Date: 20170821
Docket: CI 17-01-07775
(Winnipeg Centre)
Indexed as: Wilder v. Alder
Cited as: 2017 MBQB 152

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

WENDY JUDITH WILDER,	)	Counsel:
	)	
(driver/owner) claimant,	)	SAMUEL I. WILDER, Q.C.
	)	for the claimant
- and -	)	
	)	
BRADLEY DAVID ALDER,	)	BRADLEY DAVID ALDER
	)	the defendant in person
(owner) defendant.	)	
	)	JUDGMENT DELIVERED:
	)	August 21, 2017

GRAMMOND J.

INTRODUCTION AND BACKGROUND INFORMATION

[1] The claimant, Wendy Judith Wilder ("***Wilder****"),* seeks leave to appeal a decision rendered by a Small Claims Court Officer (the "***Court Officer***"), following the hearing of a Small Claim filed by Wilder. The Court Officer found that Wilder was 100 percent liable for a motor vehicle collision with the defendant's vehicle, which occurred on May 31, 2016. At the time of the collision, the defendant's vehicle was parked and unoccupied.

[2] The defendant attended the hearing of the application for leave to appeal, but took no position on the merits of the application. Manitoba Public Insurance

("***MPI***") was served with notice of the Small Claim and did not participate in the hearing. MPI was also served with Wilder's application for leave to appeal and took no position with respect to the application.

ANALYSIS

[3] Wilder seeks leave to appeal the decision pursuant to s. 12 of ***The Court of Queen's Bench Small Claims Practices Act***, C.C.S.M. c. C285 (the "*Act*"), in force since January 1, 2015, which provides as follows:

> **Appeal with leave of a judge**
>
> 12(1) A party may appeal a decision made by a court officer under section 9 ... to a judge of the court on a question of law or jurisdiction, with leave of a judge.

[4] Wilder argued that the Court Officer made two errors in law in her decision, as follows:

(i) the Court Officer based her conclusion upon the mistaken belief that the onus of proof was on Wilder; and

(ii) the Court Officer rendered a decision that was not supported by properly admissible evidence, or any evidence, and therefore it does not meet the standard of review of reasonableness.

[5] In ***J & V Ashfield Village Ltd. v. Starkell et al.***, 2015 MBQB 174, the Court stated that the purpose of s. 12(1) of the *Act* is "to have the rights of the parties determined by the Court Officer, in all but exceptional cases."

[6] Prior to the enactment of s. 12(1), no leave was required to appeal a decision of a Court Officer to this Court, but leave was required to appeal to the

Court of Appeal, also on a question of law or jurisdiction only. Pursuant to established jurisprudence, the applicant bore an onus to demonstrate that the appeal raised an issue of arguable merit, with a reasonable prospect of success. In addition, leave would be granted only if the proposed appeal was of sufficient public importance to warrant the attention of the Court (***Schultz v. Kopp Farms et al***., 2010 MBCA 30).

ONUS OF PROOF

[7] At the outset of the Small Claim hearing in this matter, the Court Officer stated that Wilder bore the onus of proof in the proceeding, to which no objection was taken by Wilder, and the hearing proceeded on that basis. Having said that, I accept that the correct application of the onus of proof by the Court Officer is a question of law. I must examine, therefore, whether this issue is of arguable merit, such that there is a reasonable prospect of success if leave to appeal is granted. To do so, the following examination of the context of the Small Claim is necessary.

[8] Pursuant to s. 3(1) of the *Act*, a person may file a claim under the *Act* for either:

(a) an amount of money, subject to certain dollar limits; or

(b) an assessment of liability arising from a motor vehicle accident in which the vehicle of the claimant is not damaged.

[9] In this case, Wilder initially claimed judgment from the defendant in the amount of $200.00 for the "deductible portion of damages". During final

argument at the Small Claim hearing the claim was amended by consent, to relate only to an assessment of liability for the motor vehicle accident.

[10] The *Act* does not provide specifically that a hearing of an assessment of liability under s. 3(1)(b) will proceed as a hearing *de novo*, also known as a fresh hearing. Having said that, in this case the Small Claim proceeded as a fresh hearing and that approach is not disputed by Wilder.

[11] At the hearing, Wilder gave evidence that no collision took place and that her vehicle was not damaged. Accordingly, Wilder argued in this application that her characterization as the "claimant" is a misnomer, on the basis that she has no claim for damages.

[12] Pursuant to s. 1(1) of the *Act*, a "claimant" is defined as a person filing a Small Claim under the *Act*. Accordingly, since Wilder filed the Small Claim in this matter, she is properly characterized as the claimant in this proceeding, despite the fact that Wilder did not ultimately seek payment of damages from the defendant.

[13] Wilder argued that "the Defendant is the one advancing a claim and he continued to be the person advancing his claim at the Small Claims Court hearing. Therefore, the onus of proof remained and continues to remain on the Defendant throughout these proceedings".

[14] Certainly, the defendant advanced an insurance claim, filed with MPI as a result of the collision, pursuant to which his vehicle was repaired. Within the context of that insurance claim, the defendant was the "claimant" and bore the

onus of proof in establishing his right to recover under the terms of the insurance policy. MPI accepted the defendant's claim, such that coverage was extended and his vehicle repaired.

