

In the Court of Appeal of Alberta

Citation: Southland Transportation Ltd. v. Calgary (City), 2008 ABCA 321

Date: 20080925

Dockets: 0801-0028-AC
0801-0033-AC

Registry: Calgary

Docket: 0801-0028-AC

Between:

Brenden Robert Frederick Steele an infant by his Father and Next Friend Steven Rory Steele, the said Steven Rory Steele, and Her Majesty the Queen In the Right of Alberta

Not a Party to the Appeal (Plaintiffs)

- and -

Norman Antonio Burgos

Not a Party to the Appeal (Defendant)

- and -

Southland Transportation Ltd., Leanne Ruth Steele, Vic Sharma

Appellants (Defendants)

- and -

The City of Calgary

Respondent (Defendant)

- and -

Millennium Insurance Company

Not a Party to the Appeal (Defendant by Order)

- and -

Norman Antonio Burgos

Not a Party to the Appeal (Third Party)

- and -

Southland Transportation Ltd., Leanne Ruth Steele and Vic Sharma

Appellants (Third Parties)

Between:

Brenden Robert Frederick Steele an infant by his Father and Next Friend Steven Rory Steele, the said Steven Rory Steele, and Her Majesty the Queen In the Right of Alberta

Appellants (Plaintiffs)

- and -

Norman Antonio Burgos

Not a Party to the Appeal (Defendant)

- and -

Southland Transportation Ltd., Leanne Ruth Steele, Vic Sharma

Appellants (Defendants)

- and -

The City of Calgary

Respondent (Defendant)

- and -

Millennium Insurance Company

Not a Party to the Appeal (Defendant by Order)

- and -

Norman Antonio Burgos

Not a Party to the Appeal (Third Party)

- and -

Southland Transportation Ltd., Leanne Ruth Steele and Vic Sharma

Appellants (Third Parties)

The Court:

**The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Clifton O'Brien
The Honourable Madam Justice Patricia Rowbotham**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Order by
The Honourable Madam Justice K. M. Horner
Dated the 30th day of October, 2007
Filed on the 23rd day of January, 2008
(Docket: 0401-16744)

**Memorandum of Judgment
Delivered from the Bench**

O'Brien J.A. (for the Court):

Introduction

[1] The City of Calgary (City) obtained summary judgment removing it as a defendant in this action. The chambers judge applied s. 533 of the *Municipal Government Act*, R.S.A. 2000, c. M-36 (*MGA*) which provides that a municipality is not liable for damage caused by the absence of a roadway traffic control device. She held that the statutory provision provided immunity in the circumstances of this claim.

Background Facts

[2] Seven-year-old Brenden Steele was struck by a car as he attempted to cross a street adjacent to a playground in a park in north east Calgary. No playground zone signs were present in the area at the time, although such signs were erected after the accident. Steele and the other plaintiffs (collectively, Steele) also allege that the accident was caused, in part, by several school buses parked on the side of the road along the park. The buses are owned by the co-defendant/appellant Southland Transportation Ltd. and operated by the appellants Leeanne Ruth Steele (also the plaintiff's mother) and Vic Sharma (collectively, Southland). The area was not designated as a no parking zone at the time of the accident, but "no parking" signs were erected after the accident.

[3] The City is named as a defendant in the action. Southland issued a notice to co-defendants, the City, and the driver of the car that struck Brenden Steele, seeking contribution and indemnity.

[4] The City brought a motion to strike out pleadings pursuant to r. 129 and for summary judgment dismissing the claims against it pursuant to r. 159. The r. 129 motion did not succeed, but the chambers judge granted the r. 159 motion and dismissed the claims against the City.

Relevant legislation

[5] The relevant provisions of the *MGA* are as follows:

527.2 Subject to this and any other enactment, a municipality is not liable for damage caused by any thing done or not done by the municipality in accordance with the authority of this or any other enactment unless the cause of action is negligence or any other tort.

532(1) Every road or other public place that is subject to the direction, control and management of the municipality, including all public works in, on or above the roads or public place put there by the municipality or by any other person with the permission of the municipality, must be kept in a reasonable state of repair by the municipality, having regard to

- (a) the character of the road, public place or public work, and
- (b) the area of the municipality in which it is located.

(2) The municipality is liable for damage caused by the municipality failing to perform its duty under subsection (1).

...

(8) When a traffic control device has been defaced, removed or destroyed by someone other than a designated officer or employee or agent of the municipality, the municipality is liable under this section only if the municipality

- (a) had actual notice of the defacement, removal or destruction, and
- (b) failed to restore, repair or replace the traffic control device in a reasonable period of time.

533 A municipality is not liable for damage caused

- (a) by the presence, absence or type of any ... traffic control device ... adjacent to or in, along or on a road, ...

[6] It is common ground that a playground zone sign is a “traffic control device” within the meaning of the statute.

Reasons of the chambers judge

[7] The chambers judge gave brief oral reasons for granting summary judgment. She held that section 533 of the *MGA* provides the City with immunity in this case. She further found that the City’s “Warrant for Playground Zone Signs” (Warrant), part of the City’s Manual of Traffic Control Devices, was not a clear decision by the City to erect a playground zone traffic control device. She also found that the failure to erect such signs was not a failure to keep the road in repair.

Issue

[8] The issue on these appeals is whether this is a proper case for summary dismissal under r. 159.

