June 30, 2016

I. INSURANCE ISSUES

A. Where a party pleads equitable relief (such as rescission, estoppel or relief from forfeiture) with respect to an insurance policy, the claim cannot be heard by a jury

***Maynard v. Alberta Motor Assn.*, 2015 ABQB 564, per Pentalechuk, J.[4182]**

I. FACTS AND ISSUES

The Plaintiff's vehicle was involved in a motor vehicle accident while being operated by another individual with her consent. The driver stuck another vehicle, damaging the Plaintiff's vehicle and injuring three people (Third Parties). The Third Parties sued the Plaintiff and driver for the injuries they sustained.

The Defendant insurer denied the Plaintiff's claim on the basis that the Plaintiff made material misrepresentations when placing the policy, rendering the policy void. The Plaintiff brought an action against the Defendant for the damage to her vehicle as well as defence and indemnity for the Third Parties' claims.

The Defendant was made a party to the Third Parties' action and settled those claims. Then, by way of counterclaim, the Defendant sought judgment against the Plaintiff for the damages it paid to the Third Parties.

The Plaintiff applied to the Court to have the actions heard by a jury. The Defendant opposed the application on the basis that the Plaintiff's claim and its counterclaim plead equitable relief which bars trial by jury.

II. HELD: Application dismissed. The equitable nature of relief claimed by both parties precluded a jury. In addition, the Plaintiff did not establish a statutory right to a jury (under s.17 of the *Jury Act*, RSA 2000, c J-3).

> 1. The equitable, and therefore discretionary, nature of the relief sought by both the Plaintiff and the Defendant precludes a jury trial.
>
> > (a) The equitable remedies sought by the Plaintiff included:
> >
> > > (i) Relief from forfeiture in the event she has failed to comply with the terms of the insurance policy;
> > > (ii) Estoppel; and
> > > (iii) The Court accepting the Defendant's argument that the Plaintiff's claim for indemnity was really a claim for specific performance of the insurance contract.

(b) The Defendant pled that the insurance policy was void due to the Plaintiff's material misrepresentation. This involves the equitable remedy of rescission.

(i) The Court cited the Alberta Court of Appeal in *Coulter v. Co-Operators Life Insurance Co.,* 2013 ABCA 295 for the finding that voiding a policy on the basis of misrepresentation is relief based in equity.

(c) The Court determined that equitable claims cannot be decided by a jury as "equitable claims involve an exercise of judicial discretion in applying factors that cannot easily apply" (at para 24).

(i) This is in contrast to s.17(1) of the *Jury Act*, where there is no discretion. The actions in s.17(1) are ones where the judge is able to explain the law and issues to the jury and tell them the verdict they must give if certain elements are proven.

2. The threshold for whether an equitable claim bars a jury trial is quite low. It is sufficient that the equitable claim "could potentially form the cornerstone of the case" (at para 26).

(a) A Court need not determine with exactitude the degree to which the Plaintiff will end up relying on equity at trial.

(b) The fact that the Plaintiff's claims were equitable in nature and would become key issues at trial was sufficient to find that the case could not be heard before a jury.

(i) Thus, while the Defendant also pled alternative defences not in equity (a failure to report a change material to the risk and a simple breach of policy), this was not enough to permit a jury trial.

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II. LIABILITY ISSUES

Contributory negligence of a passenger will not be found by virtue of the passenger's knowledge that the driver only has a novice driver's licence without evidence that the passenger engaged in negligent acts or knew the driver was a poor or reckless driver

***Nahal v. Ram*, 2016 BCSC 39, per Jenkins, J.**

I. FACTS AND ISSUES

Facts: The Plaintiff Nahal (17 years old and in grade 12 at the time) was a passenger in a vehicle owned by the defendant Chander Ram and driven by the defendant Raajan Ram ("Ram"). The vehicle was occupied by the driver, the Plaintiff passenger in the front seat and three other friends in the backseat of the vehicle. The group in the Ram's vehicle were intending on going to a friend's house. While driving there, Ram missed the turn onto Inverness Street. When Ram was told that he missed the turn he made a sharp left turn and drove into a tree located on the boulevard.

The Plaintiff claimed to have suffered soft tissue injuries, headaches and lacerations to his head, and a mild traumatic brain injury, which affected his memory, career options and ability to participate in social and athletic activities.

The Defendants admitted liability but claimed that the Plaintiff was contributorily negligent because he knew: (i) Ram had a novice driver licence; (ii) Ram was an inexperienced driver; (iii) Ram had more passengers in the vehicle than was allowed by his novice licence; and (iv) over the course of the night, the Plaintiff had several opportunities to remove himself from the situation but did not do so.

Issue: Was the Plaintiff contributorily negligent?

II. HELD: No. There was no contributory negligence on the part of the Plaintiff. There was no evidence that the Plaintiff knew the defendant driver was a poor and reckless driver or that being a novice driver caused or contributed to the accident.

1. The defence submitted that the case of ***Wormald v. Chariot***, 2015 BCSC 272 was similar to the instant case. There, the Plaintiff was a passenger in a vehicle driven by the defendant who had a novice drivers licence. The Court in ***Wormald*** found the Plaintiff to be contributorily negligent to 40% of the fault.

2. Justice Jenkins found that ***Wormald*** could be differentiated from the instant case based on several differences:

(a) There was no suggestion of any alcohol being consumed by anyone in Ram's vehicle;
(b) The vehicle was not overloaded;
(c) The Plaintiff was wearing a seat belt; and
(d) Above all, there was no imminent threat of egg throwing (as was the case in ***Wormald*** where the car's occupants planned to throw eggs at people from the moving vehicle, with the reasonable expectation that the vehicle might be chased).

3. Justice Jenkins then considered that in the instant case:

(a) There was evidence that the Plaintiff had never previously been in a vehicle driven by Ram, but knew that Ram had a novice drivers licence;
(b) The Plaintiff was aware of the limitations placed on a novice licence, particularly that the novice driver was allowed only one non-family passenger in the vehicle he was driving;
(c) The Plaintiff had opportunities to exit the vehicle prior to the crash but did not ask or attempt to do so; and
(d) The Plaintiff had no role in the accident that occurred and no expectation of what was about to happen based on the moments leading up to the accident.

4. However, Justice Jenkins ultimately found that neither the Plaintiff's knowledge of Ram's novice licence nor the other factors submitted by the Defence in connection with the novice driver designation were considerations relevant to contributory negligence.

(a) It is not negligent to enter as a passenger a vehicle driven by a novice driver given that the novice driver has similar obligations to be careful, cautious and alert while driving as drivers with more experience. In fact, Justice Jenkins stated that "it would be folly to find contributory negligence on the basis of simply being a passenger in a vehicle driven by a novice driver."
(b) Justice Jenkins found that the greater risk of an accident in the circumstance of a novice driver can be likened to the greater risk posed by driving in icy or rainy conditions. Thus, it does not amount to negligence on the part of the passenger to agree to be a passenger of a driver in those circumstances.

