# COURT OF APPEAL FOR ONTARIO

CITATION: Horani v. Manulife Financial Corporation, 2023 ONCA 51
DATE: 20230125
DOCKET: C70650

Zarnett, Thorburn and Copeland JJ.A.

BETWEEN

Abdullah Horani, by his Litigation Guardian, Rania Alsaman, and Rania Alsaman, personally

Plaintiffs (Appellants)

and

Manulife Financial Corporation

Defendant (Respondent)

Geoffrey D. E. Adair, for the appellants, Abdullah Horani, by his Litigation Guardian, Rania Alsaman, and Rania Alsaman, personally

David A. Zuber and Neil Searles, for the respondent Manulife Financial Corporation

Heard: January 13, 2022

On appeal from the judgment of Justice Marie-Andrée Vermette of the Superior Court of Justice, dated April 19, 2022, reported in 2022 ONSC 2350.

## REASONS FOR DECISION

[1] The appellants appeal the motion judge's decision refusing to allow them to amend their pleading to add a claim for punitive damages after the action was set down for trial.

[2] After hearing oral submissions, we dismissed the appeal, with reasons to follow. These are our reasons.

[3] We begin by setting out the history of delay in bringing this motion to amend, followed by an overview of the test for determining whether to grant leave to amend, and our analysis of the motion judge's reasons for denying leave.

## I. BACKGROUND FACTS

[4] The appellant, Abdullah Horani, tripped and fell at his workplace on August 5, 2014.

[5] The Statement of Claim was issued on November 20, 2015. It was amended on January 19, 2017, to name Mr. Horani's wife as his litigation guardian. Neither the original nor amended Statement of Claim included a claim for punitive damages.

[6] A Statement of Defence was served by the respondent Manulife Financial Corporation on January 15, 2016, disputing liability, causation and damages. The appellants, Mr. Horani and his wife, set the action down for trial on April 27, 2018.

[7] Pretrial conferences were held on January 7, 2021 and March 22, 2022. On both occasions, counsel for the parties, including trial counsel for the appellants (not Mr. Adair) advised the pre-trial judge that "pleadings were in order". Because of the onset of the COVID pandemic, the trial, originally scheduled for March 2021, was rescheduled to May 16, 2022. 32 trial days were reserved.

[8] On April 1, 2022, roughly six and a half years after the action was commenced, and six weeks before the 32-day trial was to commence, the appellants sought leave to (i) add a claim for punitive damages in the amount of $2 million; and (ii) increase the amount of damages claimed from $4 million to $7 million pursuant to Rule 48.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[9] Although the motion judge dismissed the request to add the claim for punitive damages in part so that the May, 16, 2022 trial could be maintained, the trial date was lost because of the commencement of this appeal. The 32-day trial has now been re-scheduled to proceed on February 13, 2023.

## II. THE PROPOSED NEW CLAIM FOR PUNITIVE DAMAGES

[10] In their proposed new claim for punitive damages, the appellants seek to amend their pleading to allege that the respondent Manulife Financial Corporation:

i. “behaved with arrogance and high-handedness” and showed “a callous disregard” for the appellant Mr. Horani;

ii. “engaged in contumelious behaviour in relation to its own employee or employees by providing false and or inaccurate representations in its investigation and reporting of the fall and surrounding circumstances, and made false and or inaccurate allegations of findings in relation to the surrounding facts”;

iii. “took an adversarial and hostile approach to its investigation”;

iv. “pre-judged the circumstances of the fall and/or willfully ignored or suppressed evidence unfavourable to it”;

v. “manipulated evidence either knowingly or unknowingly” before the occupational health and safety representative arrived; and then

vi. “used this false evidence in support of its defence and to allege that Dr. Horani's fall was not an uncontrolled fall.”

## III. THE APPELLANTS’ GROUNDS OF APPEAL

[11] The appellants submit that (1) the motion judge’s order is a final order that entitles them to bring their appeal to this court, and that (2) the motion judge erred in law as “there was neither prejudice nor presumed prejudice causally related or flowing from the proposed amendment” that was non-compensable, as any delay or extra work that would result from the amendment were matters compensable in costs.

## IV. ANALYSIS OF THE ISSUES

### (1) This is a final order

[12] We agree with the appellants, the respondent concedes, and a different panel of this court has already ordered, that the appeal of the motion judge’s order is properly before this court as the order finally disposes of the appellants’ substantive right to claim punitive damages: *Hendrickson v. Kallio*, [1932] O.R. 675 (C.A), at p. 680; see also, *Drywall Acoustic Lathing Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2020 ONCA 375, at paras. 13 and 16-17. In particular, orders refusing to permit a party to amend a pleading to advance an additional substantive claim or defence are final orders: *Denton v. Jones*, 13 O.R.

