SUPREME COURT OF NOVA SCOTIA

Citation: Panagopoulos v. Ugursal, 2021 NSSC 122

Date: 2021 04 12
Docket: *Hfx* No. 405434
Registry: Halifax

Between:

Maria Panagopoulos

Plaintiff

v.

Billur Ugursal

Defendant

LIBRARY HEADING

Judge: The Honourable Chief Justice Deborah K. Smith

Heard: March 16th, 2021

Subject: Civil action – striking of a Jury Notice.

Summary: The self-represented Plaintiff has brought an action in relation to a motor vehicle accident. While she is respectful to the court, she appears to suffer from a number of health issues that make it difficult for her to effectively participate in the proceeding. She has great difficulty recognizing, focusing on and responding to the matters in issue (causation and damages). In addition, she is intent on raising a number of collateral issues at trial including the conduct of defence counsel and a settlement conference that she participated in in 2018.

Issues: Should the Jury Notice be struck in these circumstances?

Result: The burden is on the Defendant to satisfy the court that, in the circumstances of this case, justice requires that the matter be heard by a judge rather than a jury. The Plaintiff has *prima facie* right to a jury trial. It is a substantive right of great importance that should not be taken away lightly. However, it is not absolute. The court concluded that the trial of this matter should be heard by a judge alone rather than a judge and jury.

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Between:

MARIA PANAGOPOULOS

Plaintiff

v.

BILLUR UGURSAL

Defendant

Judge: The Honourable Chief Justice Deborah K. Smith

Heard: March 16th, 2021, in Halifax, Nova Scotia

Oral Decision: April 12th, 2021

Written Decision: April 12th, 2021

Counsel: Maria Panagopoulos, Self-represented Plaintiff
Dennise K. Mack, for the Defendant

By the Court:

[1] This is a motion by the Defendant to strike a request for a jury trial filed by the Plaintiff. The file has a long history which I will not chronicle here. While it is tempting to go into great detail setting out the unique circumstances of this case, much ink will be spent to little gain.

[2] The action arises as a result of a motor vehicle accident that occurred on August 4th, 2009. The Defendant has admitted fault for the collision. The matters in issue are causation and quantum of damages including the issue of whether the Plaintiff suffered a minor injury as defined in s.113B of the *Insurance Act*, R.S.N.S. 1989, c. 231.

[3] I have been case managing this file since May 2018, so I am very familiar with the proceeding and, in particular, the Plaintiff.

[4] The Plaintiff is a self-represented litigant by the name of Maria Panagopoulos. Ms. Panagopoulos has had a number of lawyers represent her over the years, but she is now self-represented. She has tried on numerous occasions to retain new counsel. Her most recent attempt was around the time of this motion. I heard the matter March 16th, 2021 and was scheduled to render my decision on March 24th, 2021. On March

22nd, 2021, Ms. Panagopoulos contacted the court asking for the decision to be deferred for two weeks as she thought that she may have finally found a lawyer. Both Ms. Mack and the court agreed to this request. Unfortunately, Ms. Panagopoulos was once again unable to retain counsel. In my view, it is very likely that she will be self-represented at trial.

[5] Ms. Panagopoulos is a quiet individual who is respectful to the court. She appears to suffer from a number of health issues that make it difficult for her to effectively participate in this proceeding. In particular, she has great difficulty recognizing, focussing on and responding to the matters in issue. For example, Ms. Panagopoulos is consumed by a series of events which she categorizes as "severe abused misconducts"[1] by the Defendant's lawyer, her own former lawyers and, on occasion, the Court. She alleges that one of her former lawyers forged her signature and obtained her CPP file without her knowledge or authorization. She suggests that defence counsel has perjured herself, has "malicious motives"[2] and is involved in a "cover-up"[3].

[1] ¶2 of the document filed by the Plaintiff in response to this motion.
[2] ¶15 of the document filed by the Plaintiff in response to this motion.
[3] Second last page of the document filed by the Plaintiff in response to this motion (pages are unnumbered).

