

Date: 20101119
Docket: 10/77
Citation: *Stacey v. Seabright* 2010 NLCA 72

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN: ROBERT STACEY

INTENDED APPELLANT

AND: GORDON SEABRIGHT

INTENDED FIRST RESPONDENT

AND: WORKERS COMPENSATION BOARD

INTENDED SECOND RESPONDENT

Coram: Green, CJNL, Mercer and Harrington, JJ A

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division 2009 01T 1352

Appeal Heard: November 16, 2010
Decision Rendered: November 16, 2010
Reasons for Decision: November 19, 2010

Reasons for Judgment by: Green, CJNL
Concurred in by: Mercer and Harrington, JJ A

The Intended Appellant appearing on his own behalf
Counsel for the Intended First Respondent: Rodney Zdebiak
Counsel for the Intended Second Respondent: Rebecca C. Phillipps

REASONS FOR DECISION

Green, C.J.N.L.:

[1] This is an application by the intended first respondent, Gordon Seabright, to strike out a notice of application for leave to appeal filed by the intended appellant, Robert Stacey, on the grounds that the notice is frivolous and that Mr. Stacey failed to set the application for leave down for hearing.

[2] At the conclusion of the hearing, the Court granted the application to strike out the notice insofar as it applied to a purported challenge to an order of the applications judge relating to production of certain documents, but not otherwise. We indicated we would file reasons for our decision on a subsequent date. These are those reasons.

Jurisdiction to Entertain an Application to Strike a Notice of Application for Leave to Appeal

[3] Rule 57.17 of the **Rules of the Supreme Court, 1986** provides that any party to an appeal may apply to the Court for an order “striking out the notice of appeal” on the grounds, amongst others, that “the appeal is frivolous, vexatious or without merit” or that “the appellant has failed to apply to have the appeal set down for hearing”. By its terms, this rule applies to the striking out of a notice of appeal, not a notice of application for leave to appeal. However, notwithstanding the absence of any provision in the rules of court dealing with the striking out of notices of application for leave to appeal, we are of the view that the Court, in exercise of its inherent jurisdiction to control its own process, nevertheless, has power to entertain such an application on grounds similar to those applicable to striking out a notice of appeal. See **Hanlon v. Farrell’s Excavating Limited**. 2010 NLCA 59.

Background

[4] Stacey, a self-represented litigant, issued a statement of claim against Seabright, the Workplace Health, Safety and Compensation Commission (in fact, incorrectly described as “Workers Compensation Commission”) (WHSCC) and the Canadian Lawyers Indemnity Association (CLIA) alleging professional negligence on the part of Seabright, a member of the bar, in the handling of a compensation claim involving WHSCC. Among other things, Stacey alleged that Seabright failed to act within certain limitation periods.

[5] WHSCC and CLIA applied to have themselves struck out as parties to the proceeding on the ground that the statement of claim disclosed no cause of action against them. At the same time, Seabright applied for an order for particulars of Stacey's claim against him.

[6] Stacey agreed that CLIA should be removed as a party but opposed the removal of WHSCC. His main concern, as expressed to the applications judge, was that if WHSCC were no longer a party it would be more difficult to get disclosure of his claim file held by WHSCC.

[7] The applications judge struck out the claim against both CLIA and WHSCC. He concluded that there was no cause of action pleaded against either of them.

[8] As to the application for particulars, Stacey indicated that it would be difficult for him to respond to some of the requests unless he had access to his claim file at WHSCC. Counsel for WHSCC advised the court that her client would be prepared to make the file available at his request. The applications judge therefore adjourned the application for particulars until Stacey could access the information necessary to respond in detail to the demand for particulars.

[9] Following these dispositions, but before the court rose, counsel for Seabright asked whether Stacey would be prepared to consent to having a copy of the WHSCC file made available to Seabright as well. The following exchange occurred:

Mr. Stacey: Yes, I don't see a problem with that ...

