

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Mr. Justice Marc M. Monnin  
Mr. Justice Christopher J. Mainella  
Madam Justice Janice L. leMaistre

***BETWEEN:***

<b><i>LEO KAI YEN WONG</i></b>	)	<b><i>L. K. Y. Wong</i></b>
	)	<b><i>on his own behalf</i></b>
	)	
(Plaintiff) Appellant	)	<b><i>T. K. Reimer</i></b>
	)	<b><i>for the Respondent</i></b>
- and -	)	
	)	<b><i>Appeal heard:</i></b>
<b><i>DYKER LAW CORPORATION</i></b>	)	<b><i>October 17, 2023</i></b>
	)	
(Defendant) Respondent	)	<b><i>Judgment delivered:</i></b>
	)	<b><i>January 26, 2024</i></b>

**MONNIN JA**

[1] The plaintiff, Mr. Leo Wong (Mr. Wong), appeals the dismissal by way of summary judgment of his action against the defendant, Dyker Law Corporation (Dyker). Mr. Wong alleged that Dyker provided him with what he believed was deficient legal advice. At the relevant time, Mr. Allen Dyker (Mr. Dyker) provided legal services through Dyker.

[2] A brief history of Mr. Wong's legal proceedings will be of assistance.

[3] Mr. Wong, a professional engineer, was employed by Manitoba Hydro since August 1989 (see *Wong v Hawryluk*, 2011 MBQB 161 at para 8

[Wong 2011]). Over the years, Mr. Wong had difficulty in his workplace with his co-workers and superiors. He complained of personal harassment towards him and abuse of authority by supervisory staff (see *Wong v Grant Mitchell Law Corporation*, 2015 MBQB 88 at para 3 [Wong 2015]). Based on these difficulties, his employer required him to undergo a psychological assessment. In November 1995, he was assessed by Dr. Garry Hawryluk (Dr. Hawryluk), a registered psychologist. Dr. Hawryluk prepared a detailed report dated February 29, 1996 (the report), which he provided to Manitoba Hydro with the understanding that it was not to be disclosed to Mr. Wong (see *Wong* 2011 at para 19). In the report, Dr. Hawryluk diagnosed Mr. Wong with a mental health condition.

[4] Mr. Wong's difficulties at the workplace continued for the next 10 years. He was intermittently on sick leave until March 21, 2007, when he went on long-term disability.

[5] On November 8, 2007, Mr. Wong obtained a copy of the report. Shortly thereafter he retained the law firm of Taylor McCaffrey LLP. During the next two years, he pursued claims against Manitoba Hydro and his union, the Canadian Union of Public Employees (CUPE), at the Manitoba Labour Board and the Manitoba Human Rights Commission. These claims were all dismissed. He then filed a statement of claim in the Manitoba Court of Queen's Bench naming Dr. Hawryluk, Manitoba Hydro and CUPE as defendants.

[6] On October 1, 2010, Mr. Wong received a letter from Manitoba Hydro's then in-house counsel offering a settlement in the amount of \$100,000 subject to his providing a release and obtaining independent legal

advice. Mr. Wong did not accept this offer, and the matter proceeded by way of summary judgment.

[7] On June 30, 2011, Perlmutter J (as he then was) dismissed the proceedings against Manitoba Hydro and CUPE on the grounds that they were matters that were covered by a collective bargaining agreement and subject to an arbitration clause. Justice Perlmutter also dismissed the claim against Dr. Hawryluk because it was out of time pursuant to the then-applicable limitation legislation.

[8] Shortly after those reasons issued, Manitoba Hydro resurrected its \$100,000 offer with an additional \$5,000 contributed by CUPE. At this juncture, Mr. Wong was more receptive. He arranged to meet with Mr. Dyker. He first met with Mr. Dyker on November 2, 2011 and, a second time, on November 14, 2011. Without Mr. Dyker's knowledge, Mr. Wong recorded their conversation at that second meeting (an accurate transcript of the audio recording was made available on the summary judgment motion).

[9] During the course of the November 14, 2011 meeting, Mr. Dyker explained the settlement proposal to Mr. Wong, pointing to the consequences of accepting it. He also highlighted the potential for a claim by Dr. Hawryluk for costs, which could have been sizeable, as Mr. Wong had alleged fraud. Mr. Wong indicated his willingness to accept the settlement, and he and Mr. Dyker executed the necessary documents. The settlement funds were eventually paid to Mr. Wong.

