Court of King's Bench of Alberta

Citation: Mao v TD Insurance Meloche Monnex, 2024 ABKB 434

Date: 20240711
Docket: 2101 02719
Registry: Calgary

Between:

Larry Mao and Maggie Zhang

Plaintiffs/Respondents

- and -

TD Insurance Meloche Monnex

Defendant/Appellant

Corrected judgment: A corrigendum was issued on July 16, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Justice O. Ho

Appeal from a Decision of an Applications Judge
Filed on the 2nd of December, 2022
Dated the 23rd day of November, 2022

I. Introduction

[1] TD Insurance Meloche Monnex (**TD**) appeals the decision delivered orally by an Applications Judge on November 23, 2022 (the **Decision**).

[2] The Decision arose from an Application for Summary Judgment made by the Plaintiffs Larry Mao and Maggie Zhang heard concurrently with a Cross Application for Summary Dismissal made by TD.

[3] The Decision granted summary judgment in favour of the Plaintiffs against TD in the amount of $10,000.00 as it related to the Plaintiffs' claim for replacement of the roof of their house. The Decision summarily dismissed the remainder of the Plaintiffs' claims in favour of TD.

[4] TD filed a Notice of Appeal seeking to have the summary judgment portion of the Decision overturned. The Plaintiffs have not filed a Notice of Appeal so the remainder of the Plaintiffs' claims are not the subject of this appeal.

II. Relevant Background Facts

[5] The Plaintiffs suffered two events of water ingress into their house which caused them to make two insurance claims. The first claim was reported to TD in January and September 2018 (the **2018 Claim**) and the second claim in March and June 2019 (the **2019 Claim**).

[6] This is not a coverage dispute; the parties agree that the terms of the Policy are not in question, nor is the amount of contractual insurance coverage that may or may not have been provided by TD to the Plaintiffs.

[7] Rather, the Plaintiffs' Application for Summary Judgment alleges that they unnecessarily replaced the roof of their house based on information provided to them by TD and that had TD done a proper investigation in the first instance the Plaintiffs would have had an opportunity to fix the parts of their house which were actually faulty thereby preventing the damage which was the subject of the 2019 Claim. Paragraph 1 of the Plaintiffs' Application for Summary Judgment sets out the relief sought:

> (i) a costs penalty for the delay in service of TD Affidavit of Records;
>
> (ii) judgment in the amount of $15,000.00 for the replacement of the roof;
>
> (iii) judgment in an amount equivalent to "the repair for wall and floor damage on 2nd level"; and
>
> (iv) costs.

[8] The timing of service of TD's Affidavit of Records was dealt with by an Applications Judge on March 4, 2022 and the Order arising therefrom was filed on March 25, 2022. Therefore, the issue of the costs penalty no longer requires addressing.

[9] The Decision dismissed the Plaintiffs' claim in relation to the repair of the wall and floor damage to the 2nd level. The Plaintiffs have not filed a Notice of Appeal in relation to that portion of the Decision and, as a result that portion of the claim is not the subject of this appeal.

[10] On September 7, 2023, the Applications Judge ordered that the parties bear their own costs in relation to the Summary Judgment and Summary Dismissal Applications. Neither party filed a Notice of Appeal with respect to this and, therefore, the costs decision is not the subject of this appeal.

[11] The end result is that the only issue on appeal is the portion of the Decision granting summary judgment to the Plaintiffs in the amount of $10,000.00 for the roof repair.

III. Analysis

A. Standard of Review

[12] The starting point in determining the standard of review of the Decision is the *Rules of Court*. Rule 6.14(3)(c) provides "An appeal from an applications judge's judgment or order is an appeal on the record of proceedings before the applications judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material".

[13] While the threshold for the introduction of new evidence is low and an appeal from an Applications Judge is often referred to as a hearing *de novo*, such an appeal is in fact on the record. It is not a "new hearing of the matter, conducted as though the original hearing had not taken place": ***Challis v Maverick Oilfield Services Ltd,*** 2023 ABKB 514 at para 13.

[14] Where an appeal is on the record, the standard of review is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30.

[15] The Court's analysis in ***Lesenko v Wild Rose Ready Mix Ltd.***, 2024 ABKB 333 at para 14 is thorough and discusses the distinction between a *de novo* hearing and the correctness standard. As discussed below, since there is effectively no new evidence in this appeal, the Decision must be reviewed on a correctness standard.

B. No New Evidence

[16] While the Plaintiffs filed an additional Affidavit on February 13, 2023, the subject matter thereof was the Plaintiffs' allegations that TD had missed certain deadlines related to the filing of transcripts for this appeal.

