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SUMMARY JUDGMENT AND THE "CAP" – A NEW DECISION REGARDING THE MINOR INJURY REGULATION

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Field LLP was recently involved in a precedent setting case of interest to auto insurers concerning the viability of Certified Examinations as a way to compel summary determination of "CAP" injuries. Field LLP represents the Defendant driver in an action involving a rear-end motor vehicle collision which occurred November 26, 2004. All medical evidence available indicated that the Plaintiff's injuries were governed by the *Minor Injury Regulation*, Alta. Reg. 123/2004 (the "MIR"). [Stacey Lee-Szott](#) of our offices sought instructions from the insurer to proceed with an assessment by Certified Examiner Dr. vanZuiden pursuant to s.8(1) of the MIR. Following his assessment in January 2010, Dr. vanZuiden concluded the Plaintiff's injuries were "minor" as defined by the MIR. The Plaintiff did not obtain or produce any medical evidence to rebut Dr. vanZuiden's opinion. The Defendant took the position that an application for summary judgment on the issue of non-pecuniary damages for the "CAP" amount would be successful, as Dr. vanZuiden's opinion constituted *prima facie* evidence that the Plaintiff's injuries were minor. Essentially, the application was for a declaration that the Plaintiff's injuries were indeed "minor".

[Catriona Otto](#) of Field LLP argued the special chambers application before the Honourable Justice Wilkins on behalf of the Defendant on August 2, 2011 in Lethbridge, Alberta. In response to the application, the Plaintiff swore an affidavit deposing his personal belief that his injuries were not "minor", and that he had suffered a WAD III injury resulting in chronic pain. No medical evidence was proffered by the Plaintiff to support his personal opinion regarding his condition. Justice Wilkins refused to accept the Plaintiff's own evidence as to his medical condition as sufficient to rebut the *prima facie* evidence of the Certified Examination. Justice Wilkins did query the basis for the Court's jurisdiction to declare a Plaintiff's injuries as "minor" and grant summary judgment on that basis. Justice Wilkins indicated there was a "missing" step in the MIR and that nowhere does it give the Court the power to make such a declaration and award. Ms. Otto argued that for the Court to decline to make such a declaration and award damages summarily would be to render the MIR without effect or purpose. Ms. Otto further argued, notwithstanding the lack of an express provision,

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the logical progression of the MIR contemplates the Court making a declaration and awarding the "CAP" amount for non-pecuniary damages.

Ultimately, Justice Wilkins agreed with the Defendant's position and declared the Plaintiff's injuries "minor" as defined pursuant to the MIR. He further granted summary judgment for the Plaintiff's non-pecuniary damages in the amount of \$4,000.00. Costs were awarded to the Defendants.

Justice Wilkins' decision illustrates the merit in obtaining a Certified Examination. Where the Certified Examiner concludes the Plaintiff's injuries are minor, and the Plaintiff fails to obtain expert evidence to rebut that opinion, the Court now has persuasive authority to summarily determine the issue of general damages, in the capped amount of \$4,000.00, and grant judgment. This precedent setting decision will also assist in guiding settlement negotiations where the insurer has obtained a favourable Certified Examination and the Defendant refuses to concede their non-pecuniary damages fall within the MIR. We believe few Plaintiffs will expose themselves to the expense associated with obtaining medical evidence that may ultimately support the Defendant's position.

It remains to be seen what type of evidence a Plaintiff will have to obtain in order to rebut the *prima facie* evidence of a Certified Examination. Given the effect this decision will have on a Plaintiff's right to non-pecuniary damages, it may be that any objectively verifiable evidence, such as a doctor's treatment chart, will be sufficient to rebut the presumption, at least on a summary judgment motion. In any event, this decision will be useful in resolving files efficiently and economically, where the Defendant has obtained a Certified Examiner's opinion that the injury falls within the definition of minor injury pursuant to the MIR.

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