[10] On May 9, 2012, Mr. Wong sued his former law firm, Taylor McCaffrey LLP, alleging that they failed in their duty to advise him of the pending limitation period for an action against Dr. Hawryluk. In May of

2014, Mr. Wong sought to amend his statement of claim to add Mr. Dyker as a new defendant; however, this motion was dismissed by an associate judge. The action proceeded to trial. On June 4, 2015, Dewar J allowed Mr. Wong's claim, but awarded nominal damages of \$100. In his view, Mr. Wong was unable to show that he would have suffered compensable damages (see *Wong* 2015). The judgment was not disturbed by this Court (see 2016 MBCA 65, leave to appeal to SCC refused, 37227 (9 February 2017); 2017 MBCA 49, aff'd 2017 MBCA 118, leave to appeal to SCC refused, 38015 (1 November 2018)).

[11] On November 10, 2017, Mr. Wong commenced this action against Dyker. Mr. Wong claimed that Mr. Dyker breached his duty of care by not advising him to reject the settlement from Manitoba Hydro, and by not recommending that he obtain independent legal representation to negotiate a better settlement.

[12] Dyker brought a summary judgment motion pursuant to r 20.01(1) of the Manitoba, *Court of King's Bench Rules*, Man Reg 553/88, seeking to dismiss the action on the grounds that there was no genuine issue for trial. In support of its motion, he filed his own affidavit. In response, Mr. Wong also filed his own affidavit. Cross-examinations on each affidavit were held. An issue arose with respect to Mr. Dyker's notes. At the start of this action, Dyker's counsel requested copies of any notes Mr. Dyker had of his meetings with Mr. Wong. In the exchange of correspondence with counsel, his original notes went missing. As a result, Mr. Wong raised the issue of spoliation—the intentional destroying of evidence by a party to a litigation.

[13] The motion judge found in Mr. Dyker's favour. He held: (a) that summary judgment was appropriate; (b) that there was no genuine issue for trial as Mr. Dyker had met the standard of care; (c) that spoliation did not apply as there was no evidence of an intention to destroy the notes; and (d) to allow the action to proceed would be an abuse of process as an essential part of Mr. Wong's case was a claim for damages which had already been decided by Dewar J in an earlier proceeding.

### Standard of Review

[14] The standard of review with respect to summary judgment motions is well settled. In *Business Development Bank of Canada v Cohen*, 2021 MBCA 41 at paras 32-33, inspiring himself from this Court's decision in *Dakota Ojibway Child and Family Services v MBH*, 2019 MBCA 91, Burnett JA succinctly set out the standard to be applied:

The decision to grant or deny a motion for summary judgment is a discretionary decision, reviewed on a deferential standard, and will only be set aside if there is a material error as to the law or the facts, or if the decision is so clearly wrong as to be unjust.

The determination as to whether there is a genuine issue requiring a trial is a question of mixed fact and law and will not be overturned absent palpable and overriding error.

### Issues

#### *Issue 1: Whether Summary Judgment Was an Appropriate Procedure*

[15] At this appeal hearing, Mr. Wong argued that Mr. Dyker failed in his duty to him by not advising him to reject the proposed settlement, and by not offering to represent him to obtain a more just and fair settlement.

Mr. Wong relied upon the Law Society of Manitoba's *Code of Professional Conduct* (Winnipeg: Law Society of Manitoba, 2011) to draw a distinction between independent legal representation and independent legal advice, as well as raise the obligation of a lawyer to ensure that the client is aware of the difference. He also argued that Mr. Dyker's credibility was an issue that should be left to trial.

[16] The motion judge was "guided by the decision" in *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*], in which the Supreme Court of Canada set out factors that a judge must consider in determining whether a summary judgment should proceed. They are whether:

. . . the judge is able to reach a fair and just determination on the merits on a motion for summary judgment.

This will be the case when the process:

- a) allows the judge to make the necessary findings of fact,
- b) allows the judge to apply the law to the facts, and
- c) is a proportionate, more expeditious and less expensive means to achieve a just result [than going to trial].

(See *Hryniak* at para 49.)

That question must be resolved in the circumstances of each particular case.

