Court of Queen's Bench of Alberta

Citation: Mohamed v. Al-Karawi Estate, 2013 ABQB 438

Date: 20130814
Docket: 1001 06591, 1001 10487, 1001 10488, 1001 10922, 1001 11076, 1001 11133
Registry: Calgary

Docket: 1001 06591

Between:

Shabir Mohamed and Memuna Mohamed

Plaintiffs

- and -

The Public Trustee for the Province of Alberta, Administrator Ad Litem of the Estate of Digman Al-Karawi, Deceased, Ljerka Jackie Fortunati, Rick Hanson, Heather Gray, John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5 and John Doe #6

Defendants

- and -

Primmum Insurance Company

Defendant by Order

Docket: 1001 10487

and Between:

Claude Oliver Spencer

Plaintiff

- and -

The Public Trustee for the Province of Alberta, Administrator Ad Litem of the Estate of Digman Al Karawi, Deceased, Shabir Mohamed, Toyota Credit Canada Inc., Ljerka Jackie Fortunati, and John Does # 1 - 4

Defendants

Docket: 1001 10488

and Between:

Karim Abdul Karim and Najma K. Mohamed

Plaintiffs

- and -

The Public Trustee for the Province of Alberta, Administrator Ad Litem of the Estate of Digman Al Karawi, Deceased, Shabir Mohamed, Toyota Credit Canada Inc., Ljerka Jackie Fortunati, and John Does # 1 - 4

Defendants

Docket: 1001 10922

and Between:

Yasmeen Umar, Administrator of the Estate of Abdul Jabbar Umar and Yasmeen Umar

Plaintiffs

- and -

The Public Trustee for the Province of Alberta, Administrator Ad Litem of the Estate of Digman Al Karawi, Deceased, Shabir Mohamed, Ljerka Jackie Fortunati, Rick Hanson, Constable Heather Gray, John Doe # 2, John Doe # 3, John Doe # 4, John Doe # 5 and John Doe # 6

Defendants

Docket: 1001 11076

and Between:

Her Majesty the Queen in Right of Alberta and Keith Montgomery

Plaintiffs

- and -

Ronald J. Jewitt, Administrator Ad Litem of the Estate of Digman Al Karawi, Deceased, Ljerka Jackie Fortunati, Rick Hanson, John Doe # 1, John Doe # 2, John Doe # 3, John Doe # 4, John Doe # 5 and John Doe # 6

Defendants

Docket: 1001 11133

and Between:

Mohammed Hussein

Plaintiff

- and -

Digman Al Karai, Deceased, By the Administrator Ad Litem of his Estate Gordon Sterchi, Shabir Mohamed, Toyota Credit Canada Inc., Ljerka Jackie Fortunati, ABC Corp., John Doe # 1, John Doe # 2, John Doe # 3 and John Doe # 4

Defendants

Corrected judgment: A corrigendum was issued on September 23, 2013; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Madam Justice K. D. Nixon

I. Factual Background

[1] Ljerka Jackie Fortunati, the "Applicant", was the registered owner of a vehicle, "the van", which she gave permission to her husband, "Fortunati", to use. On July 29, 2008, the van was stolen at a gas station when Fortunati left the vehicle briefly. Fortunati immediately reported the van stolen. On August 3, 2008, the Applicant was advised that the van was involved in an accident. The police report shows that the accident occurred on August 3, 2008, and was being driven at the time by Digman Al Karawi, "Al Karawi". Al Karawi did not have the consent of either Fortunati or the Applicant to drive or possess the vehicle. Neither the Applicant nor Fortunati knew Al Karawi nor had either ever communicated with him.

[2] The Applicant was named as a defendant in six actions arising out of the accident. She seeks summary judgment dismissing the actions against her pursuant to Rule 7.3 of the Alberta Rules of Court on the basis that there is no merit to the claim against her.

II. Claim against the Applicant

[3] The plaintiffs say that Fortunati was negligent in respect of the theft of the van and they seek to have the Applicant, as owner of the van, held vicariously liable for his negligence. The Applicant says that she is not vicariously liable for the actions of Fortunati and, even if she were, and even if Fortunati was negligent in allowing the van to be stolen, the accident four days later by the thief is too remote and constitutes a *novus actus interveniens*.

[4] The claim for vicarious liability against the Applicant is based on s. 187(2) of the *Traffic Safety Act* RSA 2000 c T-6, ("the *Act*") as in force in August 2008. This section makes an owner of a vehicle vicariously liable in specified circumstances. Section 187(2) of the *Act* provides as follows:

> In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle on a highway, a person who, at the time that the loss or damage occurred,
>
> (a) was driving the motor vehicle, and
>
> (b) was in possession of the motor vehicle with the consent, express or implied, of the owner of the motor vehicle
>
> is deemed, with respect to that loss or damage,
>
> (c) to be the agent or employee of the owner of the motor vehicle,
>
> (d) to be employed as the agent or employee of the owner of the motor vehicle, and
>
> (e) to be driving the motor vehicle, in the course of that person's employment.