5. Justice Jenkins stated that it would be different if the passenger was in the vehicle of a novice driver and remained, knowing that the driver was intoxicated or intended to participate in or encourage illegal or vandalistic acts while in the vehicle.

(a) This was not the facts in the case at bar; the Plaintiff took no negligent acts and thus, there was no contributory negligence.

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June 30, 2016

Under the *Occupier's Liability Act* (*OLA*) there is no duty to investigate and identify a patron for the purposes of a claim between the two patrons unless the occupier had done something to induce an expectation that it would conduct an investigation to assist one patron to sue another

McPhail v. John Doe I, 2016 ABQB 76, per Master A.R. Robertson Q.C.

I. FACTS AND ISSUES

Facts

McPhail was a patron at the annual Calgary Stampede on July 12, 2011. After the end of the grandstand show at approximately 11:00 or 11:30 p.m., several young men ran towards Ms. McPhail; as a result, Ms. McPhail was pushed down and suffered a laceration, fractured tibia and severe injuries to her knee. The collision was accidental.

Two members of the Stampede's security crew attended the location where Ms. McPhail was hurt after hearing a report of a medical emergency on their communications system. One security member was Finigan. On arrival, the security members were waved off by the medical personnel attending to Ms. McPhail. Having been told their assistance was not required, the security members left and entered a one line report to this effect.

In Finigan's affidavit he explained that although he now understands that Ms. McPhail says she was knocked over by someone, no such individual was there when he arrived on the scene. At Questioning, Finigan stated that if he had been told that someone knocked Ms. McPhail down, he would have made notes of it and generated a report.

McPhail recalled a "uniformed person" attending soon after the accident. Mr. McPhail detained one of the individuals and spoke to a uniformed person who he believed was a member of the Calgary Police Service (CPS). The uniformed person spoke to the individual. However, the CPS had no report from this incident on July 12, 2011. The CPS's first information came later when the McPhails contacted them.

McPhail alleged that the Stampede: (a) did not follow sufficient procedures to investigate the incident and identify the individuals who knocked her over; and (b) did not take sufficient steps under the *OLA*, section 5. It was argued that the Stampede did not take sufficient care "as in all of the circumstances of the case is reasonable to see that the visitor will be reasonably safe and using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or as permitted by law to be there."

The Stampede brought an application for summary dismissal of Ms. McPhail's claim.

Issues

1. Does an invitee to a commercial operation have a claim against the occupier for failing to properly investigate a tort, of which the invitee is victim, when the occupier is not otherwise liable?
2. Do the facts of the case overall demonstrate that the Stampede has a defence which is "unassailable" such that the claim should be summarily dismissed?

II. HELD: The application for summary dismissal was allowed and McPhail's action was dismissed as against the Stampede.

Issue 1: Occupier's Liability

1. The Master rejected Ms. McPhail's argument and found that the Stampede had proper policies and procedures in place. Furthermore, had Finigan completed an incident report, it would not have identified the culprit and therefore would have made no difference to the outcome.

2. The Master stated he had "…serious doubts that an occupier would ever have any positive duty to an invitee to investigate a tort that occurred between two invitees. There would have to be something to cause that duty to arise."

a. The Master noted that it is good practice for an organization like the Stampede to investigate any incident for the purposes of preserving the evidence so that it can defend itself from a civil claim or a charge that it or one of its employees had committed an offence and also take steps to reduce the risk of similar incidents in the future.

b. The Stampede's instruction manual was found to be quite comprehensive regarding things to be done by security personnel and why. The focus of the manual was to keep the peace, avoid incidents, keep good relations with Stampede attendees and avoid attracting liability for assault, defamation and the like. The instructions on taking notes and preparing incident reports are given in that context.

c. Thus, the Master concluded that the purposes of the instruction in the manual satisfied the burden imposed by the *OLA* to protect the Stampede's interests generally, and to preserve evidence. There was no indication that an investigation was to be done to assist other parties advancing claims against each other.

3. Ultimately, there was no basis for a claim by one patron because of the failure of the Stampede to identify another patron for the purposes of a claim as between the two patrons. The duty under the *OLA* is to maintain safe premises; it does not speak to identification of attendees.

a. Any claim for an investigation for the patron's benefit would arise from the reasonable expectation of the patron that the occupier would, in addition to maintaining safe premises, investigate for the patron's benefit. There was no basis for such an expectation here.

Issue 2: Summary Dismissal

4. The Master found that summary dismissal was appropriate. The Master found that:

a. Competent host conducts investigations into incidents on its premises to protect itself as well as to try and avoid similar incidents in the future, in particular because of the requirements of section 6 of the *OLA.*

b. If the host becomes aware of hazards or aberrant behavior by third parties on its premises and ignores it, it may become liable. However, that was not the circumstance in the instant case.

c. "Unless the host does something to induce an expectation that it would do an investigation to assist one invitee sue another, I cannot find an obligation to act as a private investigator."

d. The occupier does not guarantee the safety of every person who attends an event such as the Stampede. Where an accident is caused by one invitee and another invitee is a victim, the occupier is not liable for the tort of another person unless the occupier has some prior knowledge that it was not meeting the requirements of the *OLA* to maintain safe premises.

5. Based on the foregoing, there was neither a proper case to send to trial over whether the Stampede's duties under the *OLA* were met nor a proper claim against Stampede for not investigating the battery or negligence action of which Ms. McPhail was a victim.

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June 30, 2016

Both the legal/registered owner and lessor and the beneficial owner and lessor of a vehicle are vicariously liable for the lessee's vehicular negligence but only to the liability cap for lessors

***Graham (Litigation guardian of) v. Lemay*, 2016 ONCA 55, per Pepall, J.A.**

I. FACTS AND ISSUES

On May 18, 2006, the Plaintiff Graham was injured while a front seat passenger of a vehicle being operated by Lemay was T-boned on the passenger side by a vehicle leased to West End Tile Limited and Luciano Pietrantonio, being operated by Luciano's son Mario Pietrantonio. It was alleged that Mario was speeding and on his cellphone at the time. The Plaintiff suffered traumatic brain injury and was left permanently disabled. Lemay carried $1,000,000 in third party auto liability coverage.

The Pietrantonio vehicle was registered to West End Tile Limited and Luciano Pietrantonio as lessees. The lessees carried $2,000,000 in third party auto liability coverage. The registered owner and lessor of the vehicle was Daimler Financial, which carried a standard lessors' contingent auto policy and a standard excess insurance policy providing ten million dollars of coverage, extending only to the named insured Daimler Financial and which excluded coverage for any lessee or employee of a lessee. Furthermore, that coverage was available only to the extent that the lessees' insurance was not collectable.