[17] The motion judge reviewed those factors and concluded that the necessary evidence was before the Court, including affidavits, transcripts from the cross-examinations and detailed notes documenting what occurred during the meetings between the parties, including an audio recording. In his

view, this evidence allowed for him to make a determination of the issues before him, including the issues of spoliation and abuse of process. Given the highly deferential standard that must be applied to that discretionary decision, there is no basis for appellate intervention on the issue of whether summary judgment was appropriate.

*Issue 2: Whether There Is a Genuine Issue Requiring a Trial*

[18] Mr. Wong's position is that the motion judge failed to appreciate that there were one or more genuine issues that required a trial determine them. Mr. Wong's primary issue was that Mr. Dyker failed to consider the need for Mr. Wong to receive legal representation to negotiate a proper settlement rather than simply independent legal advice. In Mr. Wong's view, the fact that the motion judge failed to refer to the October 1, 2010 letter from Manitoba Hydro indicated that he failed to appreciate that the letter was simply a "framework" for a proper settlement. As well, Mr. Wong argues that Manitoba Hydro misrepresented his ability to pursue his claim against, amongst others, Dr. Hawryluk; this was a genuine issue that required review at trial.

[19] In response, the defendant argues that the only issue for trial was whether Mr. Dyker met the standard of care required by a lawyer providing independent legal advice. There was no evidence provided to the Court, including expert evidence, to suggest that Mr. Dyker should have advised Mr. Wong to reject the settlement and to obtain independent legal representation. As noted in *MacDonald Estate v Martin*, 1990 CanLII 32 (SCC), a regulatory code of professional conduct does not equate to a standard of care.

[20] The motion judge agreed with the defendant that Mr. Wong needed to show three things to be successful in his action:

- i) that Mr. Dyker had been negligent for failing to recommend that he pursue his claims against Manitoba Hydro and CUPE;
- ii) that those claims would probably have succeeded; and
- iii) that the amount of damages Mr. Wong would have been awarded in those claims would have been more than he received through the settlement.

[21] The motion judge then reviewed in detail practical and factual considerations which led him to conclude that, in the end, Mr. Wong would not have been able to demonstrate these three things. Accordingly, he found that there was no genuine issue requiring a trial. In my view, the decision was not arrived at by a material error in fact or law, and I see no basis to interfere with it.

### *Issue 3: Spoliation*

[22] Spoliation is a legal concept that a party who has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect that litigation, raises a presumption that the evidence would have been unfavourable to the party who destroyed it (see *Rosenberg v Securtek Monitoring Solutions Inc*, 2020 MBQB 38 at para 86).

[23] The motion judge found no evidence that the destruction of the notes in question was intended to affect the litigation, nor could he draw such an



inference from the evidence put before him. Mr. Wong is unable to provide evidence to the contrary. The finding of the motion judge is reasonably supported by the record before him. Accordingly, given the deferential standard of review, the finding cannot be disturbed.

*Issue 4: Abuse of Process or Issue Estoppel*

[24] Mr. Wong submits that the motion judge erred in concluding that the issues that he wished to raise in his latest litigation amounted to an abuse of process by relitigating matters that had been decided in previous litigation. Mr. Wong submits that the issues raised in his November 10, 2017 statement of claim are “a final step in a progression of legal procedures to determine who actually participated in the superseding action that ruined [his] mental health. The culprits were Manitoba Hydro and CUPE 998.” The motion judge noted that, “the doctrine of abuse of process applies to prevent an attempt to impeach a judicial finding by re-litigation in a different forum” (see *Catalyst Capital Group Inc v VimpelCom Ltd*, 2019 ONCA 354).

[25] By his own words, Mr. Wong has acknowledged that the current proceedings are an attempt to obtain what he considers to be his right to pursue the two defendants who were released as a result of the settlement. In order to do so, he must have a redetermination of issues decided in *Wong 2015*, such as his loss of income.

[26] In light of the motion judge’s findings on the summary judgment motion, which were discussed above, it is not necessary to review this last issue in depth. Suffice to say that whether the situation here gives rise to issue estoppel or abuse of process, in my view, the motion judge reached the

appropriate conclusion that this was an improper attempt to relitigate matters already decided.

Conclusion

[27] For the above reasons, I am of the view that the motion for summary judgment was properly decided by the motion judge and that there is no basis for appellate intervention. The appeal is dismissed with costs against Mr. Wong.

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Monnin JA

I agree: \_\_\_\_\_ Mainella JA

I agree: \_\_\_\_\_ leMaistre JA