[6] In addition, the Plaintiff is fixated on a settlement conference that took place on February 5th, 2018. She says that the settlement conference was a "set up"[4] and that both the lawyers and the judge used force, manipulation, fear tactics and coercion to get her to agree to settle the matter as a cap case.[5] Despite the court repeatedly advising the Plaintiff that (1) settlement conferences are held on a without prejudice basis; (2) are irrelevant in relation to her trial and (3) should not be referred to or discussed during the course of the proceeding, Ms. Panagopoulos continuously returns to this issue.

[7] It is against this background that the court must analyze the present motion.

[8] The motion is governed by s. 34 of the *Judicature Act*, R.S.N.S. 1989, c. 240, as well as Civil Procedure Rule 52.02. Section 34 of the *Judicature Act*, *supra*, provides as follows:

> **Trials and procedure**
>
> Subject to rules of Court, the trials and procedure in all cases, whether of a legal or equitable nature, shall be as nearly as possible the same and the following provisions shall apply:
>
> (a) in civil proceedings, unless the parties in person or by their counsel or solicitors consent to a trial of the issues of fact or the assessment or inquiry of damages without a jury, the issues of fact shall be tried with a jury in the following cases:
>
> …..

[4] ¶11 of the document filed by the Plaintiff in response to this motion.
[5] ¶11 of the document filed by the Plaintiff in response to this motion.

(ii) where either of the parties in a proceeding requires the issues of fact to be tried or the damages to be assessed or inquired of with a jury and files with the prothonotary and leaves with the other party or his solicitor a notice to that effect at least sixty days before the first day of the sittings at which the issues are to be tried or the damages assessed or inquired of, except that, upon an application to the Supreme Court or to a judge made before the trial or by the direction of the judge at the trial, such issues may be tried or such damages assessed or inquired of by a judge without a jury, notwithstanding such notice,

(iii) where the judge at the trial in his discretion directs that the issues of fact shall be tried or the damages assessed or inquired of with a jury;

(b) in all other cases the issues of fact or the assessment or inquiry of damages in civil proceedings shall be tried, heard and determined and judgment given by a judge without a jury;

…..

[9] Civil Procedure Rule 52.02 provides:

52.02 Jury election

(1) For the purpose of Section 34 of the *Judicature Act*, the provisions in that Section respecting jury trials and procedure are modified by this Rule 52.02.

…..

(3) Parties to an action, to which Part 12 does not apply, must elect trial by judge or trial by jury in the request for a date assignment conference or the memorandum for the date assignment conference judge.

(4) An action must be tried by a judge without a jury, unless a party elects trial by jury in accordance with this Rule 52.02.

(5) **An action in which a party elects trial by jury must be tried by a jury, unless another party makes a motion for an order that the action be tried by a judge and satisfies the judge hearing the motion on either of the following:**

(a) under a Rule, under legislation, or by operation of other law, the action cannot be tried by a jury;

(b) the action is not for a cause referred to in subclause 34 (a)(i) of the

> *Judicature Act*, and **justice requires trial by a judge rather than by a jury**.
>
> [emphasis added]

[10] The burden is on the Defendant to satisfy me that, in the circumstances of this case, justice requires that the matter be heard by a judge rather than a jury.

[11] In *Cyr v. Anderson*, 2014 NSCA 51, Farrar, J.A., writing for the court, stated at ¶34:

> The Supreme Court of Canada and this Court emphasized over fifty years ago that the right to a trial by jury is a substantive right of great importance of which a party ought not to be deprived except for "cogent reasons": **King v. Colonial Homes Ltd.** [1956] S.C.R. 528, **MacNeil v. Hill the Mover (Canada) Ltd.,** (1961), 27 D.L.R. (2d) 734 (N.S.S.C. *in banco*). Therefore, given that either party enjoyed a *prima facie* right to a jury trial in Nova Scotia provided that it fell within the boundaries of the **Judicature Act**, the party seeking to strike the jury notice had to demonstrate "cogent reasons" why the trial should proceed before judge alone.

[12] The court went on to consider *Civil Procedure Rule* 52.02 and stated at ¶¶ 39 - 40:

> Therefore, under the current legislative framework, a party has a *prima facie* right to a jury trial. On a motion to strike (provided the law does not prohibit a trial by jury), the motions judge must now decide whether "justice requires" a trial by judge rather than by jury in accordance with Rule 52.02(5)(b).
>
> Is there any significant difference between "cogent reasons" for striking a jury notice and whether "justice requires" a trial by a judge rather than by a jury? There is no obvious change in the way that the Nova Scotia Supreme Court has interpreted the law since the introduction of the 2009 **Civil Procedure Rules**. That Court continues to determine whether there are "cogent reasons" to strike a jury notice or to explain why "justice requires" a jury notice to be struck.