The Plaintiff's damages would significantly exceed the limits of third party auto liability coverage on the two vehicles.

The beneficial owner of the Pietrantonio vehicle was the Defendant Chrysler Canada Inc. It had entered into agreements with the registered owner and lessor Daimler Financial. Specifically, Daimler Financial transferred ownership and a number of vehicles to Chrysler pursuant to a July 1, 1996 contract (1996 Gold Key Agreement). The Agreement was structured so that Chrysler could claim tax benefits in its capacity as owner of the vehicles. The Court summarized the key terms of the Agreement (at paragraph 14):

- Daimler Financial agreed to purchase vehicles as agent for Chrysler and to hold the related leases on behalf of and for the benefit of Chrysler in accordance with the terms of the 1996 Gold Key Agreement.
- Daimler Financial would retain legal title to the vehicles and would be the registered lessor of the related leases as bare trustee and nominee for and on behalf of Chrysler. All indebtedness and liability due to Daimler Financial under the

leases and all other benefits related to the vehicles including insurance were for the benefit of Chrysler.
- Daimler Financial agreed to administer, for the account of Chrysler, the leases beneficially owned by Chrysler in return for which Chrysler would pay Daimler Financial a fee.
- Chrysler's role as beneficial owner of the vehicles and leases would not be disclosed except as required by law or by the 1996 Gold Key Agreement.
- The terms of the 1996 Gold Key Agreement were binding on and ensured to the benefit of successors and assigns.

Daimler Financial and Chrysler also entered into a purchase and sale agreement and a bill of sale dated December 31, 2002, consistent with the 1996 Gold Key Agreement, carrying out the sales of the vehicles and leases to Chrysler. The Pietrantonio vehicle was governed by these contracts.

At the time of the accident, the lessee West End Tile Limited was co-owned by Luciano Pietrantonio and his son Mario Pietrantonio. In November 2002, West End Tile and Mario executed a lease agreement on the Pietrantonio vehicle with the Chrysler dealership. Both Luciano and Mario submitted an application for credit with Daimler Financial. Daimler Financial approved the lease in favour of West End Tile and Luciano but did not approve Mario's application. No reasons were provided for the rejection. Accordingly, the dealership entered into the lease only with West End Tile and Luciano as lessees. At Discovery, Luciano indicated that the reasons for the rejection of Mario as a lessee were "financial reasons." Daimler Financial provided the financing and was assigned the lease and title of the vehicle from the dealership. Daimler Financial became the registered owner and lessor of the vehicle.

Mario Pietrantonio was approximately 43 years of age at the time of the accident. His driving record revealed that in 1981 (when he was 18) he had three speeding convictions, a careless driving conviction (with a license suspension) and a collision. He was found speeding again in 1985, 1991 and 1995. Also in 1995, he was found guilty of failing to properly use a seat belt. Additional collisions involving Mario occurred in 2001, 2003 and 2006, although "his driving record contains a 'driving properly' notation for each of those incidents." In 2006 he was also convicted of having an inoperative or modified seat belt assembly.

The Defendants Chrysler, Daimler Financial and Capital Dodge, moved for summary dismissal of the action against them and the Plaintiffs brought a cross-application seeking summary judgment and a declaration that Mario Pietrantonio was an unnamed insured under Daimler Financial's excess insurance policy and, further, that Chrysler and Daimler Financial were not entitled to the cap on liability for lessors pursuant to Ontario's *Insurance Act*, R.S.O. c. I.8, section 267.12(1) [analogous to *Alberta's Traffic Safety Act*, R.S.A. 2000, c. T-6, section 187(1)]. Chrysler argued that it was not an "owner" of the vehicle. Within the meaning of *Ontario's Highway Traffic Act*, R.S.O. c. H.8, section 192(2), which provides that owners of a vehicle are vicariously liable for the vehicular negligence of drivers possessing the vehicle with consent [analogous to *Alberta's Traffic Safety Act*, section 187(2)].

The motions judge found that Chrysler was an "owner" of the Pietrantonio vehicle, rejecting the argument that it was only an owner to the extent necessary to claim capital cost deductions. In any event, the motions

judge held that such a restriction on ownership would not be effective. Thus, it was held that West End Tile Limited, Daimler Financial and Chrysler were vicariously liable for any vehicular negligence on the part of Mario Pietrantonio, rejecting Chrysler's argument that it had no control or dominion over the vehicle.

The motions judge held that Chrysler and Daimler Financial were both lessors of the vehicle, and therefore were entitled to the liability cap for lessors. The motions judge found that there was no indication in the legislation of any "bifurcation for the purposes of limitation of liability between ownership and lessor ship," such that Chrysler was a co-lessor of the vehicle.

The motions judge also dismissed the Plaintiff's claims against Chrysler and Daimler Financial for negligent entrustment, rejecting the suggestion that Mario Pietrantonio's application to become a lessor was rejected because of his driving record, as opposed to his financial status. The motions judge drew the inference that Daimler Financial and Chrysler had done nothing to check on Mario's driving record and that there was nothing in that record that should have alerted a potential lessor to any outstanding driving problems relating to Mario Pietrantonio. It was also held that any duty to inquire on the part of the potential lessors was "too remote," since West End Tile and Luciano were the lessees, not Mario. The motions judge held that it was reasonable for Chrysler and Daimler Financial to rely on the third party insurance obtained by West End Tile and Luciano "to satisfy concerns about the competence of the eventual driver."

The parties entered into a consent order declaring that Mario Pietrantonio was not an unnamed insured under Daimler Financial's standard excess policy on the basis of ***Xu (Litigation Guardian of) v. Mitsui Sumitomo Insurance Co.***, 2014 ONSC 167; aff'd 2014 ONCA 805, reserving the right of the Plaintiffs to appeal on the basis that ***Xu*** had been wrongly decided.

The Plaintiff appealed from the findings that Chrysler and Daimler Financial were entitled to the lessor liability cap and that Mario was not an unnamed insured under Daimler Financial's excess policy. The Plaintiff also appealed the dismissal of the negligent entrustment claim. Chrysler and Daimler Financial appealed the finding that Chrysler was an owner, vicariously liable for any vehicular negligence of Mario Pietrantonio.