Standard of review

[9] The standard of review on an appeal from summary judgment is correctness on questions of law and overriding error on questions of fact, and on questions of mixed fact and law save that correctness applies to an extricable principle of law in the latter instance. Having regard to the discretionary nature of a decision to grant summary judgment, deference is owed to the chambers judge: *Shuchuk v. Wolfert*, 2003 ABCA 109, 15 Alta. L.R. (4th) 5 at para. 9; *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69, 55 Alta. L.R. (4th) 1 at para 23.

Analysis

Rule 159

[10] Rule 159(2) and (3) provides:

159(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.

(3) On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

[11] The test on a r. 159(2) application for summary judgment is a high standard as an applicant to succeed must show it is “plain and obvious” or “beyond doubt” that the action will not succeed. If a chambers judge must assess and weigh the evidence to arrive at a summary judgment, the test has not been met: *Aram Systems Ltd. v. NovAtel Inc.*, 2007 ABCA 100, 84 Alta. L.R. (4th) 37, at para 19.

[12] The Supreme Court of Canada in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, 372 N.R. 239 at para 10, considered the purpose of r. 159(2):

The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

The defendant who seeks a ruling under r. 159(2) must show that there is “no genuine issue of material fact requiring trial” (para. 11).

Application to these appeals

[13] The appellants submit that the immunity provided by section 533 does not protect the City if it failed to implement an operational decision. The Supreme Court of Canada in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, distinguished between operational and policy decisions stating at 1240-41:

True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort.

[14] The appellants submit that the City was required to put up a playground zone sign and failed to do so. They point to the City’s Manual for Traffic Control Devices which includes the Warrant as requiring the establishment of a playground zone and erection of signs in the area where the accident occurred. The Manual for Traffic Control Devices expressly provided that its purpose was to establish uniform installation practices for traffic control devices. The Warrant sets out specific factors to guide the City’s traffic technicians and traffic engineers when to establish a playground zone. The factors include, for example, the existence of five pieces of recognized playground equipment, and the equipment and adjoining area are less than 50 metres from the roadway. The appellants further submit that the cross-examination testimony of the City’s officer supports the interpretation of the Warrant as a requirement for the City to designate a playground zone.

[15] The parties dispute whether there were five pieces of playground equipment in the particular park in question. Steele has set out expert evidence intended to be led at trial regarding how to count pieces of playground equipment and this would show the park in question met the requirements for a playground designation.

[16] The Supreme Court of Canada's decision in *Parkland (County) v. Stetar*, [1975] S.C.R. 884, establishes that liability can be found when, as in that case, a municipality knew that a sign it had erected had been removed. Its applicability to the case at bar remains to be determined.

[17] Alternatively, the appellants submit, and identify intended expert evidence showing, that the City was negligent in its design of the road if parking on both sides was to be allowed. They allege that parking buses along the roadway by the park created dangerous conditions because it created a blind spot. They cite *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, as authority that a municipality's duty to keep roadways in a reasonable state of repair includes the maintenance of signs and the duty to warn if the roadway presents a hazard. In *Housen*, the unexpected, unsigned sharp curve on a road was held to be a state of disrepair. As a matter of statutory interpretation, the appellants submit that sub section 532(8) indicates that the immunity under section 533(a) was never intended to be absolute.

[18] The chambers judge held that the Warrant was "not a clear decision by the City to erect a playground control device" even if *Parkland v. Stetar* applied, and further that "nor clearly is it a failure to keep the road in repair."

[19] With respect, in our view the appellants raise genuine issues as to whether or not the City is entitled to immunity under s. 533 in the circumstances of this case. It is not clear, or beyond question to us, that the immunity under s.533 arises in all cases where there is an absence of signage, if that absence is determined to arise from a failure to implement a policy decision, or otherwise is an operational decision or if that decision was made for ulterior purposes. It can be anticipated that evidence at trial will clarify the role of the Warrant and, in particular, whether it required the erection of a playground sign in this situation, and whether the absence of a sign is attributable to a policy decision, an exercise of allowable discretion under the subject manual, or the misinterpretation of its requirements by the employees responsible for its implementation. There was evidence that the Warrant requires a traffic technician to determine that if the Warrant applies, a playground zone should be designated. The evidence is not clear about the extent of discretion allowed in designating a playground zone, for example, when counting pieces of playground equipment, when there is less than five pieces or the distance of a playground zone from the road.

[20] Once again, in our view, it is not plain and obvious that the cause of action in tort relative to the design and safe worthiness of the road for its intended usage must necessarily fail. Whether the immunity granted under section 533 is broad enough to bar such a claim should only be determined in light of the evidence adduced at trial.

Conclusion

[21] We have concluded that the high threshold test for summary judgment has not been met insofar as there are genuine issues for trial. Accordingly, the summary judgment is set aside and the appeals allowed.

Appeal heard on September 11, 2008

Memorandum filed at Calgary, Alberta
this 25th day of September, 2008

Paperny J.A.

O'Brien J.A.

Rowbotham J.A.

Appearances:

D.J. Wachowich, Q.C.

J.Y. Pak

for the Appellants Southland Transportation et al.

T.D. Pipella

L.K. Lampman

for the Appellants Brenden Steele et al.

C.N. Sinclair

for the Respondent City of Calgary