[13] The court then went on to summarize the law regarding when a jury notice may be struck, at ¶¶ 41 – 42:

> In summary, **MacIntyre** and **Quinn Estate** suggest that a jury notice may be struck where:
>
> > i) the substantive issue is one of law not fact,
> >
> > ii) the issues of law and fact are so entwined with one another as to be virtually inseparable,
> >
> > iii) where the case involves scientific or technical issues that cannot be conveniently presented to the jury, or
> >
> > iv) where the evidence is extensive and complex.
>
> …..
>
> The case law since 1972 reveals that at least one of these four reasons is usually present when a judge determines that there are cogent reasons for striking a jury notice or that justice requires trial by judge alone. This should not be taken as suggesting that these reasons are exhaustive, nor that these factors are mutually exclusive. ….. As almost every judge notes on a motion to strike a jury notice, each case turns on its specific facts and issues to be determined.

[14] The Defendant relies on *Desjardins v. Arcadian Restaurants Ltd.* (2005), 77 O.R. (3d) 27 (Ont. Sup. Ct. J.), in support of this motion. In that case, the Defendant filed a jury notice but subsequently brought a motion to have it struck. The Plaintiff was self-represented at the time the motion was heard. The court allowed the motion to strike, stating, at ¶ 11:

> The following are the factors I have considered in exercising my discretion to strike the jury:

(i) This case has become unduly complicated because of the fact that the plaintiff is unrepresented.

(ii) The trial will be prolonged because the plaintiff is unrepresented.

(iii) It has become increasingly obvious to me that the plaintiff will require a great deal of assistance and guidance from the court. Assistance from the bench could possibly leave the jury with the impression that the court, in addition to assisting her, is favouring the plaintiff. Such an impression would obviously be prejudicial to the defendant.

(iv) The plaintiff has a lengthy and complex medical history. She has indicated that she does not intend to call a physician to testify at trial because she cannot afford to pay for that cost. She has indicated an intention to simply file the clinical notes and records of the physicians who have treated her. The position of the defendant throughout has been that a substantial portion of the plaintiff's medical history is completely unrelated to any injuries the plaintiff may have suffered on December 4, 2001. The medical history will have to be considered at length during the trial. The jury may have to be excused for significant periods of time during that process.

(v) The plaintiff has recently made new allegations about the injuries she suffered in the incident giving rise to her claim. She now claims that she has suffered cataracts, brain damage, fibromyalgia and permanent bruising over significant portions of her back. It is anticipated that the defendant will aggressively oppose the introduction of any evidence related to these recently reported injuries and symptoms. It is further anticipated that this will result in the jury being excused for additional significant periods of time …….

(vi) The plaintiff has repeatedly alleged that counsel for the defendant has not been forthright in conducting the defence of this action. In a letter dated December 21, 2004, the plaintiff alleges that counsel for the defendant has lied. I am concerned that members of the jury could be prejudiced should such an allegation be repeated in their presence.

(vii) In correspondence with counsel for the defendant, the plaintiff has made inflammatory comments regarding the ethics and morals of counsel, which comments in my view are totally unfounded. Again, I am concerned that, if such highly inflammatory allegations are repeated in the presence of the jury, they would be highly prejudicial to the defendant.

(viii) The plaintiff has filed correspondence with the court indicating that she wishes to use, and indeed requires the use of, a special lift chair in the courtroom for the duration of the trial. She has not provided any satisfactory medical evidence to substantiate the need for such a chair. Counsel for the defendant opposes her use of such a chair for obvious reasons.