II. HELD: Appeals and cross-appeals dismissed

> 1. The Court upheld the motions judge decision that Chrysler was a non-registered "owner" of the vehicle, vicariously liable for vehicular negligence on the part of Mario Pietrantonio, rejecting Chrysler's argument that it did not exercise the necessary dominion and control over the vehicle. Citing ***Winne v. Dalby*** (1913) 16 DLR 710 (Ont.CA), ***Hayduk v. Pidoborozny*** [1972] SCR 879, ***Honan v. Gerhold*** [1975] 2 SCR 866 and ***Kerri (Guardian Ad Litem of) v. Decker***, 2002 NFCA 11, the Court concluded as follows:
>
> 39 While these cases involved registered owners, the Supreme Court also looked to other factors to reflect ownership. I see no reason to adopt a different approach for non-registered owners. The language of s. 192(2) of the Highway Traffic Act speaks of an owner and does not reflect any distinction between non-

registered and registered owners. Nor does it impose any dominion and control requirement. Such an approach is also consistent with the public protection purpose of s. 192(2). Dominion and control may result in a finding of ownership in the case of a non-registered owner but other factors may also lead to that conclusion.

40 In this case, Chrysler admitted that it was the non-registered owner of the Pietrantonio vehicle. Moreover, its conduct was consistent with that admission in that it had claimed significant tax deductions in its capacity as owner. The agreements between Daimler Financial and Chrysler explicitly state that Chrysler is the beneficial owner. In these circumstances, it was unnecessary for the motions judge to engage in any additional analysis on dominion and control. The motions judge did not err in concluding that Chrysler was an owner for the purposes of s. 192(2) of the Highway Traffic Act. Therefore, I would dismiss Chrysler's cross-appeal.

2. It was held that Chrysler and Daimler Financial were both lessors entitled to the benefit of the lessor liability cap under *Ontario's Insurance Act*, section 267.12(1) [analogous to *Alberta's Traffic Safety Act*, section 187(2.1)].

> (a) The Court commented behind the lessor liability cap:

49 In Xu, McEwen J. considered whether s. 267.12 prevented a lessee from obtaining coverage under a lessor's insurance policy beyond the liability cap. At para. 31, McEwen J. discussed the policy rationale for the statutory cap on liability for lessors:

> The legislative intent behind Bill 18 is clear from Hansard. Lessors were, according to the Government of Ontario, experiencing unfairly high costs of doing business given the fact that awards for personal injury had become exorbitant. This was increasing lessors' insurance rates and affecting their ability to obtain insurance at a reasonable price. The cost of this would be passed on to the consumer. The purpose of the legislation was to protect lessors by reducing their exposures in personal injury lawsuits, thus reducing their insurance rates.

50 At para. 29, McEwen J. quoted from ***Hansard***:

> This is about fairness. Leasing and rental companies do not have control over the actions of the drivers. Those vehicles are in the hands of the driver for an extended period of time, and there's no direct business relationship, save and except the rental, between the owners of the company and the actual drivers. Continuing to impose uncapped vicarious liability on the basis of ownership may unfairly drive up the cost of doing business for the leasing and rental companies. This would, in turn, drive up the cost of those leased or rented vehicles and thus the cost to the consumer who is choosing that form of auto usage.

51 Section 267.12 was designed to reduce insurance costs and the cost of doing business for leasing and rental companies in the automotive arena — an industry of significant importance in Ontario — and hence those of the consumer. This was the legislative context. The legislative objective was clearly expressed in s. 267.12 by the introduction of the cap on liability available to a lessor or lessors.

[footnotes omitted]

(b) The Court rejected the argument that the Chrysler-Daimler Financial agreements effectively divided ownership and leasing between Chrysler and Daimler Financial. It was held that both Chrysler and Daimler Financial were lessors (and that there can be more than one lessor) and that the lessor liability cap should apply to both:

56 The appellants argue that the agreements between Chrysler and Daimler Financial effectively divided ownership and leasing between Chrysler and Daimler Financial respectively. I disagree. The effect of the agreements was to divide legal title and beneficial ownership. Canadian law has long recognized a division between legal and equitable property rights: Bruce Ziff, Principles of Property Law, 5th ed. (Toronto: Carswell, 2010) at pp. 78 and 211.

57 A lease is a contract by which the lessee obtains a right to use the property leased in exchange for consideration. The proprietary interest in the property is not changed, but remains in the owner: Canadian Acceptance Corp. v. Regent Park Butcher Shop Ltd. (1969), 3 D.L.R. (3d) 304 (Man. C.A.). Put differently, an owner has the right to lease the vehicle owned.

58 Daimler Financial assigned to Chrysler beneficial ownership in the Pietrantonio vehicle, the related lease, and all indebtedness and liability due and to become due to Daimler Financial under or in respect of the related lease. It is clear from the agreements that Daimler Financial and Chrysler intended that Chrysler have the benefit of the debt assigned, Daimler Financial would act as agent to administer the leases, and the transfer was made for good consideration. The lease with West End Tile Limited and Luciano permitted a sale or assignment of both the motor vehicle and the lease to a third party — in this case, Chrysler. As such, at all material times, Chrysler was a lessor.

59 I would also note that the presence of the bare trustee language found in the 1996 Gold Key Agreement and Purchase and Sale Agreement does not detract from the vesting of the beneficial ownership of the vehicle and the lease in Chrysler. The agreements reflected intertwined but separate promises: Chrysler would purchase the beneficial ownership in the vehicles and the related leases and Daimler Financial would retain legal title and remain registered lessor as bare trustee for Chrysler. Both the assignment and the trust served to vest in Chrysler the beneficial ownership of the Pietrantonio vehicle and the related lease.

60 In conclusion, the language of s. 267.12(1), its legislative purpose, and the

agreements between Chrysler and Daimler Financial all supported the motions judge's conclusion that Chrysler was a lessor within the meaning of that subsection and was therefore entitled to the cap on liability. There is nothing that would cause one to conclude that a beneficial owner of the motor vehicle and the lease is not, or should not be considered, a lessor.

61 It remains to be considered whether Daimler Financial was also a lessor. The appellants submit that s. 267.12(1) does not speak of an administrator of a lease and as such, Daimler Financial was not entitled to benefit from the cap on liability.

62 I do not agree. Daimler Financial retained legal title to the Pietrantonio vehicle. Section 267.12 (1) speaks of "the maximum amount for which the lessor or lessors of the motor vehicle are liable in respect of the same incident in their capacity as lessors of the motor vehicle." Clearly the statute contemplates multiple lessors.

63 Furthermore, by virtue of the assignment to Daimler Financial from Capital Dodge, the lease itself described Daimler Financial as lessor.

3. The Court held that ***Xu*** had been properly decided such that Mario Pietrantonio was not an unnamed insured under Daimler Financial's standard excess policy.