The Court: Right, and any – obviously – any records that you have that are relevant, you'll have to provide to Mr. Seabright, if you haven't already.

Andrews, Q.C.[counsel for Seabright]: If the [WHSCC] could have the consent, then, of course, when they provide the records, they could provide a copy to Mr. Stacey and a copy to our office which will help us move the matter forward.

Ms. Phillipps [counsel for WHSCC]: That's no problem, my lord.

The Court: Mr. Stacey has consented, and I think that's a rational way to approach it and move things along is simply to provide a copy to Mr. Andrews at the same time you provide it to Mr. Stacey.

Ms. Phillips: ... it would be preferable to have that in the form of an order.

The Court: I'd be prepared to order on the basis of the consent of the parties that the [WHSCC] file be provided both to Mr. Stacey and to Mr. Andrews, as counsel for Mr. Seabright ...

[10] The formal order issued following the hearing struck out the claim as against WHSCC and, as well, ordered WHSCC to "provide a copy of the Plaintiff's claim file to the Plaintiff and the First Defendant [Seabright]".

[11] Stacey then filed a document entitled "Notice of Application to Appeal Order (*Inter Partes*)" in this Court, naming Seabright and "Workers Compensation Board" as intended respondents. This was regarded by all as an application for leave to appeal. That was five months ago. Nothing has been done since.

[12] The Notice filed by Stacey did not, as required by Form 57.02A, set out the grounds relied on in support of leave to appeal being granted. Instead, it just listed the proposed grounds of appeal themselves, assuming leave were to be granted. The stated grounds focused essentially on what Stacey perceived as prejudice and an injustice to him in having to make his full WHSCC file available to Seabright when he himself did not have knowledge as to what it contained. He also alleged that he had been "blindsided" by the request for access to the file which arose near the end of the hearing.

[13] None of the stated grounds of appeal specifically attacked the correctness of the applications judge's order striking out WHSCC as a party. However, in the Notice's statement of the relief sought, it requested that the applications judge's "order" (presumably the whole order, including the part striking out WHSCC) "be vacated". As well, it requests:

That Workers Compensation remain listed now as Second defendant so as not to limit the scope of any decision rendered by any Justice hearing the pending case in the Trial Division.

[14] That is the extent of the possible references in Stacey's Notice to the applications judge's order striking out WHSCC as a party. While certainly attenuated, and not stating any grounds for asking that the order in that regard be vacated, it still seems reasonably clear that Stacey's intention in filing the Notice was to attempt to appeal not only the order for production of his claim file but also the order striking out WHSCC as a party.

The Current Application

[15] Seabright made application to strike out the Notice on the grounds that: (i) it was frivolous; and (ii) Stacey had failed to apply to have the appeal set down for hearing. The second ground was not pressed in argument.

[16] It is important to appreciate that the application to strike was made by Seabright only. The other intended respondent, WHSCC, did not apply to strike the Notice insofar as the Notice sought to challenge the applications judge's order removing WHSCC as a party to the proceeding.

[17] The essence of counsel for Seabright's argument is that it is plain and obvious that the grounds of appeal cannot succeed. The Notice, it is said, has no substance, is obviously unsustainable and without arguable merit. Counsel points out that access to Stacey's claim file is something that, in the regular course of things, Seabright would be entitled to have, as part of production of documents under rule 32. It would certainly relate to the question of the timing of the missing of the limitation period and to assessment of damages, if liability were to be found. Consequently, even though the order for production was not made following a formal application and for that reason might be said to be premature, allowing the appeal to proceed now would not change the ultimate result because Stacey would ultimately be obliged to produce the claim file.

Considerations

(a) The Nature of the Intended Appellant's "Notice"

[18] The order relating to the production of the claim file is in the nature of an interlocutory order within the principles discussed in **Carroll (Re); Kent v. Kent**, 2010 NLCA 53 at paras. 23 – 25. Leave to appeal such an order is required: rule 57.02(1)(a). It was appropriate, therefore, to treat Stacey's "Notice of Application to Appeal" as a notice of application for *leave* to appeal.