(2d) 419 (S.C.); *Ontario (Securities Commission) v. McLaughlin*, 2009 ONCA 280, 248 O.A.C. 54, at para. 7.

[13] As such, this appeal is properly brought before this court.

**(2) The Test for Granting Leave to Amend Pleadings After the Action Has Been Set Down for Trial**

[14] Rule 48.04(1) provides that a party who has set an action down for trial shall not initiate or continue any motion or discovery without leave of the court.

[15] In deciding whether to grant leave for a motion to amend a pleading under Rule 48.04(1), the parties agree that the scope of the court's discretion is shaped by Rule 26.01 of the *Rules of Civil Procedure*. Under Rule 26.01, the court shall grant leave to amend a pleading unless it would result in prejudice that "could not be compensated for by costs or an adjournment": see *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co*., 2017 ONCA 42, 409 D.L.R. (4th) 75, at para. 25; *Trillium Power Wind Corp. v. Ontario*, 2019 ONSC 6905, at para. 25.

[16] The proper test for granting leave to bring a motion under Rule 48.04(1) after an action has been set down for trial is subject to some disagreement among Ontario courts.

[17] Some courts have required the moving party to show "a substantial or unexpected change in circumstances such that a refusal to make an order under Section 48.04(1) would be manifestly unjust": see, *Hill v. Ortho Pharmaceutical*

*(Canada) Ltd*., [1992] O.J. No. 1740, 11 C.P.C. (3d) 236 (Gen. Div.); for cases adopting *Hill*, see *LML Investments Inc. v Choi* (2007), 85 O.R. (3d) 351 (S.C.), at para. 10; *Jetport v Jones Brown Inc.,* 2013 ONSC 2740, 115 O.R. (3d) 772, at paras. 68, 70 and 71; *Lugen Corporation v Starbucks Coffee Canada Inc*., 2014 ONSC 7141, at paras. 12, 30, 31; *Denis v Lalonde,* 2016 ONSC 5960, at para. 11; *Secure Solutions Inc. v. Smiths Detection Toronto Ltd*., 2017 ONSC 2401, at paras. 42-46.

[18] Others have determined that leave be granted if the moving party can demonstrate that "the interlocutory step is necessary in the interests of justice" even in the absence of a substantial or unexpected change in circumstances: see, *A.G.C. Mechanical Structural Security Inc. v. Rizzo*, 2013 ONSC 1316 (CanLII), at paras. 21-23; *BNL Entertainment Inc. v. Ricketts*, 2015 ONSC 1737, 126, O.R. (3d) 154 (Mast.), at paras. 12, 14; *Fruitland Juices Inc. v. Custom Farm Service Inc. et al*., 2012 ONSC 4902, at para. 28; and *Cromb v. Bouwmeester*, 2014 ONSC 5318, at para. 35.

[19] In yet other cases, courts have considered both tests and determined that they need not weigh in on the prevailing approach as the moving party could not meet the bar even under the broader "interest of justice" test: see for instance, *Alofs v. Blake, Cassels & Graydon LLP*, 2017 ONSC 950, at paras. 22-23; *Chokler v. FCA Canada Inc. 2017*, ONSC 4494, at para. 13.

[20] The appellants concede that (i) the motion judge correctly noted that the language of Rule 26.01 defines the scope of the exercise of the court's discretion to grant leave to move to amend under Rule 48.04(1), and that (ii) the motion judge correctly articulated the principles that apply to a Rule 26.01 motion as to whether an amendment ought to be granted.

[21] However, the appellants submit that the motion judge erred in applying those principles. More specifically, they claim that, first, the motion judge erred in denying the amendment as "the only potential prejudice flowed from a possible delay in the trial being a matter compensable in costs". Although the appellants concede that the motion judge was entitled to find and to presume prejudice, they argue that each item of potential prejudice to which the motion judge adverted was a matter compensable by costs or an adjournment. Second and relatedly, the appellants argue that it is in the interests of justice to allow the appeal to permit the amendment. Counsel for the appellants conceded in oral argument that the motion to amend should have been brought earlier than it was in this instance, but submitted that trial counsel's error in not bringing it earlier should not be visited on the appellants.