4. The Court upheld the dismissal of the Plaintiff's negligent entrustment claim.

> (a) The Court noted that it was unclear whether or not such a tort existed in Ontario but proceeded to decide the case as if it did, without deciding the point:

79 The parties and the motions judge proceeded on the basis that the tort of negligent entrustment exists in Ontario and in that regard relied on ***Cella***. While the tort exists in the United States and arguably in British Columbia (***Schulz***, at p. 105) and has been advanced in Ontario (***Vynckier v. Brown***, 2015 ONSC 376 (Ont. S.C.J.); ***Persaud v. Suedat***, 2012 ONSC 5232, 96 C.C.L.T. (3d) 147 (Ont. S.C.J.); ***Ladouceur v. Zimmerman***, [2009] O.J. No. 4777 (Ont. S.C.J.); and ***Ahmetspasic v. Love***, 2002 CarswellOnt 4475 (Ont. S.C.J.)), no definitive statement on the existence of the tort has been enunciated by either the Supreme Court of Canada or by this court. As the appeal was not argued on the basis that the tort does not exist, I propose to address this ground of appeal assuming, without deciding, that such a tort does exist.

(b) The Court held that it was open to the motions judge to conclude that Mario's rejection as a lessee had to do with financial issues but, more significantly, it was held that there was an absence of any duty of care between the Plaintiffs and Daimler Financial:

> 81 The test for a duty of care is well-established in Canadian law. As noted in ***Knight v. Imperial Tobacco Canada Ltd***., 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 41, a duty of care requires both foreseeability and "a relationship of sufficient closeness, or proximity, to make

it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other." In particular, when the claim at issue alleges a failure to act, foreseeability alone cannot be enough and the facts must disclose a justification for imposing on a defendant a positive duty to act: ***Childs v. Desormeaux***, 2006 SCC 18, [2006] 1 S.C.R. 643 (S.C.C.), at para. 31. In ***Childs***, at para. 31, the court noted that "[generally], the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved."

82 In ***Cella***, a decision the appellants rely upon, this court stated, at p. 331, that "[liability] for a negligent act or omission will be imposed in situations where there is a sufficient relationship between the injured party and another person, which makes it reasonable to conclude that the other person owed a duty towards the injured party."

83 In the case under appeal, the vehicle was leased not to Mario but to West End Tile Limited and Luciano. The motions judge concluded that a duty on Daimler Financial to ascertain the competency of the driver of the vehicle was too remote. It was reasonable for the lessors to rely on the insurance that had been obtained by the lessees. On this basis, the motions judge correctly concluded that there was no genuine issue requiring a trial on the issue of negligent entrustment. He wrote:

> Moreover the vehicle was not leased directly to the driver; it was leased to the company [West End Tile Limited] for whom the driver worked. It would seem, therefore, that a duty to inquire about the eventual driver would be one that would be far too remote. Indeed, the lessors would have no ability to ascertain who the driver was at a particular time even if the driving record of the eventual driver was suspect. It would be entirely reasonable for them to be satisfied with regard to the fact that insurance had been granted.

84 As noted by the motions judge, in the present case, Daimler Financial leased the Pietrantonio vehicle to Luciano and West End Tile Limited. Finding a duty of care in the present case would lead to the conclusion that the lessor had an obligation to inquire into who would be driving it. The relationship between the appellants and Daimler Financial does not disclose proximity sufficient to justify imposing a duty. The motions judge properly concluded that Daimler Financial had met its evidentiary burden and that there was no genuine issue requiring a trial on the claim of negligent entrustment.

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June 30, 2016

III. QUANTUM/DAMAGES ISSUES

Surveillance evidence significant in discrediting Plaintiff in large chronic pain case

***Bumstead v. Dufresne*, 2015 ABQB 787**, per Horner, J.

I. FACTS AND ISSUES

The Plaintiff was injured in a rear-end motor vehicle accident on a secondary highway approaching the exit to the Highway #1. His truck was rear-ended by a much smaller vehicle. The descriptions of the accident and the resulting damage and force of impact were very different from the Plaintiff and Defendant. The Trial Judge preferred the Defendant's description, being more consistent with the accident reconstruction evidence by experts on behalf of both parties and the limited physical evidence available.

The Plaintiff never returned to work as an industrial electrician working in the oil and gas industry after the accident. He made some attempts to return for short periods of time but failed. He received long term disability benefits for a time, until they were ultimately discontinued. He settled his claim with the disability insurer after they obtained surveillance evidence showing him working in awkward positions replacing the brakes on his vehicle in a back alley over a period of approximately three hours one day without assistance. That surveillance evidence, introduced by the defence at the Trial was of great significance in the Trial Judge's assessment. The date the Plaintiff did the brake replacement is the day the Trial Judge terminated the Plaintiff's damages claim.

The Plaintiff claimed Chronic Pain Syndrome had developed as a result of his injuries. He took the position that his pre-existing back pain and other work-related injuries and health issues were unrelated to the accident and that all of his complaints after the accident, including the development of Chronic Pain Syndrome, resulted from the motor vehicle accident.

A number of medical experts testified on behalf of both parties. Dr. Suffield, a Neuropsychologist on behalf of the defence, reviewed the Plaintiff's medical history and his psychometric test scores, particularly the Fake Bad Scale and other validity scales in a number of tests. Dr. Suffield ultimately concluded that the Plaintiff was malingering. Dr. Suffield only came to that conclusion after he saw the surveillance evidence. The Trial Judge appreciated his consideration of new evidence. She criticized some Plaintiff experts for failing to reassess and adjust their opinion when they were confronted with new evidence. A dispute amongst the experts regarding the usefulness and relevance of the Fake Bad Scale in the MMPI was not ruled on by the Court.