III. Test for Summary Dismissal

[5] To succeed on a summary dismissal application, the Applicant must show that there is no genuine issue for trial. It must be "plain and obvious that the action cannot succeed." The defendant must show "... more than a strong likelihood that he will succeed; the pleadings and evidence on the motion must show that the claim has no reasonable prospect of success...." *Prefontaine v. Veale* 2003 ABCA 367 at para 9. The test pursuant to the old Rule 159 remains the same pursuant to the new Rule 7.3: *The Manufacturers Life Insurance Co. v. Executive Centre at Manulife Place Inc.* 2001 ABQB 189.

IV. Issues

[6] Is there a genuine issue for trial that the Applicant is vicariously liable for the actions of Al Karawi?

[7] Is there a genuine issue for trial that the Applicant is vicariously liable for the actions of Fortunati in respect to the alleged negligent theft of the van?

V. Is the Applicant liable for the actions of Al Karawi?

[8] For liability to arise under the *Act*, consent must have been given to the driver both to possess and to drive the vehicle at the time the loss or damage occurred. When such consent is present, the driver is deemed to be the agent or employee of the owner, employed as such and driving in the course of his or her employment. The Alberta Court of Appeal in *Mugford v. Weber* 2004 ABCA 145 made clear that the requirements of consent to driving and being in possession are conjunctive.

[9] At issue in *Mugford* was whether an owner, who had given consent to his employee to possess but not to drive the vehicle at the time the accident occurred, was vicariously liable for the negligent driving of the employee by virtue of s. 181(b) of the *Highway Traffic Act* RSA 1980 c H-7, the predecessor to s. 187(2) of the current *Act*. The trial judge had declined to hold the owner vicariously liable as there was no consent to drive, express or implied, at the time of the accident. Consent to possess was not sufficient, the trial judge concluded, to invoke the deeming provision of the *Highway Traffic Act*.

[10] After setting out the legislative history of the vicarious liability provision, the court noted that the predecessor of the current section was enacted following the decision of *Guyton v. Lacroix* (1961), 30 DLR (2d) 488 (Alta S.C.A.D.) where the court held that the statute, as then written, made an owner liable for the negligent driving of a thief. The owner, Lacroix, had given permission to Dufour, a virtual stranger, to store his vehicle in a garage. Lacroix had instructed Dufour not to drive his vehicle. Lacroix was unaware that Dufour was an ex-convict wanted for car theft. In contravention of Lacroix's instructions, Dufour took the vehicle intending to sell it. Whilst driving to Vancouver, he was involved in a fatal collision. The Court held that Lacroix was vicariously liable for Dufour's negligent driving as he had consented to Dufour having possession of the vehicle. The result of the decision was that an owner was vicariously responsible for the negligent driving of a person who stole the vehicle.

[11] The *Guyton* decision was discussed in an article by Walter Shandro (1962) 2 *Alberta Law Review* 113. Shandro noted that the effects of the judgment were far-reaching. He gave, for example, the scenario of an owner being held liable for the negligent driving of a porter to whom the owner gave his keys to park his car at a hotel parking lot, even if the negligent driving occurred years later. Shandro referred to the policy behind the vicarious liability section which was to "... be very careful to whom ... [one] entrusts his vehicle for driving purposes because ... [one] will be liable for injuries caused by that person's negligent driving." (at p. 116) Shandro expressed the view that the owner in *Guyton* did not come within the policy of the vicarious liability section even though he fell within the literal wording of it. (at p. 117) To remedy this, he proposed a change in the legislation, either in accordance with the legislation in Saskatchewan,

which excused the owner if at the time of the incident the vehicle had been stolen or otherwise wrongfully taken from his possession, or in accordance with the Ontario legislation, which excused the owner when a vehicle was without the owner's consent in the possession of another.

[12] The Alberta legislation was subsequently amended. The Alberta Court of Appeal in *Mugford* held that it was reasonable to infer that the intent of the amendment was to avoid the result in *Guyton* at paragraph 41, the Court concluded:

> Given the purpose of s. 181, it must be read as imposing vicarious liability on an owner when consent has been given to both possession and driving of the vehicle. The phrase "a person who is driving the motor vehicle and who is in possession of it" is a conjunctive requirement. Although the *Traffic Safety Act* does not apply to this case, this interpretation of s. 181(b) is consistent with the formatting of s. 187 in the *Traffic Safety Act* as s. 187(2) sets out two subclauses (a) driving and (b) possession.
>
> This interpretation also gives effect to the purpose of the 1963 amendment by avoiding liability in cases such as *Guyton* where consent was given to possession but not to driving. This interpretation would also permit the termination of consent to drive even though a person may have possession. This would also avoid the outcome in *Guyton* where the later specific denial of consent to drive did not alter the owner's liability because possession had previously been given.

[13] It is clear that the Applicant is not liable for the actions of Al Karawi. Neither she nor Fortunati gave consent to Al Karawi to possess or to drive the van.

