COURT OF APPEAL FOR ONTARIO

CITATION: Yasmin v. Alexander, 2016 ONCA 165
DATE: 20160229
DOCKET: C60796

MacPherson, van Rensburg and Miller JJ.A.

BETWEEN

Rukhsana Yasmin

Plaintiff (Appellant)

and

Lenard Alexander

Defendant (Respondent)

William G. Scott, for the appellant

Michael Chadwick, for the respondent

Heard: February 24, 2016

On appeal from the order of Justice Frederick L. Myers of the Superior Court of Justice, dated June 22, 2015.

ENDORSEMENT

[1] This is an appeal of the dismissal of an action as statute-barred. At issue is when the appellant Rukhsana Yasmin ought reasonably to have known that the impairment for her injuries was serious and permanent, such that her claim for personal injury damages as a result of a motor vehicle accident was discoverable under s. 5 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

[2] Yasmin claims that on August 16, 2008, while walking on Silvercreek Road in Mississauga, she was struck by a car owned and operated by the respondent Lenard Alexander, and that as a result she has sustained serious, lasting and permanent personal injuries.

[3] Yasmin retained a lawyer, K., who pursued her claim for statutory accident benefits. K. did not, however, commence a tort action. In 2011 Yasmin sued K., alleging negligence in his failure to commence the tort action within the prescribed limitation period. K. defended the action, asserting that his retainer was limited to claiming accident benefits.

[4] At the request of K.'s lawyers, Yasmin's new counsel issued a statement of claim on February 17, 2012 against Alexander. Alexander moved for summary judgment claiming that the action was statute-barred.

[5] K.'s lawyers obtained an intervener order and responded on behalf of Yasmin to Alexander's motion. The intervener submitted that, to the extent that Yasmin sustained an injury that met the threshold under s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8 (permanent serious impairment of an important physical, mental or psychological function), her injury was not discoverable prior to February 17, 2010 (two years prior to the date on which the statement of claim was issued).

[6] The motion judge granted the respondent's motion and dismissed the action. He noted that the appellant's claim may not meet the threshold under s. 267.5(5) of the *Insurance Act*, in which case she would have no right to sue. If the claim meets the threshold, then the question is when a person exercising reasonable diligence would have known this was the case. The motion judge concluded that, according to the available medical reports, from the date of the accident to February 10, 2010 (two years before the statement of claim was issued) little, if anything, had changed. Even if admissible, the appellant's statement in her discovery that she believed she would get better did not address the objective test for discoverability set out in s. 5(1)(b) of the *Limitations Act, 2002.* The appellant, or her former lawyer, did not exercise reasonable diligence to determine the possibility that her injuries were serious and permanent. The appellant failed to persuade the court that the seriousness and permanence relied upon and asserted were not discoverable within the limitation period.

[7] The appellant makes three arguments on appeal.

[8] First, the appellant says the motion judge erred in finding that she had no right to sue at all if her claim did not meet the threshold under the *Insurance Act.* The appellant says that this finding was not relevant to the issue on the motion because it amounted to a pre-trial determination that her injuries did not meet the threshold.

[9] We disagree. The motion judge, in stating that the appellant would have no right to sue if she did not meet the threshold was simply stating the obvious – that the appellant would have to meet the threshold to be successful in her action. There was no pre-trial determination by the motion judge that the appellant's injuries failed to meet the threshold, and this was not, on any reasonable interpretation of his reasons, the basis for his dismissal of her claim.

[10] Second, the appellant says that the motion judge erred in finding that she did not exercise reasonable diligence to determine the possibility that her injuries were serious and permanent. The appellant contends that she acted with reasonable diligence by attending for treatment and assessments by the health care providers and doctors provided by her accident benefits insurer, that she underwent x-rays on three occasions, consulted her family doctor and was assessed by nine different doctors and health practitioners each of whom delivered a report. None of the reports indicated that she had a permanent injury.

[11] We do not give effect to this argument.

[12] Although prior to February 17, 2010 none of the medical reports indicated that the appellant had a permanent impairment, the reason this is not mentioned in the reports is because neither the appellant nor her counsel sought an opinion with respect to this issue. According to the appellant, she had retained K. to pursue her claim. K., who denied such a retainer, had not taken any steps to

investigate whether the appellant's injuries met the threshold. The evidence suggested no real change in the appellant's condition since 2008; indeed the appellant's new counsel based his opinion that she met the threshold on her description of her injuries together with an x-ray report from 2009. The motion judge concluded that it was unreasonable for the appellant to have failed to make the inquiry having regard to her injuries and condition. In these circumstances, there was no error in the motion judge's finding that the appellant failed to act with diligence to determine whether her injuries were serious and permanent, and that her claim ought reasonably to have been discovered before February 17, 2010.

[13] Finally, the appellant contends that the motion judge erred in failing to consider the fact that the defendant obtained an orthopaedic report dated September 6, 2013 that states that the appellant had not sustained a serious impairment of an important bodily function. The effect of this report, according to the appellant, is to toll the limitation period.

[14] Again, we disagree.

[15] The defence orthopaedic report does not assist the appellant. It is simply an opinion obtained in the course of the litigation that no serious impairment had occurred, and expresses the opinion that the appellant's condition had almost entirely resolved. This is not evidence, as the appellant asserts, that she had "not

yet" met the threshold, nor can it be determinative of whether the appellant, who had commenced an action seeking damages for her injuries, ought reasonably to have discovered that her impairment was serious and permanent.

[16] For these reasons, the appeal is dismissed. Costs to the respondent in the sum of $7,500, inclusive of applicable taxes and disbursements.

"J.C. MacPherson J.A."
"K. van Rensburg J.A."
"B.W. Miller J.A."