[15] The Defendant also relies on the recent Ontario Court of Appeal decision in *Girao v. Cunningham*, 2020 ONCA 260. That case involved a jury trial with a self-represented Plaintiff. For various reasons, the Ontario Court of Appeal found that a miscarriage of justice had occurred during the trial. One of the issues was whether the trial judge should have taken the case from the jury. The Plaintiff had moved to strike the jury during the trial. The court stated at ¶¶ 170-172:

> In my view, the self-represented status of a litigant is a factor that might unduly complicate or lengthen the trial, leading the trial judge to conclude that prudence suggests the jury be discharged. As noted by Epstein J.A. in *Kempf*, "in many cases the 'wait and see' approach is the most prudent course to follow": at para. 43(9). As the trial unfolds, the trial judge becomes better able to assess the capacity of the self-represented party to present the case, whether as a plaintiff or a defendant. While remaining mindful of the substantive but not absolute right to a trial by jury, the trial judge then is positioned to determine whether justice to the parties would be better served by dismissing or retaining the jury.
>
> While I recognize that the right to a jury trial in a civil action has been recognized as fundamental, it is not absolute and must sometimes yield to practicality. I should not be understood as stating that the presence of a self-represented litigant should invariably lead to the dismissal of a civil jury. In many if not most cases, a trial judge should be able to fairly manage a civil jury trial with a self-represented litigant, with the willing assistance of counsel acting in the best traditions of officers of the court.
>
> In my view, the trial judge erred in failing to revisit his decision not to strike the jury.

[16] A similar result occurred in *Belende c. Greenspoon*, 2006 CarswellOnt 9135 (Ont. Sup. Ct. J.). In that case, the court determined that it was not appropriate for the matter to be heard before a jury in light of the type of relief that was being

claimed (an interlocutory and permanent injunction as well as equitable relief). The court went on to state, at ¶¶ 3-6:

> In my opinion there are other reasons why it would be inappropriate to have a jury decide the question of fact in this case. I do not intend to analyze the jurisprudences cited by counsel for the purpose of this endorsement. I would simply note that I accept the principles enunciated in such cases as *Bank of Montreal v. Citak* (1997), 16 C.P.C. (4th) 193 (Ont. Gen. Div), *Majcenic v. Natale* (1967), [1968] 1 O.R. 189 (C.A.) and *Desjardins v. Arcadian Restaurants Ltd.* (2005), 77 O.R. (3d) 27.
>
> Mr. Belende has chosen to represent himself in this action. If the trial proceeds with a jury it will be unnecessarily prolonged and unduly complicated. Some of the issues pleaded by Mr. Belende are complex. He would require a considerable amount of assistance from the Court. If a jury is present, the jury cannot help but receive the impression the Court (the judge) favours Mr. Belende's position which would not be fair to the defendants.
>
> As well, Mr. Belende has made derogatory and inflammatory comments about the defendants, counsel and the Court (or at least some judges). Such comments are even found in his factum filed for this motion. Given his attitude, and his conduct to date, it would be virtually impossible to conduct this trial in a way that would be fair to the defendants or indeed to Mr. Belende, if a jury were to be the judges of fact.
>
> For the above reasons I direct an order striking the jury notice. The trial will proceed before a judge presiding without a jury.

[17] One must be careful about relying on jurisprudence from other jurisdictions when considering this issue. As noted by Farrar, J.A. in *Cyr v. Anderson*, *supra*, at ¶46:

> … One must be cautious about importing reasoning from cases from other provinces with respect to the striking of jury notices since the legal framework regarding civil jury trials has evolved differently in each province. For example, Quebec abolished the right to a civil jury in 1976 and there is no such right in Federal Courts. **The right to a civil jury in Ontario is not dissimilar to the legal framework in Nova Scotia**. In Nova Scotia, the test is "where justice requires" trial by a judge rather than a jury, whereas in Ontario, a common law test has evolved so that a judge must decide "whether the moving party has shown that

> justice to the parties will be better served by the discharge of the jury": **Cowles v. Balac** (2006), 83 O.R. (3d) 660 (C.A.), at p. 670.
>
> [emphasis added]

[18] I am satisfied that the Ontario authorities referred to earlier are useful in analyzing the motion before me.

