Citation: Yarmie v Anderson et al, 2017 MBCA 90 Date: 20170918
Docket: AI17-30-08859

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

EUGENE ORIST YARMIE and VALERIE ADONA YARMIE	)	***E. O. Yarmie*** *on behalf of the Applicants*
	)	***K. L. Dixon*** *for the Respondents*
(Claimants) Applicants	)	
	)	***J. Taylor*** *on a watching brief for the Public Guardian and Trustee*
- and -	)	
TINA ANDERSON, ZELIJKA BAKIJA and BARBARA KITZAN	)	*Chambers motion heard:* ***September 7, 2017***
(Defendants) Respondents	)	*Decision pronounced:* ***September 18, 2017***

LEMAISTRE JA

[1] The claimants seek leave to appeal the decision of a Court of Queen's Bench judge in a small claims matter. For the reasons that follow, the application for leave to appeal is denied.

[2] Rebecca Yarmie was the claimants' daughter. In June 2012, the Public Guardian and Trustee (PGT) became the committee of property and personal care for Rebecca. In April 2014, Rebecca was diagnosed with terminal cancer. The PGT became aware of Rebecca's diagnosis in late August 2014 and advised her Community Mental Health Worker, Shauna

Derksen. On September 4, 2014, Derksen went to the home Rebecca shared with her parents in an effort to see her. Although it appeared to Derksen that someone was home, no one answered her repeated knocks on the door.

[3] On September 5, 2014, Derksen received a voice mail message from Rebecca's father, Eugene Yarmie, that he left on the previous day at 10:07 p.m. indicating that Rebecca would not "endure chemotherapy until the [PGT was] removed entirely from any measure of control over her." As a result, Derksen asked the Winnipeg Police Services (the police) to check on Rebecca "to ensure she was safe and receiving proper care considering her medical diagnosis."

[4] At 6:05 p.m., the police and a Winnipeg Regional Health Authority (WRHA) mobile crisis team went to Rebecca's home, they forced open the door when no one responded to knocks and they found Rebecca and her mother in the basement. Rebecca described having auditory hallucinations and exhibited some paranoid behaviour. Accordingly, the police took Rebecca to the Health Sciences Centre Psychiatric Ward where she was admitted involuntarily. Rebecca was treated with anti-psychotic medication and released from the hospital 10 days later.

[5] On the same day that Rebecca was admitted to the hospital, September 5, 2014, Yarmie went to CancerCare Manitoba where he met with the defendants and at approximately 2:37 p.m., he made an appointment for Rebecca to receive chemotherapy. Sadly, Rebecca died in April 2015.

[6] The claimants filed a small claim seeking $10,000.00 plus prejudgment interest and costs for damage to property caused during the forced entry and for Rebecca's funeral expenses. The claim alleges that the

defendants "were [a] party to sending the police to [their] home . . . to apprehend [their] daughter Rebecca", that the defendants withheld information which would have prevented the forced entry to their residence by the police and that the defendants' actions caused Rebecca to abort medical treatment which would have extended her life.

[7] A hearing was scheduled before a Small Claims Hearing Officer. Yarmie served eight witnesses with subpoenas for the hearing. At the hearing, the defendants sought summary dismissal of the small claim pursuant to section 2.1(2) of *The Court of Queen's Bench Small Claims Practices Act*, CCSM c C285 (the *Act*) on the basis that there was no cause of action against them. The Hearing Officer did not conduct the hearing and did not hear from the witnesses. Rather, she adjourned the claim to be heard and decided by a judge pursuant to section 2.1(2)(c) of the *Act*.

[8] Yarmie served a ninth witness with a subpoena for the hearing before a Court of Queen's Bench Judge. At the hearing, the judge considered the defendants request for summary dismissal.

[9] In support of their argument for summary dismissal, the defendants, who worked at CancerCare Manitoba, argued that there was no evidence that they knew about the police attendance at the claimants' residence on September 5, 2014. They pointed out that there was affidavit evidence that Derksen asked the police to conduct a well-being check and that the well-being check was the reason for the police attendance at the claimants' residence on September 5, 2014.

[10] The claimants' main contention at the hearing was that, once Yarmie had made an appointment for Rebecca to receive chemotherapy, there was no

longer any need for the police to check on her well-being.

[11] In brief oral reasons, the judge determined that there was no basis for a claim against the defendants and he dismissed the claim summarily.

[12] The claimants filed a lengthy document setting out the grounds for the motion for leave and the intended appeal, as well as an affidavit sworn by Yarmie with attached exhibits which is similar in length and content to the first document. In the documents, Yarmie asserts, among other things, that there were no court orders that permitted the actions of the police on September 5, 2014, that these actions resulted in Rebecca's loss of trust in and fear of the PGT, the WRHA and CancerCare Manitoba, that Rebecca's loss of trust in and fear of the PGT, the WRHA and CancerCare Manitoba caused her to abort her medical treatment and that this led to her death prematurely.

