CITATION: McLinden v. Payne, 2011 ONCA 439
DATE: 20110608
DOCKET: C53136

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Feldman and LaForme JJ.A.

BETWEEN:

Samantha McLinden, Matthew McLinden and Ashely McLinden, minors under the age of eighteen years, by their Litigation Guardian Samantha McLinden

Plaintiffs (Appellant)

and

Melissa Payne

Defendant

James L. Vigmond and Brian M. Cameron, for the appellant

Bruce Keay, for the Co-Operators General Insurance Company

Heard and released orally: June 3, 2011

On appeal from the order of Justice M.P. Eberhard of the Superior Court of Justice, dated December 13, 2010.

ENDORSEMENT

[1] The appellant appeals from the order of Eberhard J., refusing to permit the appellant leave to amend her Statement of Claim to add Co-Operators General Insurance Company as a defendant in this action.

[2] The appeal raises two issues. The first is whether s. 40(4) of the *Statutory Accident Benefits Schedule* precludes a person from making more than one application for a determination that he or she has suffered a catastrophic impairment. Section 40(4) of the *Schedule* at the relevant time read as follows:

> The determination by the designated assessment centre is binding on the insured person and the insurer, subject to the determination of a dispute, in accordance with sections 279 to 283 of the *Insurance Act*, relating to whether the impairment is a catastrophic impairment.

[3] The language of the section does not specifically preclude multiple applications. Indeed, counsel for Co-Operators fairly concedes that a person may bring a further application provided the application is not brought under the same sub-paragraph of the definition of a catastrophic impairment as a previous application.

[4] The motion judge went further. She found that a person could also bring a subsequent application based on the same sub-paragraph as a previous application provided that, "there must be evidence of a change in circumstances such that the court is not simply being asked to consider the same condition already denied and not challenged by the procedures set out in the SABS legislation."

[5] By this, we understand the motion judge to be saying that there must be a material change in the condition of the applicant. If there is no such change, a further application is not permitted as it would amount to a reconsideration of the earlier decision.

[6] We agree with the motion judge's interpretation of s. 40(4), essentially for the reasons she gave.

[7] The second issue is whether the motion judge erred in refusing the amendment to claim a catastrophic impairment based on the record before her.

[8] Having found that the appellant could bring a second application under s. 40(4), the motion judge considered the material filed by the parties and determined that the appellant had not shown that her second application was "anything other than a rehashing of the evidence" that was found to be insufficient in her earlier application. The motion judge went on to say that the present application appeared to be a dispute of the original denial which dispute was out of time. We agree with the motion judge's conclusions.

[9] The appellant argues, however, that the motion judge erred in treating this matter, in effect, as a motion for summary judgment rather than as a motion under Rule 26. The appellant submits that on a motion for summary judgment, a fuller record on the issue of catastrophic impairment would have been filed.

[10] In our view, it was open to the motion judge to consider the issue of potential prejudice to Co-Operators should she permit the appellant to amend the Statement of

Claim and add Co-Operators as a party based on the record before her. Both parties filed material on the motion addressing the issue of whether the appellant's second application for catastrophic impairment was permissible. We are not persuaded that the motion judge made an error in proceeding to address the issue before her under Rule 26. We note that on the motion, neither party submitted that she should do otherwise.

[11] In the result, the appeal is dismissed.

[12] Costs to the respondent fixed in the amount of $5,000, inclusive of all applicable taxes.

"D. O'Connor A.C.J.O."
"K. Feldman J.A."
"H.S. LaForme J.A."