[17] This Court heard arguments about that issue on January 31, 2023, and issued an Order that was filed on February 6, 2023 (the **February 2023 Order**). Therefore, the question on the timing of the filing of transcripts for this appeal has already been decided. If the Plaintiffs did not agree with the February 2023 Order, their remedy was to appeal it. They are not permitted to raise on this appeal the same issues and arguments which were the subject of the February 2023 Order.

[18] For these reasons, I have not considered the content of the Plaintiffs' Affidavit filed on February 13, 2023. The effect is that there is no new evidence on this appeal.

C. Preliminary Issues

[19] The Applications Judge addressed two preliminary issues: 1) whether some of the relief sought by the Plaintiffs was sufficiently plead in the pleadings; and 2) whether portions of the Plaintiffs' affidavit evidence ought to be struck out pursuant to Rule 3.68(4). These preliminary issues are not noted as grounds in TD's Notice of Appeal, so I make no comment about the Applications Judge's decisions on those points.

D. Appropriateness of Summary Judgment and Summary Dismissal

[20] As noted above, the parties agree that the present dispute is not about the terms of the Plaintiffs' insurance policy with TD or the amount of coverage that may or may not have been provided. The question before the Applications Judge on the Summary Judgment Application was whether TD was responsible to compensate the Plaintiffs for: a) its recommendation that the Plaintiffs repair their roof based on information that turned out to be incorrect or incomplete, a recommendation on which the Plaintiffs acted to their financial detriment; and b) the costs of the repair of the damage to the 2nd story wall and floor.

[21] The Applications Judge correctly set out the test for summary judgment in ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49, and noted the four key considerations at para 47 thereof. The Applications Judge further noted the Court of Appeal's statement at para 32 of ***Weir-Jones*** that that there is no symmetry of burdens when dealing with applications for summary dismissal. In other words, while on a summary judgment application a plaintiff must demonstrate that a defendant has "no defence", on a summary dismissal application a defendant must demonstrate that the facts or law preclude a fair disposition and that there is a genuine issue for trial.

[22] The Applications Judge also correctly considered the Supreme Court of Canada's call for a simplified, expeditious, and proportionate means of adjudicating claims in ***Hryniak v Mauldin***, 2014 SCC 7 in circumstances where a claim requires a less lengthy pre-trial process to achieve a fair result.

[23] For the reasons that follow, I believe that while the quantum of damages sought may have led the parties to prefer a less lengthy pre-trial process, the totality of the circumstances required a more fulsome consideration of evidence, and in particular evidence about whether TD's conduct met the standard required of a reasonable insurer.

E. Negligent Misrepresentation

[24] The dispute about the roof replacement arises from TD's recommendation that the Plaintiffs repair their roof, which the Plaintiffs say turned out to be unnecessary. This issue amounts to a question about whether TD made a negligent misrepresentation to the Plaintiffs. The Decision speaks of TD's recommendation and concludes that it amounted to a requirement. I do not disagree with that conclusion. However, that conclusion addresses only one of the elements of the 5-part test for negligent misrepresentation and, as such, the analysis in the Decision was incomplete.

[25] The common law tort of negligent misrepresentation was initially recognized by the House of Lords in ***Hedley Byrne & Co Ltd v Heller & Partners Ltd***, [1963] 2 All ER 575. Later, in ***Queen v Cognos Inc***, [1993] 1 SCR 87 at 110, the Supreme Court of Canada set out the following test for claiming negligent misrepresentation:

(i) there must be a duty of care based on a "special relationship" between the representor and the representee;

(ii) the representation in question must be untrue, inaccurate, or misleading;

(iii) the representor must have acted negligently in making said representation;

(iv) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

(v) the reliance must have been detrimental to the representee in the sense that damages resulted.

[26] In relation to the first element of the test, the Supreme Court of Canada said that a sufficiently close relationship existed if: 1) a defendant could reasonably foresee that the plaintiff would rely on its representation; and 2) reliance by the plaintiff was reasonable: ***Hercules Managements Ltd v Ernst & Young***, [1997] 2 SCR 165 at para 24. In the present case, given the pre-existing relationship between the Plaintiffs and TD, I find that there was a special relationship.

[27] At this stage the question is not whether the Plaintiffs did rely or should have relied on TD's representation; it is only whether TD reasonably could foresee that the Plaintiffs would rely on its representation and do something with the information communicated to them. At a minimum, TD ought to have had an expectation that the Plaintiffs would consider the information given to them. I can see no reason why TD would make a recommendation if there wasn't at least some expectation that the Plaintiffs would rely on it; it defies logic that TD would not have foreseen that the Plaintiffs would rely on TD's statement. Put another way, it defies logic to assume that TD expected the Plaintiffs to ignore the information it communicated.