II. HELD: For the Plaintiff; damages of less than $300,000.00 awarded

1. This is a personal injury claim relating to chronic pain with very significant credibility issues. The Plaintiff's claim in excess of $2 Million resulted in an ultimate judgment of less than $300,000, the exact terms and calculation of which are still subject to review by the Trial Judge. The Judge relied on strong surveillance evidence to cut off the Plaintiff damages claimed at a specific date at which she was sure the Plaintiff was no longer disabled as claimed. She did not find him to be credible, but stopped short of finding that he was malingering.
2. The Plaintiff was injured in a rear-end motor vehicle accident on a secondary highway approaching the exit to the Highway #1. His truck was rear-ended by a much smaller vehicle. The descriptions of the accident and the resulting damage and force of impact were very different from the Plaintiff and Defendant. The Trial Judge preferred the Defendant's description, being more consistent with the accident reconstruction evidence by experts on behalf of both parties and the limited physical evidence available.
3. The Plaintiff never returned to work as an industrial electrician working in the oil and gas industry after the accident. He made some attempts to return for short periods of time but failed. He received long term disability benefits for a time, until they were ultimately discontinued. He settled his claim with the disability insurer after they obtained surveillance evidence showing him working in awkward positions replacing the brakes on his vehicle in a back alley over a period of approximately 3 hours one day without assistance. That surveillance evidence, introduced by the defence at the Trial was of great significance in the Trial Judge's assessment. The day of the Plaintiff doing the brake replacement is the date the Trial Judge terminated the Plaintiff's damages claim.
4. The Plaintiff claimed Chronic Pain Syndrome had developed as a result of his injuries. He took the position that his pre-existing back pain and other work-related injuries and health issues were unrelated to the accident and that all of his complaints after the accident, including the development of Chronic Pain Syndrome, resulted from the motor vehicle accident.
5. A number of medical experts testified on behalf of both parties. Dr. Suffield, a Neuropsychologist on behalf of the defence, reviewed the Plaintiff's medical history and his psychometric test scores, particularly the Fake Bad Scale and other validity scales in a number of tests. Dr. Suffield ultimately concluded that the Plaintiff was malingering. Dr. Suffield only came to that conclusion after he saw the surveillance evidence. The Trial Judge appreciated his consideration of new evidence. She criticized some Plaintiff experts for failing to reassess and adjust their opinion when they were confronted with new evidence. A dispute amongst the experts regarding the usefulness and relevance of the Fake Bad Scale in the MMPI was not ruled on by the Court.
6. The assessment of damages was not particularly complex in this matter. No significant new legal principles were established. In the initial reasons the Judge made errors with respect to the calculation of the past loss of income that was awarded. She grossed up the loss of

income rather than reducing it to a net income basis. In addition, the deduction for Section B benefits that was clearly intended to be made was not mathematically made in the calculation of the final amount awarded for past loss of income. On further application the Trial Judge determined that she could and should correct the errors in her judgment under Rule 9.13. The deduction for Section B benefits was to be made. She acknowledged that past loss of income damages are not to be grossed up and reduced the damages to eliminate the tax gross up that had been applied. She concluded that the income figures she used had been net income and not gross income, so no further adjustment was made. The last aspect of the judgment calculation is still under discussion among counsel.

7. The Trial Judge made a ruling with respect to costs in this matter. The Plaintiff had multiple experts in several areas of expertise. The Judge limited the recovery of costs for those experts. In particular, of two psychology experts costs were allowed for only one. Of four medical experts costs for only two were to be allowed.
8. The entire judgment is under appeal by the Plaintiff. The calculation of past loss of income and possibly other elements of the judgment are under appeal by the Defendant. Both parties question whether the termination of changes on the date the Plaintiff was observed performing the brake work is appropriate. The Plaintiff suggests damages should have been confirmed beyond that date to allow for retraining or to find employment. The Defendant argues this effectively reversed the onus and that damages should have been terminated earlier, at the last date the Court was satisfied on a balance of probabilities that the Plaintiff was disabled.

III. COMMENTARY:

Counsel for the Defence in this matter was Field Law's very own Doreen Saunderson of the Calgary office.

The judgment is helpful as reflecting an effective use of surveillance evidence and grounds for negative credibility findings. The evidence in this case challenging the Plaintiff's credibility was particularly strong. There will be few other cases where there will be so many bases upon which a Trial Judge can be invited to find that the Plaintiff's evidence is not credible.

The judgment is also useful with respect to the Trial Judge's direction that not all experts retained and called by the Plaintiff are necessarily going to be reflected in the Bill of Costs payable by the Defendant.

At the conclusion of this matter, taking into account formal offers made before trial the net judgment payable to the Plaintiff is very low. If further corrections are made to the calculation of the past loss of income as the Defendants assert, a net amount will be payable by the Plaintiff to the Defendants, given the Defendants entitlement to costs after a Formal Offer made. The case is an excellent example of the powerful effect of an early, reasonable formal offer.

In this case the surveillance evidence was particularly effective because of its proximity in time to IME attendances by the Plaintiff where he described significant limitations entirely inconsistent with the surveillance evidence. In addition, the evidence was particularly effective given the activity the Plaintiff was observed doing and the multiple different bodily

positions he was able to get in and out of and sustain beyond what he reported or demonstrated when aware that he is being assessed. In the surveillance evidence he showed no obvious signs of pain or discomfort despite these body positions and heavy lifting and physical exertion involved. Defence experts reviewed the surveillance video when it became available and wrote reports and testified very effectively on the effect it had on their opinions.

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The Court overtly accepted the Plaintiff's expert testimony and criticized well-known defence experts with regard to whether the Plaintiff's injuries were minor and whether fibromyalgia can be caused by trauma

***Jones v. Stepanenko*, 2016 ABQB 295, per Madam Justice K.M. Eidsvik**

I. FACTS AND ISSUES

The Plaintiff was a 19 year-old nursing student at the time of the accident on September 18, 2009. She was stopped at a red light and was rear-ended by the Stepanenko vehicle (operated by Jelena and owned by Nikolajs), pushing her into the vehicle in front of her. Both vehicles were severely damaged. The Plaintiff did not recall the impact and was not in immediate pain. She declined treatment by EMS, stating she was worried about cost. Her headache started that night and she saw her doctor and physio the next day, continuing with physio and massage therapy treatments into 2016.

One of the issues at trial was whether or not the Plaintiff's injuries were minor according to the *Minor Injury Regulation*. The Defendants initially claimed it was but amended their argument after the trial evidence was closed and conceded that the cap did not apply.

Another issue was whether the Plaintiff's fibromyalgia was caused by the accident. Again, the Defendants initially argued that the Plaintiff had recovered from her injuries after a short period of time and that her fibromyalgia was not caused by the collision. They amended this argument at the close of trial and accepted that the Plaintiff was suffering from fibromyalgia and chronic pain caused by the accident but argued her award should be in the range of the less serious chronic pain cases.

II. HELD: For the Plaintiff; $282,683.65 awarded in damages plus pre-judgment interest

1. Were the Plaintiff's injuries minor under the *Minor Injury Regulation*?

(a) The Defence IMEs claimed they were.

(i) The report of Dr. John Bauman (Calgary orthopedic surgeon) indicated that she had "no evidence of ongoing injury."

(ii) Dr. Myron Stelmaschuk (an M.D. and Certified Medical Examiner) concluded that she suffered from a minor injury and that she had no serious impairment or disability.

(iii) Dr. Anthony Russell (Edmonton rheumatologist) noted that the Plaintiff might have had a WAD II type injury but it had settled by March 2010 and would be classified as minor in terms of the *Regulation*.

(b) On cross-examination each of the defence IMEs were largely discredited.

(i) Dr. Bauman clarified his "no injury" conclusion meant no objective orthopedic injury and agreed the Plaintiff could still have been suffering from pain. The Plaintiff's Section B benefits had been cut off as a result of Dr. Bauman's report and Justice Eidsvik stated he had "forgotten his audience."