VI. Is the Applicant vicariously liable for the actions of Fortunati in respect of the alleged negligent theft of the van?

[14] The plaintiffs submit that the issue of the Applicant's vicarious liability pursuant to s. 187 of the *Act* for the actions of Fortunati should be permitted to proceed to trial. They argue that, applying s. 187 of the *Act*, an owner (here the Applicant) who gives consent to another to possess and to drive is liable for the negligent actions of that person (here Fortunati). Hence, they argue that the Applicant is liable for Fortunati's negligence in allowing the vehicle to be stolen.

[15] The plaintiffs argue that their loss and damage from the collision with Al Karawi started at the time of the theft and that at that time Fortunati was in possession and driving with the consent of the Applicant. They argue that it is open to the trier of fact to conclude that Fortunati was still in the act of driving at the time the van was stolen even though he was not in it.

[16] It is not disputed that the Applicant gave consent to Fortunati to possess and to drive the van and that he was in possession of it at the time it was stolen. The Applicant submits, however, that at the time the van was stolen, Fortunati was not driving. Hence, the conjunctive requirement of driving and possession was not met. Further, s. 187(2) requires consent by the owner to both driving and possession at the time of the loss or damage occurred. At the time of the accident, there was no consent. Any negligence of Fortunati was not in relation to his driving and, thus, s. 187(2) of the *Act* does not apply.

[17] The Applicant submits, in the alternative, that even if she were held to be vicariously liable by virtue of s. 187 of the *Act* for the actions of Fortunati, the accident four days later by a thief is a *novus actus interveniens*, not reasonably foreseeable and too remote.

[18] In order to hold the Applicant vicariously liable for any liability arising out of the allegedly negligent theft of the vehicle, Fortunati must be deemed to be the Applicant's agent or employee pursuant to s. 187 of the *Act*.

[19] Section 187(2) provides, in respect to an action for the recovery of loss or damage sustained by reason a motor vehicle on a highway, that a person who *at the time that the loss or damage occurred* was driving the motor vehicle and in possession of it with the consent of the owner is deemed to be the agent or employee of the owner, to be employed as the agent or employee of the owner and to be driving the vehicle in the course of that person's employment.

[20] Section 187(2) does not make the Applicant vicariously liable to the plaintiffs for any negligence of Fortunati. The loss or damage occurred at the time of the accident, four days after the van was stolen. At that time, the person driving, Al Karawi, had neither consent to possess nor to drive the van from the Applicant. Fortunati was not "a person who, at the time of loss or damage occurred," driving or in possession of the motor vehicle in respect of which the plaintiffs sue. Even if it could be said that Fortunati, despite not being in the vehicle, was driving the vehicle at the time it was stolen, the loss or damage did not occur at that time.

[21] Fortunati, the only person who had consent to possess and to drive the Applicant's vehicle, was not driving at the time of the accident, ie., at the time the loss or damage occurred. Therefore, even if Fortunati was negligent in allowing the van to be stolen, and even if the accident four days later was not a *novus actus interveniens* and was not too remote, the Applicant is not vicariously liable to the plaintiffs. It is not necessary, therefore, to address whether the accident was a *novus actus interveniens* and or was too remote and not reasonably foreseeable.

[22] In the result, the actions against the Applicant are dismissed.

Heard on the 31st day of May, 2013.
Dated at Calgary, Alberta this 13th day of August, 2013.

K. D. Nixon
J.C.Q.B.A.

Appearances:

Dale E. Johns
Kuljeet S. Gill
Carscallen LLP
for Ljerka Jackie Fortunati (Defendant)

Walter Kubitz, Q.C
Kubitz & Company
for Shabir Mohamed and Memuna Mohamed (Plaintiffs)

Richard McRae
Rodin Law Firm
for Yasmeen Umar, Administrator of the Estate of Abdul Jabbar Umar and Yasmin Umar (Plaintiffs)

Lorena T. M. Kohlruss
Carbone & Associates
for Shabir Mohamed (Defendant)

Shanna L. Hunka
Bishop & McKenzie LLP
for Her Majesty the Queen and Keith Montgomery (Plaintiffs)

Craig G. Gillespie
Cuming & Gillespie
for Mohammed Hussein (Plaintiff)

Kimberley A. Bufton
Parlee McLaws LLP
for SEF 44 Primmum (Defendant by Order)

Gary D. Braun
First West Law LLP
for Estate of Digman Al Karawi (Defendant) (Motor Vehicle Accident Claims Fund)

Anatoliy Vlasov
Pipella Law
for Karim Abdul Karim and Najma K. Mohamed (Plaintiffs) as well as Claude Oliver Spencer (Plaintiff)

Corrigendum of the Reasons for Judgment
of
The Honourable Madam Justice K. D. Nixon

A Corrigendum has been added to this Decision please note the citation line has been changed to read Mohamed v. Al-Karawi Estate, 2013 ABQB 438.