[28] The second element of the analysis is whether TD's representation was untrue, inaccurate, or misleading. Despite the Plaintiffs' arguments that TD's representation to repair their roof was inaccurate, that conclusion is not clearly borne out by the evidence in the record.

[29] The first report requisitioned by TD was the Epic Report arising from Epic's March 26, 2018 inspection; this report appears as Exhibit "E" to the Affidavit of Larry Mao, filed January 4, 2022. This report set out conclusions related to a wall scupper detail not having been installed correctly "leaving the top edge totally exposed", an open lap, and evidence of leaks having occurred previously. TD appears to have adopted these conclusions and, based on such adoption, recommended to the Plaintiffs to repair their roof.

[30] Significantly however, the subsequent reports requisitioned by TD do not explicitly say that there were no issues with the roof, or that the roof repair was unnecessary. The one-page letter from Alba Exteriors arising from Alba's inspection on March 13, 2019, which appears as Exhibit "F" to the Affidavit of Larry Mao, filed January 4, 2022, refers to condensation issues and also makes reference to ice damming having been reported in previous years. While this report refers to condensation, it does not conclude that there was no ice damming, or that the roof repair was unnecessary. The second Alba report, which appears as Exhibit "G" to the Affidavit of Larry Mao, filed January 4, 2022 similarly refers to condensation issues, but also does not say that ice damming did not occur or that the roof repair was unnecessary.

[31] The final report requisitioned by TD was prepared by CEP Forensic, dated October 11, 2019, and appears as Exhibit "I" to the Affidavit of Larry Mao, filed January 4, 2022. The summary of findings section in this report states that:

> [T]he stains around the pot lights are a result of condensation buildup within the roof cavity during the cold winter weather, which then melts as the weather warms resulting in moisture staining on the ceiling... To prevent additional moisture damage to the ceiling around the pot lights, adequate sealing of the vapour barrier and roof insulation are necessary. If modifications to this ceiling assembly are not made, further water-related damage can be expected.

[32] The CEP Forensic report identifies condensation as an issue, which might be interpreted to mean that condensation is the only issue with the roof, and that ice damming could not have been an issue causing the original leak. But that is not what the CEP Forensic report actually states. The difficulty at this stage of the dispute is that this appeal is on the record, and there is no other evidence that concludes that ice damming was not an issue, or that a roof repair was not necessary. This Court cannot take judicial notice that ice damming and condensation are mutually exclusive causes of water ingress and therefore, based on the record, there is insufficient evidence to conclude that TD's statement was untrue, inaccurate, or misleading.

[33] The third element of the test is whether TD acted negligently in making its recommendation to the Plaintiffs to repair their roof. TD suggested that the Plaintiffs could not succeed in their summary judgment application since they did not tender any expert evidence about what the standard of care was. That is a reasonable starting point; expert evidence is required where the question to be resolved requires a technical or specialized knowledge beyond the knowledge or experience of laypersons. In ***Kostic v Thom***, 2021 ABCA 406 at paras 15 and 16, the Court confirmed the strong presumption that, with limited exceptions, expert evidence is required to prove the standard of care expected of a professional.

[34] One might be tempted to conclude that this case is an exception to the requirement of expert evidence on the standard of care because TD's recommendation was wrong. In my opinion that approach would be incorrect in the circumstances because, at the time the recommendation was made, all of those involved believed it to be true and appropriate, and only after a year had passed and subsequent investigations had been made was it discovered that there were possible other reasons for the water ingress.

[35] As noted above, the Alba reports and the CEP report do not explicitly say that ice damming was not a cause of the water ingress related to the 2018 Claim. Rather, more than one potential source of water ingress is identified and no clear conclusion is stated about the source of the water ingress. The fact that the source of the water ingress is not clear and obvious is a marker that expert evidence is required on the subject of what a reasonable insurer in the circumstances ought to have communicated to its insured.

[36] I do not believe that it is within the knowledge or experience of laypersons to know whether sufficient facts exist to make a recommendation about whether roof repairs ought to be performed. Indeed, in the present circumstances, many of those involved with knowledge of the circumstances had differing views of the cause of water ingress and the types of repairs necessary to address it. Without further evidence, I cannot determine whether TD acted negligently given the information it had and/or may or may not have been in the process of obtaining.