[22] Despite the divergence of opinion on the test to be met under Rule 48.04(1), the parties agree that (i) leave to bring a motion to amend a pleading under Rule 48.04(1) is shaped by the requirements of Rule 26.01 and (ii) leave to amend a pleading under Rule 26.01 will be refused if it would result in prejudice that cannot

be compensated for by costs or an adjournment: *State Farm*, at para. 25; *Trillium Power*, at para. 25. Briefly put, regardless of which Rule 48.04(1) test is adopted, this appeal must fail if the motion judge properly determined that allowing the appellants' proposed amendment would result in non-compensable prejudice.

**(3) The Applicable Standard of Review**

[23] The granting or denial of leave is a discretionary order, which attracts deference on appeal. Absent an error in principle, the applicable standard of review is palpable and overriding error: John Sopinka, Mark Gelowitz and David W. Rankin, *The Conduct of an Appeal*, 5th ed. (Toronto: Lexis Nexis, 2022), at section 2.60; *Conway v. Law Society of Upper Canada*, [2016] O.J. No. 451, 2016 ONCA 72, 395 D.L.R. (4th) 100, at para. 16 (leave to amend); *Gloucester Organization Inc. v. Canadian Newsletter Managers Inc.* (1995), 21 O.R. (3d) 753, [1995] (Gen. Div.) (leave to bring a motion to amend); and *Ginkel v. East Asia*, 2010 ONSC 905 (CanLII), at para. 17 (leave to bring a motion to amend).

**(4) The Motion Judge's Reasons to Deny Leave**

[24] In her carefully crafted reasons, the motion judge set out the principles to be followed in considering whether to allow a proposed amendment to pleadings as outlined by this court in *State Farm*.

[25] While the onus to prove actual prejudice lies with the responding party, the onus to rebut presumed prejudice arising from delay lies with the moving party. A

motion to amend will be denied where there is prejudice to the responding party that cannot be compensated by an award of costs, provided that the prejudice flows from the amendments. At some point, the delay will be so lengthy and the justification so inadequate that prejudice will be presumed: *State Farm*, at para. 25. The appellants accept these principles.

[26] Citing the Supreme Court's decision in *Whiten v Pilot Insurance Co.*, [2002] S.C.J. No. 19, at para. 86, the motion judge further held that it is a "basic proposition in our justice system that before someone is punished, they ought to have advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it".

[27] The motion judge found that:

i. The new $2 million claim for punitive damages depended on additional facts that were not pleaded (including facts related to the conduct of the investigation by the defendant);

ii. The proposed new claim also includes new legal arguments that would have affected the way in which the claim was defended;

iii. Responding to these new allegations would require the production of additional documents, additional information from the plaintiffs, and further oral discovery regarding the basis of the claim of punitive damages;

iv. The claim of punitive damages would have affected the way the defendant responded to the claim;

v. The appellants offered no explanation or justification as to why they waited seven and a half years after the accident to bring their motion to amend to add a claim for punitive damages; and

vi. The plaintiffs/appellants offered no explanation as to what changed since the Trial Record was served and why they had certified to the court several times that they were ready for trial, the pleadings were in order and no motions (other than leave to call more than three experts) were contemplated.

[28] The motion judge concluded that because there was no reasonable explanation for the significant delay in bringing the motion to amend,

> Therefore, I find that the delay in seeking an amendment in this case is such that prejudice to the [respondent] is presumed.
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> …
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> In this regard, I find that the [appellants] have not rebutted the presumption of prejudice. Contrary to the amendment increasing the amount of compensatory damages, the claim for punitive damages depends on additional facts that were not pleaded, including facts related to the conduct of the investigation by the [respondent], and new legal arguments. I am not satisfied that the claim for $2 million in punitive damages would not have affected the way in which the [respondent] responded to the claim. …Among other things, the [respondent] may have produced additional documents and sought additional information from the [appellants] regarding the bases for their claim for punitive damages.
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> …
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> If leave were to be granted to add a claim for punitive damages, the [respondent] would need to be given an opportunity to respond to it. The Statement of Defence would need to be amended, additional documents may have to be produced and, ordinarily, the [respondent] would be allowed to ask questions of the [appellants] on an examination for discovery with respect to the bases for these new allegations. Additional documentary and or oral discovery could not take place without jeopardizing the trial date and I have no evidence as to how far in the future a new trial date could be obtained for this matter,

> a 32-day jury trial. The risks of adjourning the trial for a second time and incurring additional and potentially significant delay on top of the delay already incurred in this matter, strengthen the presumption of prejudice in this case. The [appellants] have not adduced evidence that rebuts this presumption. [Citations omitted; emphasis added.]