[15] Also at issue pursuant to the insurance claim was responsibility for the collision, and the corresponding liability for payment of the defendant's deductible. This assessment was conducted by MPI in the context of the statutory, mandatory, no-fault insurance scheme that it administers, by which both Wilder and the defendant were insured. There was no evidence or authority presented that the defendant bore an onus within the context of the insurance claim relative to establishing whether Wilder was responsible for the collision.

[16] In support of her argument regarding who bore the onus of proof in the Small Claim, Wilder relied upon ***Shams v. Wiebe***, 2000 MBCA 4 ("***Shams***"), wherein the Court considered an application for leave to appeal filed by a landlord who claimed successfully against a tenant at the Residential Tenancies Branch. The tenant appealed the Branch's decision, and the landlord failed to attend at the appeal hearing before the Residential Tenancies Commission, as a result of which the Commission granted the tenant's appeal.

[17] The Court held that the appeal hearing before the Residential Tenancies Commission constituted a hearing *de novo* at which the landlord continued to bear the onus of proof, as was the case at the initial hearing before the Branch.

[18] Wilder argued that the onus of proof in this case also continues to reside with the original claimant, namely the defendant. I have found that there was a distinction between the defendant's role as claimant in the context of his insurance claim, and his role in the context of the liability assessment.

[19] It is trite law that in a legal proceeding or insurance claim, the plaintiff or claimant generally bears the onus of proof, subject to specific exceptions, none of which apply here. In this case Wilder, as the party seeking to set aside the liability assessment of MPI, bore the onus of satisfying the Court Officer on a balance of probabilities that she was not responsible for the damage to the defendant's vehicle.

[20] The decision in ***Shams***, *supra*, does not apply because that appeal involved the same relief and the same issues before both the Branch and the Commission. In this case, there was in essence a two-pronged process consisting of the defendant's insurance claim (in which he bore an onus vis-à-vis MPI) and the liability assessment (in which he did not bear an onus). In the Small Claim, only the liability assessment was at issue.

[21] For the foregoing reasons, I am not satisfied that there is a reasonable chance of success relative to Wilder's argument regarding the application of the onus of proof by the Court Officer.

INSUFFICIENCY OF EVIDENCE

[22] The *Act* provides as follows:

> **Object and purpose**
>
> 1(3) The object and purpose of this Act is to provide for the determination of claims in a simple manner as expeditious, informal and inexpensive as possible commensurate with the matters at issue in each claim.
>
> **Claims dealt with in summary manner**
>
> 1(4) A claim may be dealt with in a summary manner and the rules of the court, other than the small claims rules, do not apply and the judge or court officer hearing the claim may conduct the hearing in such manner as the judge or court officer considers appropriate in the circumstances of the case to effect an expeditious and inexpensive determination of the claim.
>
> . . .
>
> **Admissible evidence**
>
> 8.4(1) In a hearing under this Act, a judge or court officer may admit as evidence anything that the judge or court officer considers relevant to an issue, whether or not it would be admissible under the laws of evidence.

[23] Wilder argued that the Court Officer relied upon the following evidence in making her decision:

(a) the defendant's testimony regarding what both an unnamed doorman and MPI told him, including that Wilder's vehicle was damaged in several different accidents;

(b) MPI's findings as to liability, in the absence of an MPI witness testifying or the MPI file being entered into evidence; and

(c) photographs of each vehicle, shown to the Court Officer by the defendant on his phone, but not entered as exhibits in the Small Claim.

[24] Wilder argued that there was a breach of natural justice on the basis that the defendant did not call the doorman as a witness at the hearing, and accordingly she was denied "the basic right of knowing who her accusers are and having the opportunity to cross-examine them". Wilder argued that necessary procedural fairness must outweigh the statutory right of the Court Officer to admit hearsay evidence, particularly where all of the evidence is hearsay, and that evidence was flawed.

[25] Having determined that Wilder bore the onus of proof in the Small Claim, it was incumbent upon her to call any and all witnesses on whose evidence she may seek to rely in prosecuting the Small Claim. Wilder did not call any witnesses other than herself, knowing that the Court Officer held the view that she bore the onus of proof in the proceeding. Accordingly, there is no question of law arising from a breach of natural justice.

[26] Leaving aside the matter of additional witnesses, it is apparent that the Court Officer, having weighed the evidence presented, relied upon the defendant's evidence that the doorman contacted him, advised him of the collision and gave him Wilder's contact information. The Court Officer concluded in this context that it was more likely that Wilder hit the defendant's car than that there was no collision, as Wilder testified. The Court Officer also considered MPI's finding that the damage to both vehicles was consistent with a collision.

[27] Certainly, it would have been preferable for the MPI file to have been produced to the Court Officer, and for the photographs of the vehicles shown to her by the defendant to have been entered as exhibits.

[28] Having said that, the approach taken with respect to this evidence is permitted by s. 8.4(1) of the *Act*, particularly in the context of ss. 1(3) and 1(4). For that reason, I am not satisfied that this issue constitutes a question of law in this case.

[29] If I am wrong and this issue does constitute a question of law, I am not satisfied that the issue is of arguable merit with a reasonable prospect of success, on the basis of the same provisions of the *Act*.

CONCLUSION

[30] Accordingly, Wilder's application for leave to appeal is dismissed.

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Grammond J.