Court of Appeal Requires Defendant's Motion for Summary Judgment to Dismiss Medical Malpractice Claim to Include Evidence Going to The Merits of The Defence

August 05, 2016

In the recent decision of *Sanzone v. Schechter*,[1] the Ontario Court of Appeal provided insight regarding the evidentiary burden that a defendant must meet in moving to dismiss an action by way of summary judgment, and in particular what expert evidence may be required.

Sanzone involved the appeal of a successful summary judgment motion brought by the defendants, who were dentists, to dismiss a medical malpractice action. The summary judgment motion was granted at first instance on the basis that the self-represented plaintiff had not delivered an expert report in support of the allegation that the defendants had breached the standard of care required of them or that the purported breach had caused the plaintiff's injuries. In support of their motion, the respondent dentists filed an affidavit from one of their lawyers describing the procedural history of the action and stating that the appellant had not delivered an expert report in support of her claim. Neither of the respondent dentists filed an affidavit, nor did they file an expert's report on the issue of the standard of care. The appellant first filed a responding affidavit setting out the difficulties she faced as a self-represented litigant without legal training, and then ultimately a supplementary affidavit stating that she was looking to retain an expert and would comply with the Rules of Civil Procedure when she had retained one. Also filed was a one-page letter from a dentist stating that the respondent dentists had not met the standard of care in two respects, although the appellant admitted that the "letter is by no means complete, however."

The motions judge held that the appellant's "report" did not comply with the *Rules of Civil Procedure* surrounding expert reports and was therefore inadmissible. The motions judge then granted summary judgement by accepting the defendants' submissions on the basis of established case law (see *Kurdina v. Dief*, 2010 ONCA 288) holding that a plaintiff will not be successful in a medical malpractice action in the absence of supporting expert opinion.

On appeal, the Court of Appeal held that the defendants, as the parties moving for summary judgment, had the burden of persuading the Court that there was no genuine

issue requiring trial. Noting that Rule 20.01(3) allowed a defendant to move for summary judgment with supporting affidavit material or other evidence, the Court of Appeal interpreted this to mean that the defendants were required to put their "best evidentiary foot forward" to discharge their evidentiary burden. Only then would the onus shift to the plaintiff to prove that the claim had any real chance of success. The defendants could not simply rely on the plaintiff's failure to deliver an expert report as a basis for the dismissal of the action.

The Court of Appeal took issue with the defendants' failure to file any evidence going to the merits of their defence, including affidavits regarding the treatment they provided to the plaintiff or expert reports in support of their position. If the defendants had filed evidence regarding the merits of their defence as Rule 20.01(3) required, it would have then been open to the motions judge to dismiss the action based on the plaintiff's failure to deliver a compliant expert report.

The Court of Appeal also took issue with what it described at the defendants' strategy of using Rule 20 against a self-represented litigant to accelerate the requirements regarding service of an expert report. When the defendants brought a motion for summary judgment, the plaintiff was not in breach of Rule 53 regarding service of expert reports, and ought not to have been compelled to deliver a report without the defendants first meeting their evidentiary burden as the moving party. The appeal was ultimately granted and summary judgment was set aside.

Outside of the medical malpractice sphere, those defending products liability claims will want to carefully consider the strategic merits of leading with early opinion evidence on summary judgement versus waiting to respond to expert evidence first provided by a plaintiff. The result of *Sanzone* may be that, despite the Supreme Court's endorsement of summary judgment as a tool to deal expeditiously with cases, it will be deployed sparingly in medical malpractice and products cases.

[1] 2016 ONCA 566.

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