COURT OF APPEAL OF YUKON

Citation: *Liedtke-Thompson v. Gignac*,
2014 YKCA 10

Date: 20140806
Docket: 12-YU715

Between:

Tina Liedtke-Thompson

Appellant
(Plaintiff)

And

Paul Gignac

Respondent
(Defendant)

Before: The Honourable Madam Justice Levine
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of Yukon, dated February 4, 2013
(*Liedtke-Thompson v. Gignac*, 2013 YKSC 9,
Whitehorse Registry, Docket No. 11-A0009).

Counsel for the Appellant:	S. Roothman
Counsel for the Respondent:	D.L. Fendrick
Place and Date of Hearing:	Whitehorse, Yukon November 12, 2013
Place and Date of Judgment:	Vancouver, British Columbia August 6, 2014

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson

Summary:

Application by the appellant to re-open the appeal to consider fresh evidence. The appellant alleges the evidence demonstrates that a significant witness at the trial committed perjury in his testimony. ***Held:*** *application to re-open dismissed. The fresh evidence is not reasonably capable of belief, and if believed, could not reasonably be expected to have affected the outcome of the trial. The appellant failed to prove perjury on a balance of probabilities.*

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The appellant applies to the Court to re-open her appeal to consider fresh evidence. She alleges this evidence demonstrates that a significant witness at the trial committed perjury in his testimony.

[2] For the reasons that follow, I would dismiss the appellant's application.

The Litigation

[3] The litigation concerned allegations of assault and battery arising from an incident at a house party. The trial judge dismissed the appellant's claim and allowed the respondent's counterclaim: *Liedtke-Thompson v. Gignac*, 2013 YKSC 9.

[4] This Court heard the appellant's appeal on November 12, 2013, and dismissed it in reasons for judgment released January 14, 2014: *Liedtke-Thompson v. Gignac*, 2014 YKCA 2. The Court described the case as turning on "the trial judge's assessment of the credibility and reliability of the evidence of the parties and other witnesses" (at para. 2) and summarized the trial judge's conclusions (at para. 37):

> After considering all of the evidence, the trial judge concluded the appellant's evidence lacked reliability and credibility. On the other hand, he found the respondent's evidence was credible and supported by the other witnesses, especially Mr. Symynuk, who was an eyewitness to the assault. The trial judge considered the frailties in all of the evidence, including Mr. Symynuk's, due to the level of intoxication of the parties and the witnesses at the time of the incident. He also considered the inconsistencies in the details of the

> assault as reported by Mr. Symynuk and the other witnesses. He found that Mr. Symynuk's position as an eyewitness, whose evidence was broadly consistent with that of the respondent and the other witnesses, led to proof of the respondent's claim.

[5] In dismissing the appeal, the Court held that the trial judge had committed no palpable and overriding error in his assessment of the evidence (at paras. 3, 38).

[6] The order dismissing the appeal has not been entered.

The Fresh Evidence

[7] Mr. Symynuk's evidence was significant to the result of the trial. The appellant now seeks to introduce evidence that, she maintains, shows Mr. Symynuk did not tell the truth at the trial. She says the evidence was not available before the trial and did not come to her attention until after the appeal was heard.

[8] The evidence consists of the affidavits of two men who depose they each had a conversation with Mr. Symynuk after the trial. One witness, John Wheeler, deposes that Mr. Symynuk told him that he "took his buddy's side at the trial". The other witness, Jason Thompson, deposes that Mr. Symynuk told him that he did not see what happened between the appellant and the respondent and that the respondent told him afterwards what happened and what to say in Court.

[9] The respondent provided an affidavit in which he says that he does not know how he was assaulted, and the only information he has about what happened came from Mr. Symynuk. He denies that he told Mr. Symynuk what to say during the trial.

[10] Mr. Symynuk deposes that he did witness the incident between the appellant and the respondent and gave his evidence truthfully in court. He says that he did not discuss this case with either Mr. Wheeler or Mr. Thompson. He says further that Mr. Thompson visited him at his home following the trial and left bullets on his doorstep, which Mr. Symynuk reported to the RCMP.

[11] Counsel for the respondent cross-examined Mr. Wheeler and Mr. Thompson on their affidavits. Their evidence on cross-examination was inconsistent in several respects with their affidavit evidence, in particular concerning the relationship between Mr. Wheeler and the appellant and the circumstances of the conversations between each of them and Mr. Symynuk. Their accounts of when and how they reported their conversations with Mr. Symynuk to the appellant also varied from their affidavits.

[12] According to the respondent, Mr. Thompson threatened to physically harm him if the criminal charges against him of assault of the appellant were dismissed. A peace bond was issued against Mr. Thompson to keep him away from the respondent and his family.

The Test to Re-Open an Appeal

[13] This Court considered its jurisdiction to re-open an appeal and the applicable principles in *R. v. Hummel*, 2003 YKCA 4, leave to appeal dismissed, [2002] S.C.C.A. No. 434. More recently, in reference to a civil appeal, the Court of Appeal for British Columbia considered the steps involved and the application of the principles for the admission of fresh evidence in *Temple Consulting Group Ltd. v. Abakahn & Associates Inc.*, 2013 BCCA 119.

[14] In *Hummel*, the Court held that it has the inherent jurisdiction to re-hear an appeal after judgment has been delivered, but prior to the entry of an order, to prevent an injustice (at para. 14). After canvassing the civil and criminal jurisprudence, Mr. Justice Donald, for the Court, summarized the factors relevant to a re-opening application (at para. 24):

1. Finality is a primary but not always determinative factor.
2. The interests of justice include finality and the risk of a miscarriage of justice.
3. The applicant must make out a clear and compelling case to justify a re-opening.