[19] By the same token, the order striking out WHSCC as a party must be regarded as a final order because it finally disposes of the issue between Stacey and WHSCC: **Carroll (Re); Kent v. Kent** at para. 25 and **SNC Lavalin Inc. v. Newfoundland and Labrador Hydro-Electric Corp.**, (1998), 162 Nfld. & P.E.I.R. 172 (Nfld.C.A.) at paras. 3-6. To the extent, therefore, that Stacey's Notice challenges the order striking out WHSCC,

leave is not required and Stacey may appeal as of right in respect of that matter. That aspect of Stacey's Notice should therefore be regarded as a notice of appeal rather than as a notice of application for leave to appeal.

(b) Striking the Notice Regarding the Order for Production

[20] We agree with counsel for Seabright that, insofar as the Notice sought to challenge the order for production of WHSCC's claim file, the Notice meets the test for a frivolous appeal and should be struck.

[21] In the first place, Stacey consented to the order. That is clear from the extract from the transcript quoted above. While the issue arose at the end of the proceeding without a formal application being made, it is clear that Stacey had time to deal with the issue. It cannot be said that he was "blindsided". It was specifically made clear to him that it depended on his consent and if he had any apprehensions about it, he could have withheld that consent.

[22] There is nothing to indicate that Stacey was acting under any material misapprehension as to the effect of giving consent or acting on a false factual premise, or that his consent was not otherwise voluntarily given. As to the stringent circumstances when a consent order may be set aside on appeal, see **Barter v. Barter**, 2006 NLCA 13 at paras. 11-15. We note as well that rule 57.02(1)(b)(ii) requires leave to appeal from a consent order and Stacey here has not stated any grounds in his Notice as to why leave should be given.

[23] Secondly, the objection that Stacey is making to the production is that it is "potentially prejudicial" to his ability to prove that Seabright failed to meet his professional obligations. In argument, it appeared that Stacey was under the misapprehension that he is not required to disclose documents that might be prejudicial to his case. In fact, rule 32 requires any party to disclose, and produce for inspection, any documents in his or her possession or under his or her control that "relate to" a matter in question in the proceeding regardless of whether such documents may support that party's case or be prejudicial to it. An appeal based on the notion that the production may be prejudicial to Stacey is therefore bound to fail.

[24] Stacey also argued that there may be many parts of the claim file that relate only to the details of his medical conditions and that such material would not necessarily relate to the issue of Seabright's liability. He

suggested that the production of the whole file would be premature because the issue of liability should be decided first, and only if Seabright were to be found liable would it be necessary to delve into the details of his medical condition for the purpose of assessment of damages. The problem with this submission is that the presumptive rule, in the absence of an order or agreement of the parties to the contrary, is that all issues in a proceeding are to be tried together: rule 40.04. The consequence of this litigation approach is that all pre-trial procedures, including document discovery and disclosure, presumptively relate to all issues in the case unless the issues have been severed. Here, there has been no order or agreement of severance of issues of liability and damages and, accordingly, discovery and disclosure must proceed on the basis of production of documents that relate to any of the issues potentially in dispute. That would certainly encompass the issue of damages. It can hardly be said that the very claim file which Stacey says relates to the claim for loss he allegedly suffered at the hands of the lawyer in not processing a claim properly does not relate to the proceeding in question.

[25] The test for determining whether a notice of appeal should be struck out on the grounds that it is without merit is whether it is plain and obvious that the grounds of appeal cannot succeed: **Walsh v. Johnson**, 2010 NLCA 6. Although the threshold that an appellant must meet to keep the appeal alive is a low one, the appellant must at least state a ground of appeal that is justiciable and engages, on some basis known to the law, the correctness of the decision under appeal: **Walsh**, para. 15. An appeal that is obviously unsustainable and without arguable merit will also generally be regarded as frivolous: **Walsh**, para. 21.