[19] The Plaintiff in this action has a *prima facie* right to a jury trial. It is a substantive right of great importance that should not be taken away lightly. However, it is not absolute. I have concluded in that in the circumstances of this case, justice requires that the trial of this matter be heard by a judge alone rather than by a judge and jury. My reasons for reaching this conclusion include:

(1) Ms. Panagopoulos is going to require a great deal of assistance from the court during the course of the trial. This assistance may leave the jury with the impression that the court favours Ms. Panagopoulos or her case;

(2) Ms. Panagopoulos has a great deal of difficulty focussing on the matters at hand (causation and damages). She has made it clear that she intends to raise and deal with a number of collateral issues at trial, including how she perceives she has been treated throughout this litigation. While the trial judge will determine which issues are relevant and properly before the court, I have no doubt that a great deal of trial time will be taken up

trying to help the Plaintiff focus on the real issues. In my view, continuous reference to collateral issues will be confusing to the jury;

(3) The Plaintiff appears to be consumed with the conduct of defence counsel. She feels that she has been abused by Ms. Mack and calls into question her actions and conduct throughout this matter. She alleges wrongdoing by the Defendant's solicitor regardless of how many times the court explains to her that it has seen nothing wrong in Ms. Mack's actions and, in fact, it is grateful for the assistance that she has attempted to provide both to the Plaintiff and the court in relation to this action. In my view, there is a real chance that a jury will be improperly influenced by the Plaintiff's apparent need to call into question Defence counsel's conduct;

(4) I am fully satisfied that regardless of any direction that the court may provide at the time of trial, Ms. Panagopoulos will make reference to the settlement conference that took place on February 5th, 2018. In my view, she is incapable of doing otherwise. This information could improperly affect a jury. A judge will ignore it.

(5) In my view, at trial the Plaintiff will have great difficulty determining what is admissible and inadmissible evidence. If the matter is heard

> before a jury, the judge will have to be careful not to allow in inadmissible evidence. That process will be extremely time consuming. With a judge alone trial, the court can be more relaxed about admissibility recognizing that the trial judge will simply ignore inadmissible evidence.
>
> This factor, on its own, would not be sufficient to strike the jury notice. However, it has formed part of my reasoning, coupled with the other factors referred to above.

[20] I have considered whether this is an appropriate case to take the "wait and see" approach referred to in *Kempf v. Nguyen*, 2015 ONCA 114, and allow the matter to commence with a jury to see how the Plaintiff does. I have concluded that in the circumstances this would be inappropriate. As indicated previously, I am extremely familiar with the Plaintiff's abilities, having case managed this file for almost three years. I have no doubt that the Plaintiff will not be able to effectively present her case without considerable assistance from the court (to the extent that it is appropriate) and that the concerns expressed in ¶ 19 will occur. I do not need to wait and see. My experience with this file fully satisfies me that justice requires that the matter be heard by a judge alone.

[21] I appreciate that, historically in this province, the self-represented status of a litigant has not been taken into account when determining whether to strike a jury notice. The law, however, must evolve. It is not at all uncommon in a twenty-first century courtroom to have one or more self-represented litigants participating in a proceeding. Many of these individuals are very capable of learning civil procedure and advancing their case in an effective manner. Others struggle greatly. Ms. Panagopoulos is one of those others. She struggles greatly.

[22] I do not feel that it is necessary to attempt to fit this situation under the rubric of complexity. I do not see the case as being particularly complex even with the Plaintiff's self-represented status. It is not complexity that drives my decision. It is the fact that I am not satisfied that there will be a fair trial if the matter is heard before a jury.

[23] I have heard from the parties on the issue of costs. Costs are governed by Civil Procedure Rule 77. Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise (CPR 77.03(3)). Nevertheless, a presiding judge retains a general discretion to make any costs order that she feels will do justice between the parties (CPR 77.02(1)).

[24] To my knowledge, this is the first time that a jury notice has been struck in Nova Scotia on this basis. In Mark M. Orkin, **The Law of Costs**, 2d. ed., looseleaf, vol. 1 (Aurora: Ont.: Canada Law Book, 2009), it is stated, at pp. 2-78 to 2-81:

> ……. An action or motion maybe be disposed of without costs when the question involved is a new one, not previously decided by the courts on the theory that there is a public benefit in having the court give a decision; or where it involves the interpretation of a new or ambiguous statute; or a new or uncertain or unsettled point of practice; or law; or in a case of first instance; or where there were no previous authoritative rulings by courts; or decided cases on point ……
>
> [citations omitted]

[25] I have concluded that in this case, it is appropriate that each party bear their own costs of this motion.

[26] An Order will issue accordingly.

Deborah K. Smith
Chief Justice