[37] The fourth element of the test requires a finding that the Plaintiffs relied, in a reasonable manner, on TD's representation. As referred to in my analysis of the first part of the test, there is no question that it was reasonable for the Plaintiffs to rely on TD's representation. Indeed, and not surprisingly, the Plaintiffs did rely on TD's representation.

[38] TD's evidence about its recommendation to the Plaintiffs is set out in the Affidavit of Brock Ausmus, filed March 15, 2022. TD's position is that its words were never intended to obligate the Plaintiffs to take any remediation steps, and that the Plaintiffs were at liberty to repair or not to repair. Despite TD's arguments, in the circumstances and based on the record, I find that it was reasonable and foreseeable that the Plaintiffs would rely on TD's words. I come to this conclusion based on the evidence before me, and in particular:

(i) the letter from TD to the Plaintiffs dated May 10, 2019 appearing as Ex. "D" to the Affidavit of Brock Ausmus, filed March 15, 2022 wherein TD says, among other things:

> *"... We recommend that the issues on the roof be corrected in order to prevent future water infiltration issues... You were made aware of the possibility that water infiltration problems may persist due to the issues with the scruppers identified by Epic Roofing; these issues were* ***not adequately addressed*** *prior to the winter of 2019..."* [emphasis added]

(ii) the email from TD's Sr. Claims Advisor to the Plaintiffs on April 15, 2019, appearing as Ex. "B" to the Affidavit of Larry Mao, filed March 21, 2022 wherein TD says, among other things:

> *"...Our original roofing report from Epic Roofing (attached) indicated that there are potential avenues for water infiltration through wall scuppers that were not installed and sealed correctly.* ***This is why I had recommended the roof be replaced before interior damages were performed****..."* [emphasis added]; and

(iii) the evidence from Mr. Mao given during the Questioning of him on his Affidavit sworn January 4, 2022, such Questioning occurring on February 16, 2022, and filed on March 4, 2022. During that Questioning Mr. Mao's evidence included at page 48, lines 2-16:

> *Q Okay. So let's be clear here. The full extent of your claim for the roof is based off of a single line in TD's May 10, 2019 letter that says "We recommend that the issues on the roof be corrected in order to prevent future water infiltration issues"; is that correct?*
>
> *A On paper, yes,* ***but we also had verbal conversation over the phone. They said, "OK, you need to replace the roof."***

> *Q did they tell you that or is this again you telling me words that you don't remember?*
>
> *A Yeah, they told me that. Otherwise, why would I replace the roof? They tell me I need to - - the ice damming is the roof problem. I need to replace the roof - - or I mean, I need to - - they didn't say replace,* ***they say, 'You need to fix the roof."*** [emphasis added]

[39] The final part of the test requires that the Plaintiffs relied on TD's representation to their detriment and that they suffered damages. In that regard, the evidence is that the Plaintiffs relied on TD's representation in deciding to repair their roof. Indeed, the evidence is that the Plaintiffs acted swiftly after receiving TD's representation and arranged, at their own cost, to have their roof repaired.

IV. Conclusion

[40] Notwithstanding the desire to facilitate a less lengthy pre-trial process where circumstances allow, in the present circumstances given the factual background, the nature of the relationship between the parties, together with the issues being determined, an application for summary judgment without expert evidence about the standard of care, cannot succeed. While the rules of evidence may be relaxed in the Court of Justice, they cannot be similarly relaxed in the Court of King's Bench solely on the basis of the amount of money being claimed. Further, while it is completely reasonable to expect that an insured would act on the recommendation made by an insurer, it is not clear on the record that the recommendation made by TD was inaccurate.

[41] The failure to meet these two parts of the test of negligent misrepresentation is fatal to the Plaintiffs' claim for summary judgment. As a result, I grant TD's appeal of the Decision; the portion of the Decision granting the Plaintiffs judgment in the amount of $10,000.00 is overturned. As noted above, the Plaintiffs did not file a Notice of Appeal and as a result the other portions of the Decision are not overturned. However, and for clarity, the Plaintiffs' claim for $15,000.00 for the repair of their roof based on TD's alleged misrepresentation remains an issue, and the parties may proceed with the litigation in pursuit of that relief.

[42] The parties shall bear their own respective costs of this appeal.

Heard on the 6th day of June, 2024.
Dated at the City of Calgary, Alberta this 11th day of July, 2024.

O. Ho
J.C.K.B.A.

Appearances:

John R. Gilbert, Field LLP
for the Defendant/Appellant

Larry Mao and Maggie Zhang
Self-Represented Litigants

Corrigendum of the Reasons for Decision
of
The Honourable Justice O. Ho

Page 1: Error in citation number corrected.