applicable law

[16] The appellants concede that Michigan law would apply to the issues of liability and damages. If the matter proceeds to trial in Ontario, the defendants would be required to provide expert opinion evidence on the legal issues in respect of the law of Michigan. The costs of having liability and damages witnesses travel to Ontario would be significant as would be the costs that would be incurred to adduce expert evidence on Michigan law. These expenses will not, however, be borne personally by the defendants

but by their insurer, Westfield Insurance. The unfairness to the defendants is thus mitigated: see *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76, at para. 18. Ontario law would apply to the claim against Lombard.

6. Geographical factors suggesting natural forum.

[17] The reasonable expectation of persons traveling abroad is that an accident in another country will be litigated there: *Gajraj*, at para. 16. It is the natural forum.

7. Whether declining jurisdiction would deprive the plaintiffs of a legitimate juridical advantage in the domestic court.

[18] The plaintiffs concede that declining jurisdiction would not deprive them of a legitimate juridical advantage in the Ontario courts. However, see our comments in relation to avoidance of multiplicity of proceedings at para. 15.

Conclusion

[19] A fair weighing of the seven *Muscutt* factors leads to the conclusion that the plaintiffs' choice of Ontario as the jurisdiction in which to try their claims has not been displaced. When the location of the parties and their key witnesses is considered, the balance favours Ontario. While Michigan is the natural forum and Michigan law will have to be proved, allowing the action to be tried in Ontario avoids multiple proceedings and the possibility of conflicting decisions, thereby promoting the overarching goals of efficiency and justice.

[20] Accordingly, we would allow the appeal, set aside the order of the motion judge staying the plaintiffs' action and dismiss the motion for a stay of proceedings.

Costs

[21] As agreed by counsel, costs of the appeal and the motion below are payable to the plaintiffs and are fixed at \$17,500, inclusive of disbursements and G.S.T.

RELEASED: May 14, 2009
"K.M.W"

"K.M. Weiler J.A."
"E.E. Gillese J.A."
"G.J. Epstein J.A."