4. If the case has been heard on the merits the applicant must show that the court overlooked or misapprehended the evidence or an argument.

5. The error must go to a significant aspect of the case.

[15] *Hummel* has since been applied in a number of cases in the Court of Appeal for British Columbia: see *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2005 BCCA 111 at para. 3; *McVea (Guardian ad litem of) v. British Columbia (Attorney General)*, 2006 BCCA 199 at para. 6; *Melnikov v. ICBC*, 2010 BCCA 502 at para. 6; *McGarry v. Co-operators Life Insurance Co.*, 2011 BCCA 272 at para. 4.

[16] In *Temple Consulting Group*, Mr. Justice Chiasson, for the Court, summarized the steps for reconsidering a decision (at paras. 17-18):

> [17] In my view, reconsidering a decision of this Court involves a two-step process: first, should the appeal be re-opened in order to consider a position advanced by a party; second, if so, should the decision be reconsidered, that is, changed. This is the approach taken by the court in *R. v. Hummel*, 2003 YKCA 4, 175 C.C.C. (3d) 1, leave to appeal dismissed, [2002] S.C.C.A. No. 434, and applied by this Court in *Hadcock v. Georgia Pacific Securities Corp.*, 2007 BCCA 127, 64 B.C.L.R. (4th) 316. I recognize that often, from a practical perspective, the two steps are conflated, but in a case like the present, this Court must consider whether to re-open the appeal to determine whether to admit the tendered fresh evidence. If we were to do so, only then would we decide whether to reconsider our decision based on the fresh evidence.
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> [18] Reconsideration is guided by the words of this Court in *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, 2005 BCCA 111, 209 B.C.A.C. 197 at para. 6:
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> > The circumstances in which a reconsideration will be undertaken are limited and do not include simple re-argument of the appeal. Something in the nature of overlooked or misapprehended evidence, or failing that, a clear and compelling case in law on the point and the prospect of a very serious injustice absent reconsideration, is required: *Mayer v. Mayer*. That is to say, an application for reconsideration is of an extraordinary nature.
> >
> > [Emphasis added.]

[17] In that case, the Court considered whether the fresh evidence should be admitted, applying the test for the admission of fresh evidence in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775 (at para. 20):

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[18] In the result, the Court did not admit the fresh evidence.

[19] The appellant suggests that the test to be applied "starts at an elementary principle of law, namely that a judgment obtained by fraud or perjury is tainted and should be vacated", citing *MacDonald v. Pier*, [1923] S.C.R. 107 at 111, and *Harper v. Harper*, [1980] 1 S.C.R. 2 at 5.

[20] She says that "the Court should balance the need for courts to protect the integrity of their process against fraudulent practices before them on the one hand, and the practical requirement of finality in litigation on the other hand". She suggests the tests to be applied where a party alleges perjury are those set out in *Canada v. Granitile Inc.* (2008), 302 D.L.R. (4th) 40 at paras. 278-326 (Ont. S.C.J.). These are set out in the appellant's argument:

> 32. The four tests are that the party alleging perjury must:
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> 32.1 prove perjury on a balance of probabilities with clear and cogent evidence;
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> 32.2 not have had knowledge of the perjury and the evidence necessary to prove the perjury at the time of the initial trial;
>
> 32.3 show the perjury affected the result, but need not show it was a determining factor, only that it was material to the decision. What is material is set against the basic value that those who deceive others should not be permitted to profit from the deception;
>
> 32.4 demonstrate it did not act with undue delay.

[21] It follows, the appellant says, that the Court should first decide whether the fresh evidence establishes perjury.

[22] In this case, whether the *Palmer* tests for the admission of fresh evidence or the *Granitile* tests for the proof of perjury apply, the task of the Court is to decide whether the evidence of the two deponents who allege that Mr. Symynuk perjured himself at trial is admissible. In *Temple Consulting Group*, Chiasson J.A. characterized this step as re-opening the appeal to the extent of considering whether to admit the fresh evidence. If it were admissible, the next step would be for the Court to reconsider the outcome of the appeal.

The Evidence of Perjury

[23] The respondent suggests that "even if it can be assumed that the evidence here could not have been obtained by due diligence before the trial and is relevant in the sense that it bears upon a decisive or potentially decisive issue, the evidence fails to meet the third and fourth test referred to in *Palmer*". I agree.

[24] The cross-examination of Mr. Wheeler and Mr. Thompson significantly undermined the credibility of their affidavit evidence.

[25] Mr. Wheeler admitted that his opinion is that Mr. Symynuk lied because he believes the respondent assaulted the appellant. In conversation with Mr. Symynuk, Mr. Wheeler suggested that Mr. Symynuk "took his buddy's side", to which Mr. Symynuk agreed. As the respondent points out, this does not amount to lying.

[26] Mr. Thompson's evidence on cross-examination revealed that he had not told the appellant directly about his conversation with Mr. Symynuk; he had told his daughter. He was also incorrect regarding the circumstances and location of his conversation with Mr. Symynuk.

[27] Both Mr. Gignac and Mr. Symynuk denied the content of Mr. Wheeler and Mr. Thompson's evidence, further undermining its credibility.

[28] In my opinion, the fresh evidence does not satisfy the criterion of being reasonably capable of belief. Furthermore, if believed, the evidence could not reasonably be expected to have affected the result of the trial.

[29] It follows that the appellant has failed to meet the tests for alleging perjury as she has failed to prove perjury on a balance of probabilities with clear and cogent evidence.

Conclusion

[30] The appellant has not satisfied the tests for the admission of fresh evidence or for the admission of evidence of perjury.

[31] It follows that I would dismiss her application to re-open the appeal for the purpose of reconsideration of this Court's decision to dismiss her appeal.

[32] I would order that the respondent is entitled to the costs of this application.

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Garson"