

CITATION: Machacek v. Ontario Cycling Association, 2011 ONCA 410
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COURT OF APPEAL FOR ONTARIO

MacPherson, Armstrong and Karakatsanis JJ.A.

BETWEEN

Paul Machacek and Susan Machacek

Appellants (Plaintiffs)

and

Ontario Cycling Association, Canadian Cycling Association,
D'Ornella's Racing Team a.k.a. D'Ornella's Bike Shop Racing

Respondents (Defendants)

William G. Scott and Brian A. Pickard, for the appellants

Aaron Postelnik, for the respondents

Heard: May 17, 2011

On appeal from the Order of Justice Leonard Ricchetti of the Superior Court of Justice dated December 21, 2010.

ENDORSEMENT

[1] The appellants appeal the order of Ricchetti J. of the Superior Court of Justice dated December 21, 2010, which dismissed the appellants' motion to set aside the registrar's dismissal of their action for negligence arising from a bicycle accident. The

appellant, Paul Machacek, was seriously injured in the accident. The accident occurred on June 15, 2002. The Statement of Claim was issued on February 20, 2003.

[2] The action was dismissed for delay in setting the action down for trial by the local registrar on August 15, 2007 pursuant to rule 48.14 of the *Rules of Civil Procedure*. Between the time of the commencement of the action and September 2006, pleadings were exchanged, some discovery sessions were held, a defence medical was completed and various documents were produced.

[3] The lawyer for the appellants left his law firm prior to the issuance of the status notice and the registrar's order under rule 48.14. The lawyer did not receive a copy of the status notice. While he had filed a change of address with the post office, he had not bothered to serve a notice of change of solicitors under the rules.

[4] The order dismissing the action came to the attention of the appellants' lawyer sometime in early 2008. On April 2, 2008, the appellants' lawyer wrote to the lawyer for the respondents and asked for his consent to set aside the dismissal order. The consent was refused. The appellants' lawyer did some work on a motion to set aside the dismissal in the summer of 2008. Some efforts were made between counsel to agree on a date for the motion but nothing happened.

[5] Between February 2008 and October 2008, the appellant, Paul Machacek, met with his lawyer six times and urged him to deal with the dismissal of the action. He also

had to resort to communicating with his lawyer by registered mail due to the failure of the lawyer to respond to his inquiries between meetings. The appellant consulted with other lawyers who told him to stay with his current lawyer.

[6] Eventually, in June 2009, the matter was reported to LawPRO, the Law Society's insurers. On July 14, 2009, counsel for LawPRO (not Mr. Scott) wrote to counsel for the respondents requesting motion dates. However, it was not until March of 2010 that counsel for LawPRO served the motion record to set aside the registrar's order. The motion was heard on December 8, 2010 and reasons were released on December 21, 2010.

[7] Between September 2006 and April 2008, when the appellants' lawyer says he was advised of the registrar's dismissal order, nothing of any significance happened in the litigation, apart from the dismissal order. Between April 2008 and the time that the matter was reported to LawPRO in June 2009, the lawyer for the appellants did almost nothing to get the appropriate motion before the court. When counsel for LawPRO became involved, virtually nothing was done for another 10 months.

[8] In our view, the delay in this case between September 2006 and March 2010 is inexcusable.

[9] Virtually all of the delay between September 2006 and March 2010 is attributable to the failure of counsel for the appellants to move the action along and take the

appropriate steps to set aside the registrar's order. The observation made by Sharpe J.A. in *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited*, 2007 ONCA 695 at para. 31 applies to the case at bar:

...the nature of the delay and the solicitors' conduct in this case amount to more than that kind of lapse or inadvertent mistake that the legal system can countenance. We should opt for a resolution that discourages this type of conduct which undermines the important value of having disputes resolved in a timely fashion. The decision of the Master sends the right message and provides appropriate incentives to those involved in the civil justice system.

Sharpe J.A.'s comments at para. 32 are also apt:

Moreover, excusing a delay of this magnitude and gravity risks undermining public confidence in the administration of justice. Lawyers who fail to serve their clients threaten public confidence in the administration of justice. The legal profession itself has recognized this danger: Commentary to rule 2.01 of the Law Society of Upper Canada's *Rules of Professional Conduct* states, "A lawyer who is incompetent does the client a disservice, brings discredit to the profession, and *may bring the administration of justice into disrepute.*" [Emphasis added.] There is a risk that the public would perceive disregarding the solicitor's conduct in the circumstances of this case as the legal system protecting its own. Excusing a delay of this kind would throw into question the willingness of the courts to live up to the stated goal of timely justice.

[10] Counsel for the appellants, in his able argument, emphasized that the more significant consideration in the case at bar is that there is no evidence of actual prejudice as found by the motion judge. While this is an important factor, it has to be balanced by

a consideration of the finality principle. In our view, the delay in this case and the conduct of counsel tips the balance towards the latter. As Sharpe J.A. found in *Giant Tiger* “reinstating the action at this point would undermine the finality principle while refusing to reinstate the action does not interfere with the need to ensure adequate remedies.” In respect to the latter comment, we note that the appellants are not left without a remedy as they still have recourse through an action in solicitor’s negligence.

[11] In the result, the appeal is dismissed. As agreed, the respondents shall have their costs fixed in the amount of \$7,500 inclusive of disbursements and applicable taxes.

“J.C. MacPherson J.A.”

“Robert P. Armstrong J.A.”

“Karakatsanis J.A.”