[26] We have concluded that none of the grounds of appeal stated by Stacey has any prospect of being sustained on appeal. They do not state grounds of appeal known to the law. It is plain and obvious on their face that they cannot succeed, in the sense of resulting in the decision of the applications judge being overturned.

[27] Accordingly, those portions of the Notice relating to the challenge to the order for provision of a copy of Stacey's claim file to Seabright must be struck out.

The Remainder of the Applications Judge's Order

[28] As noted previously, WHSCC did not apply to strike out Stacey's Notice as it affected them. To the extent, therefore, that the Notice seeks to appeal from the order striking out WHSCC as a party to the proceeding, it remains on the record unless it is discontinued, deemed abandoned or is struck out on proper grounds on subsequent application by WHSCC.

[29] Because it relates to an appeal against a final, as opposed to an interlocutory, order, leave to appeal is not required. Accordingly, it is appropriate to recast Stacey's Notice relating to the striking out of WHSCC as a party as a notice of appeal rather than a notice of application for leave to appeal. Stacey should therefore be given leave, pursuant to rule 57.02(7), to file a new Notice of Appeal in relation – but only in relation – to the appeal against the order striking out WHSCC as a party to the proceeding.

[30] It is also to be noted that once the portions of Stacey's existing Notice relating to the order for production of the claim are stripped away, all that will remain will be the claim for relief that the order be vacated and WHSCC remain as a party. As such, the new notice of appeal will be deficient because it does not state any grounds for appealing the order. Stacey should be given leave, pursuant to rule 57.07(4), to amend the notice of appeal to conform to rule 57.07 and, specifically, to state the grounds he will rely on in submitting that the order striking out WHSCC as a party should be set aside.

[31] Finally, the references to WHSCC in the pleadings and the existing Notice are inaccurate in that they refer to "Workers Compensation Board". Henceforth the proper name should be used – Workplace Health, Safety and Compensation Commission.

Conclusion and Disposition

[32] The application to strike out the Notice of Intention to Appeal Order (*Inter Partes*) filed by the intended appellant is granted insofar as the Notice relates to an appeal from the order of the Trial Division filed June 1, 2010 requiring provision of the intended appellant's claim file to the intended first respondent.

[33] The remainder of the Notice of Application to Appeal Order (*Inter Partes*) shall henceforth be treated as a notice of appeal in which Robert Stacey shall be named as appellant and Workplace Health, Safety and

Compensation Commission shall be named as respondent. The appeal shall relate only to that portion of the order dated June 1, 2010, striking out WHSCC as a party.

[34] The appellant, Robert Stacey, is given leave to file an amended notice of appeal in conformity with the requirements of rule 57.07 and in compliance with the directions in the preceding paragraph.

[35] Counsel for WHSCC requested that timelines be set for filing the appeal book and facta, so that the appeal will move forward at a reasonable pace. The appellant opposed this, arguing that he had been the victim of arsenic poisoning and was disabled from responding in the near future. He asked that the appeal be postponed indefinitely. No evidence was provided by the appellant to support his claimed medical condition or to support the assertion that that condition, if it existed, would disable him from dealing with the appeal in the normal course. Accordingly, there is no basis for not acceding to counsel's request to set timelines. The appellant shall file the appeal book and his factum within sixty days of the date of this order and the respondent shall file its factum within thirty days after filing of the appellant's factum.

[36] We would note that if good and valid reasons – medically-based or otherwise - occur that prevent either party from complying with these deadlines, either has the right to bring an application, properly supported in the normal manner, for an extension of time in which to comply. Such applications would be dealt with on their merits at that time.

[37] All parties shall bear their own costs on the hearing of this application.

J. D. Green, C.J.N.L.

I concur: _____

K. J. Mercer, J.A.

I concur: _____

M. F. Harrington, J.A.