[29] The motion judge therefore refused the appellants' request for leave to bring a motion to add the claim for punitive damages.

[30] She did, however, grant their request to increase the quantum of damages claimed from $4 million to $7 million on the basis that the respondent had known for four years that the compensatory damages exceed the amount pleaded and both parties were aware of the expert evidence that concluded that Mr. Horani's present and future losses would exceed the amount claimed.

**(5) Analysis**

[31] In our view, the motion judge made no error in her determination.

[32] First, as noted above, where the delay in seeking amendment is lengthy, courts will presume prejudice to the responding party and the onus to rebut the presumed prejudice lies with the moving party: *State Farm*, at para. 25 citing *Family Delicatessen Ltd. V. London (City)*, 2006 CanLII 5135 (Ont. C.A), at para. 6. In *Family Delicatessen*, prejudice was presumed when the delay spanned over six years.

[33] The presumption of prejudice is also applicable in this case where the appellants sought leave to amend their pleading seven and a half years after the incident in question and four years after the action was set down for trial.

[34] Second, the appellants do not challenge the motion judge's finding that, during this time, they failed to adduce evidence sufficient to rebut the presumption of prejudice. It is not clear what explanation the appellants proffered for the delay at the motion below and no explanation was offered on appeal other than counsel's inattention. Indeed, the appellants' counsel rightly conceded that this motion should have been brought at an earlier stage.

[35] Third, the motion judge correctly found that the prejudice was causally connected to the proposed amendment and not compensable in costs. As she noted, the proposed amendment to add a claim for punitive damages depended on new facts and arguments that were not pleaded, would affect how the respondent conducted its litigation, and would likely jeopardize the 32-day jury trial scheduled to begin on February 13, 2023, which has already been significantly delayed.

[36] Fourth, although some of the matters the motion judge referred to in her discussion of prejudice may have been items that would be compensable in costs, we do not read her presumption of prejudice to be limited to those matters, as the appellants contend. The motion judge was keenly aware of the fact that an

amendment was to be denied only if prejudice was non-compensable, and we interpret the prejudice she presumed to extend to non-compensable matters. We agree with the respondent that the facts in this case are akin to those in this court's decision in *Family Delicatessen*, at para. 7, where this court held that requiring a party to change its entire litigation strategy late in the litigation constituted non-compensable prejudice:

> We agree with Counsel for the City that there would be some prejudice to the City had the amendment been allowed. The City had participated in the proceedings for some six years on the basis that it was a nominal Defendant. Its participation in the lawsuit was minimal and it took a cooperative stance with the other parties. Were the proposed amendment to be allowed, the City would be in a very different position with serious allegations of misrepresentation being brought against it. Its litigation strategy may well have been entirely different. It, of course, cannot undo what has already been done in this proceeding. While it is true that the prejudice to the City flowing from the proposed dramatic change in the course of this litigation could be addressed in part by appropriate orders concerning added discoveries and related matters, we are satisfied that the City could not be put in the position it would have been to meet these allegations had they been made in a timely fashion. [Emphasis added.]

[37] The underlined considerations above apply equally in this case. The prejudice to the respondent that the motion judge presumed, is non-compensable by costs or adjournment. The appellants, therefore, would not have been granted leave to amend under Rule 26.01. This is sufficient to dispose of the issue.

[38] We found that it is not necessary to determine the appropriate test under Rule 48.04(1) on this appeal. In any event, even if we were to apply the lower threshold for granting leave to bring a motion to amend under Rule 48.04(1), we are not satisfied that it would be necessary in the interests of justice to allow the appellants to bring a motion to amend its pleading to add punitive damages. The appellants have represented to the court their readiness to proceed to trial on two separate occasions and not once in this six-year period did the appellants seek to amend its pleading to add a claim for punitive damages. No plausible explanation for the delay was proffered to this panel and the motion judge beyond counsel's inattention.

[39] Finally, the motion judge carefully reviewed both this request for leave to amend to bring a claim for punitive damages (which she refused) and the claim to increase the damage claim (which she granted). She offered a balanced approach and there was no evidence that she acted arbitrarily or capriciously in exercising her discretion to deny leave to bring a motion to add a claim for punitive damages.

## V. CONCLUSION

[40] For the above reasons, we see no reason to interfere with the motion judge's decision to deny the appellants leave to bring their motion to amend their pleading to advance a claim for punitive damages.

[41] The appeal is dismissed. Costs to the respondent in the amount of $5,000 as agreed by the parties.