[13] Yarmie also provided a letter addressed to this Court regarding the events which he says led to Rebecca's death. In the letter, he contends that the defendant, Tina Anderson, admitted to him, in Rebecca's presence at her chemotherapy appointment which was sometime after the events of September 5, 2014, that she knew that the police were on their way to his residence on September 5, 2014, that she should have told the police he made a chemotherapy appointment for Rebecca so that they would not have attended the residence and that her words and actions caused Rebecca to abort her chemotherapy.

[14] At the hearing for the claimants' application for leave to appeal, Jana Taylor appeared on a watching brief on behalf of the PGT. Yarmie sought to have her excluded from the courtroom. I denied this request.

[15] Yarmie posed two questions at the hearing to determine whether leave to appeal will be granted:

1. Who was responsible for obtaining the court orders which permitted the police to force entry into his home on September 5, 2014?

2. Who withheld Rebecca's chemotherapy appointment record from the police which would have terminated their attendance at his home?

[16] It would be inappropriate for me to answer these questions on an application for leave to appeal. In my view, the grounds of appeal raised by Yarmie can be framed as follows:

1. The claimants were not given an opportunity to present their case to the judge, including the opportunity to call the nine witnesses under subpoena; and

2. The small claims judge provided no reasons for dismissing the small claim.

[17] Section 15(1) of the *Act* establishes that leave to appeal from an order of a judge of the Court of Queen's Bench on a small claim may only be granted where there is a question of law or jurisdiction.

[18] The test is stringent and was explained by Chartier JA (as he then was) in *Schultz v Kopp Farms et al*, 2010 MBCA 30 (at para 2):

> Leave to appeal may only be granted on "a question of law only." It cannot be granted on questions of fact or questions of

> mixed fact and law. If the question is intertwined with factual determinations, it will not be a question of law. Moreover, it is not enough to simply raise "a question of law only." The onus rests on the applicants to demonstrate that the issue raised has arguable merit; that is, that it has a reasonable prospect of success. Finally, and even then, leave will only be granted if the proposed appeal is of sufficient public importance to warrant the attention of this court. See *Wuziuk v. Manitoba (Executive Director of Social Services)* (1979), 3 Man.R. (2d) 81 (C.A.); *Kotello v. Quick Loan*, 2002 MBCA 179; *Jeffrys v. Veenstra*, 2004 MBCA 6 at para. 2; and *Lukács v. United Airlines Inc. et al.*, 2009 MBCA 111, 245 Man.R. (2d) 292 at para. 4.

[19] It should be noted that *Schultz* was decided prior to the amendment to section 15(1) of the *Act* which now permits an appeal on a question of jurisdiction in addition to a question of law. However, this Court has applied the test set out in *Schultz* to other statutes requiring leave to appeal regarding questions of law or jurisdiction. See for example: *Prairie Coach Charter Services Ltd v The Motor Transport Board*, 2011 MBCA 82 (re: *The Highway Traffic Act*, CCSM c H60); and *Nedokis v Selluski et al*, 2004 MBCA 74 (re: *The Residential Tenancies Act*, CCSM c R119).

[20] With respect to the first ground that the claimants were not given an opportunity to call their witnesses at the hearing, I am of the view that it has no arguable merit. The judge gave the claimants a reasonable opportunity to be heard at the hearing to determine whether the claim ought to be dealt with in a summary manner. It is apparent from the record that the judge dealt with the claim in a summary manner as permitted by section 1(4) of the *Act* and that this is the reason that the judge did not hear the testimony of the witnesses at the hearing.

[21] I now turn to the second ground. The claimants assert that the judge

provided no reasons for dismissing their claim. Failure to provide adequate reasons may be an error in law. See *R v Sheppard*, 2002 SCC 26.

[22] The adequacy of the reasons should be considered in the context of the record and the live issues before the judge. The main difficultly the claimants face is that the evidentiary record demonstrates that Derksen asked the police to check on Rebecca. There is no evidence that the defendants asked the police to attend the residence or that the police relied on information from the defendants, nor is there any evidence that knowledge of Rebecca's chemotherapy appointment by Derksen or the police would have prevented the police from forcing entry into the home, removing Rebecca and taking her to the hospital.

[23] After considering the proceedings from the small claims hearing, the judge's decision and the materials filed by the claimants, and after hearing from Yarmie and counsel for the defendants, I have concluded that, when the judge's reasons are viewed in light of the record and the submissions, it cannot be said that there is arguable merit that the reasons are inadequate as it is apparent why the judge decided the way he did.

[24] All of the remaining issues are factual in nature and do not raise questions of law. Accordingly, I must deny leave to appeal. I make no order as to costs.

leMaistre JA