(ii) Dr. Stelmaschuk admitted that his diagnosis of a minor injury was based on a medical model and not the definition in the *Regulation*. He stated that he had never found someone to suffer a "serious impairment" and that the legislation has not changed how he does certified medical examinations. On cross-examination Dr. Stelmaschuk agreed the Plaintiff was suffering from chronic pain (symptoms had continued past 6 months) and that fibromyalgia is not a minor injury. Justice Eidsvik noted that it is not appropriate to provide an opinion in a legal setting without relying on definitions and tests set out in the legislation.

(iii) Dr. Russell conceded that the Plaintiff's injuries had not settled in 2010 and he was not sure why he had thought they had.

(c) Justice Eidsvik agreed that the Plaintiff was still suffering from symptoms in 2010 (therefore making them chronic and outside the cap), accepting the Plaintiff's family doctor and physio evidence and rejecting the defence experts' evidence.

2. Did the Plaintiff have fibromyalgia and was it caused by the accident?

(a) Plaintiff IMEs:

(i) Dr. Esmail diagnosed her with a post-traumatic sprain/strain injury and micro damage of the spine (not able to be seen on diagnostic imaging tests) in 2011.

(ii) In 2012 Dr. Apel diagnosed the Plaintiff with fibromyalgia and suggested it can be caused in three ways: by trauma, due to disease (such as MS), or onset with no known cause. In order to determine if it is caused by trauma Dr. Apel indicated pre-existing red flags must be ruled out; she relied on the Plaintiff's family doctor's treatment notes and determine there was no pre-existing condition and that the

fibromyalgia and myofascial pain were caused by the accident.

(iii) In a follow-up report in 2013 Dr. Esmail noted the Plaintiff's condition was chronic and would persist. He also explained that fibromyalgia is not a diagnosis used by orthopaedic surgeons but that myofascial pain and fibromyalgia are similar and that patients can have a combination of both.

(b) For the defence, Dr. Russell's report noted the Plaintiff was tender in fibromyalgia tender points and agreed with the diagnosis of fibromyalgia. However, he stated that fibromyalgia could not be caused by trauma and that she likely had undiagnosed fibromyalgia at the time of the accident. He suggested that the Plaintiff's complaints of fatigue in 2005 were an indication of fibromyalgia.

(i) This portion of Dr. Russell's opinion was also compromised on cross-examination. Based on the explanation the Plaintiff and her family doctor gave with regard to the fatigue issues in 2005 (a teenager staying up later on her phone and being diagnosed with ADD) there was little to suggest pre-existing fibromyalgia. He agreed that it is a widely held belief in his field that fibromyalgia can be causally linked to trauma, but it is not a belief he holds. However, he provided an example of a patient that had developed fibromyalgia after a motor vehicle accident, but put more stress on the intervening event of PTSD for the development of fibromyalgia. He felt there may have been intervening events in the Plaintiff's situation that contributed to her developing fibromyalgia, such as stress and sleep deprivation. Dr. Russell conceded that even if the Plaintiff's fibromyalgia was a pre-existing condition or there were intervening events, the Plaintiff would not have been suffering symptoms without the accident.

(c) Justice Eidsvik accepted Dr. Esmail's and Dr. Apel's evidence that the Plaintiff was suffering from fibromyalgia and that it was caused by the accident. She rejected Dr. Russell's opinion and said it was unfortunate that it took cross-examination for his concession that the Plaintiff would not have been symptomatic without the accident.

III. COMMENTARY:

Based on Justice Eidsvik's comments with respect to Dr. Stelmaschuk's evidence, it is important that medical experts, particularly Certified Examiners, are specifically commenting on the legally relevant tests in addition to their medical findings and opinions in order to properly introduce this evidence at trial.

Justice Eidsvik's overt acceptance of Dr. Apel's evidence over Dr. Russell's is essentially an

endorsement that fibromyalgia is, or may be, causally linked to trauma.

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IV. PRACTICE ISSUES

The principles for extending the limitation period for filing Third Party Notices

***Condominium Corporation No 0425636 v Amyotte's Plumbing,* 2015 ABQB 801, per Master Schulz**

I. FACTS AND ISSUES

When the condominium complex (Condo) was constructed in 2005, Amyotte's Plumbing installed the plumbing system using materials from Ipex. In March 2012, the proposed Third Party, Save-On Mechanical Ltd., repaired a glycol leak at the condominium. Twelve days later there was a water/glycol leak.

The condominium corporation filed a Statement of Claim alleging, *inter alia*, negligent design, manufacture and installation of the PVC fittings by Amyotte and Ipex. Ipex filed its Statement of Defence on September 14, 2014. Amyotte filed its Statement of Defence on November 6, 2014.

Rule 3.45(c)(i) regarding filing Third Party Claims states that the claim must be filed within 6 months of the Statement of Defence being filed. Therefore, without a court ordered extension, Ipex needed to file its Third Party Claim by March 18, 2015 (March 14 being a Saturday). Amyotte needed to file its Third Party Claim by May 6, 2015.

Both Defendants Ipex and Amyotte filed an application on August 7, 2015 for an extension to file their Third Party Claim against Save-On.

II. HELD: For the Defendants; the Court granted an extension of 20 days from the written decision to file and serve the Claim.

1. The test to allow a party to file and serve a Third Party Claim outside the 6 month limitation period consists of 3 factors: (1) Was the delay inordinate? (2) Was the delay adequately excused in the circumstances? (3) Did the delay prejudice the proposed Third Party Defendant?

(a) Where the delay is short, as was the case here, the primary focus of the application is on the last two factors.

(b) The test must be examined in the context of the benefits of the Third Party procedure which are: (1) avoiding multiplicity of actions; (2) avoiding contrary or inconsistent findings; (3) allowing the third party to defend the plaintiff's claim against the defendant; (4) to save costs; and (5) to determine the

issues between the defendant and the third party as soon as possible.

(c) On application to extend the time for a third party claim, a court will look at both the pleadings and the evidence adduced on application.

2. Applying the three-part test, the Court determined that the applicants had met the low threshold present in these circumstances. Given the short length of the delay, the focus of the test was on the excuse offered and prejudice suffered with the weight being more on the existence of prejudice.

3. Factor 1: The delay of approximately 3 months plus a day for Amyotte and 4 months less 2 days for Ipex, is relatively short and not inordinate.

(a) The delay to be considered is the period between the time the Claim should have been filed and the Application to extend the time. Here, September to August, 2015.

(b) Whether a delay is inordinate is fact dependent and influenced by the answers to the rest of the test. Delays of 16 or more months have been found not to be inordinate; a delay of 2 years has been described as "not commendable…but…not gross."

4. Factor 2: The delay was adequately excused in the circumstances.

(a) The "excuse offered" was that time was required to review the historical records and information relating to the manufacture of the fitting, installation of the HVAC at the Plaintiff's premises and the ongoing repair, service and maintenance of the HVAC. These records were in the Plaintiff's possession and had to be provided to the Defendants by the plaintiff for review.

(b) The Court found this to be a reasonable excuse.

5. Factor 3: Any prejudice that might be suffered by Save-On can be met through monetary compensation.

(a) Given the short nature of the delay, emphasis would be placed on this element.

(b) The Court will look at the pace of the litigation when assessing prejudice; where the pace is "leisurely" this will weigh in favour of granting the time.

(i) Here, the litigation did not appear to be either fast paced or leisurely. Thus, this was a neutral consideration.

(c) Save-On claimed prejudice because of its inability to locate employees (possible witnesses) that were involved at the relevant time. However, it did not indicate whether or not this inability occurred during the September to August 2015 period. Therefore, this did not assist Save-On's position.

(d) Possible limitations defences are also considered under this factor.

(i) The ability to start a new claim is reason for not allowing a Third Party action; whereas, the loss of a right to start a new action can weigh in favour of a late Third Party Notice.

(ii) Here, if the Defendants have a claim against Save-On, it is possible that a limitation period will bar the bringing of a separate action. This militates in favour of allowing the Third Party notice to be filed.

(e) The Court must also consider the Plaintiff's other defences to determine if there is "an air of reality" to the proposed Third Party Claim.

(f) The Court found that overall, despite not being worded as clearly as perhaps it should be, the proposed Claim appeared to support an arguable claim. The Court also noted it was early enough in the litigation.

6. While Save-On presented strong arguments that raised questions as to the ultimate success of the Third party notice, it was not sufficient to defeat the Defendant's application.

(a) Save-On still had the ability to bring a Summary Dismissal application, an application to Strike or any other application it felt was appropriate.

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June 30, 2016

V. SURETY AND BOND ISSUES

Obligee's claim against surety can survive despite Obligee's claim against principal being unenforceable as a result of wording of completion agreement

***HOOPP Realty Inc. v. The Guarantee Company of North America*, 2015 ABCA 336**

I. FACTS AND ISSUES

This is the appeal of the decision in *HOOPP Realty Inc. v. The Guarantee Company of North America,* 2015 ABQB 270, which was briefed in the June 2015 edition of *Defence & Indemnity.* The appeal was unanimously dismissed, allowing HOOPP Realty Inc. (HOOPP), to continue its action against GCNA.

This case arises from a dispute involving the construction of a warehouse, between HOOPP, the owner, and Clark Builders, the general contractor.

GCNA, as surety, issued a Performance Bond whereby it guaranteed the performance of the obligations of Clarks Builders to HOOPP under a Design-Build contract. After the construction of the warehouse was completed, deficiencies were found in the warehouse floor.

GCNA, Clark Builders, and HOOP entered into a completion agreement whereby Clark Builders undertook to replace the floor at its cost (Bond Agreement). Clark Builders then undertook the remedial work. Importantly, the 2004 Bond Agreement contained express provisions preserving HOOPP's ability to claim losses or damages for legal costs, investigation costs and interest (Fees Claim) in relation to the remedial work.

A dispute arose between Hoopp and Clark Builders as to whether or not the remedial work was successful. HOOPP commenced separate actions against Clark Builders and GCNA, with the latter action eventually being amended to be only with respect to the Fees Claim. The claim against Clark Builders was struck due to HOOPP's failure to commence mandatory arbitration within the limitation period.

GCNA then applied to strike HOOPP's claim against it on the basis that if HOOPP's action against Clark Builders no longer existed, then at law the claim against GCNA must also have been extinguished.

GCNA's application was brought under Rule 3.68(2)(b) of the Alberta *Rules of Court* which allows a party to have a pleading struck if that pleading fails to disclose a reasonable cause of action. Under this rule, no evidence may be tendered by the applicant to support its application.

The chambers judge dismissed the application. He first concluded that Rule 3.68(2)(b) required him to assume the facts in the claim were true, as no evidence could be led by the applicant, GCNA. He made this finding notwithstanding that the earlier decision in the Clark Builders' action addressed aspects of the claim against GCNA. In the alternative, the chambers judge applied ***Meridian Developments Ltd. v. Nu-West Group Ltd***. (1984), 52 A.R. 248 to conclude that a guarantor remains liable even though the debtor is released where the contract creating the guarantee obligations so provides. He held that the provisions of the 2004 Bond Agreement created an arguable issue as to provide continuing obligations for GCNA.

The issues addressed on appeal were whether the words used in HOOPP's Statement of Claim described a valid cause of action, and whether the chambers judge was precluded from considering factors other than evidence, including decisions in companion litigation (i.e., the claim dismissed against Clark Builders).

On appeal, the majority held that the chambers judge erred in failing to consider earlier reported decision in the Clark Builders' action which addressed aspects of the same claim in determining whether a "reasonable claim" existed. They found that "[t]o conclude otherwise [and] allow actions to continue that have no reasonable prospect of success would be to ignore the culture shift described in ***Hryniak v. Mauldin***, 2014 SCC 7 toward simplifying pre-trial procedures and promoting timely and affordable access to justice." However, they deferred to the chambers judge with respect to his second conclusion and agreed that the provisions of the 2004 Bond Agreement may arguably be found sufficient to render GCNA liable to HOOPP.

Justice Wakeling, while concurring in the majority's result, found separately that a court may only refer to the facts alleged in the commencement document when it assesses the merits of an application under Rule 3.68 of the *Alberta Rules of Court*. He disagreed with the majority in this respect, finding that the argument "in favour of economical and expeditious resolution of disputes does not justify judicial amendment of clear text" and concluded that the appeal should be dismissed.

II. COMMENTARY

It should be noted that the Court of Appeal did not decide that GCNA was in fact liable to HOOPP even though the claim against Clark Builders has been struck. Rather, the Court only held that it was reasonably possible that a claim against GCNA could still exist at law notwithstanding there was no longer a claim possible against Clark Builders.

The facts of this case are somewhat unique. To the extent there is companion litigation which may affect the consideration of the reasonableness of a cause of action in a separate action, then we now know that the Court should consider any findings made in such companion litigation. While this case clarifies the factors to be considered by the Court in making a decision under Rule 3.68(2)(b), this technical finding will not matter to the surety industry. However from an industry perspective, this case underlines the importance of the content and scope of completion agreements. A review of the decision at the Court of Appeal and at the Chambers' level does not provide very much insight into the content of the completion agreement in question, but it was the scope of that agreement which resulted in a finding that the obligee's claim against the surety remained a legal possibility.

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