

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE FRUMAN
THE HONOURABLE MR. JUSTICE COSTIGAN
THE HONOURABLE MR. JUSTICE RITTER

BETWEEN:

RANDY WOLFERT, THE WORKERS' COMPENSATION BOARD
AND GENE MUDRY

Appellants
(Defendants)

- and -

THOMAS SHUCHUK

Respondent
(Plaintiff)

- and -

DR. PAUL GREEN AND DR. GORDON KING

Not Parties to this Appeal
(Defendants)

Appeal from the Order of
The Honourable Justice R.P. Marceau
Given on December 10th, 2001
Entered the 28th day of March, 2002

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

COUNSEL:

W.P. Ostapek
For the Appellants

J.R. Nickerson
For the Respondent

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

RITTER J.A. (for the Court):

[1] The appellants appeal a chambers decision in which the chambers judge held that the respondent was entitled to advance a claim against the appellants based on the tort of abuse of public office. They argue that the statement of claim should have been struck in its entirety or, in the alternative, that they have established a case for dismissal pursuant to the summary judgment rule.

[2] The statement of claim issued by the respondent advanced a number of claims against several persons employed by, or contracted to, The Workers' Compensation Board ("The Board") respecting dealings the respondent had with those persons regarding injuries he suffered in a work-related accident. All of the claims, except for the one that leads to this appeal, were struck by the chambers judge on the basis that s. 12 of *The Workers' Compensation Act* ("Act") barred them. This section provides that The Board has exclusive jurisdiction to deal with work-related injuries and decisions regarding those injuries are not subject to court review, provided that they are made "in the honest belief that [they are] within the jurisdiction of the Board".

[3] We can discern no error in the chambers judge's analysis regarding the tort of abuse of public office, the protection afforded by s. 12 of the *Act* and Rule 129 of the Alberta Rules of Court. He listed the elements of the tort, related the allegations in the statement of claim that advance the tort, and determined that in a Rule 129(1)(a) application those allegations are presumed to be true. He found that this tort was not statute-barred, as decisions based on malice, bad faith or blind eye knowledge on the part of The Board's decision-maker are not made with an honest belief that they are within the jurisdiction of The Board.

[4] The appellants also rely on Rule 129(1)(b), alleging that the abuse of public office claim is scandalous, frivolous and vexatious. They rely on delay by the respondent and suggest that the respondent has already been compensated for his claims by The Board.

[5] Delay is generally dealt with under Part 24 of the Rules. Here the appellants could not have the claim dismissed for want of prosecution under this part of the Rules. We can see no reason for striking out for delay when a Part 24 application would be unsuccessful. Striking out is only done in the clearest of cases.

[6] The issue of compensation under the *Act* and damages for abuse of public office may have some commonality, but the Workers' Compensation scheme is "no fault". The tort of abuse of public office is fault based. Therefore an award under one does not preclude the possibility of an award under the other.

[7] The appellants also argue that the claim is an abuse of process and should be struck under Rule 129(1)(d) of the Rules. They argue *res judicata*, issue estoppel and collateral attack. Each of these is based on the assumption that the Workers' Compensation scheme provides the exact relief that is appropriate for the tort of abuse of public office. Again, we are not persuaded that this will invariably be the case.

[8] Further, if this decision was made outside jurisdiction, then it cannot be *res judicata* as the issue could not have been before The Board.

[9] The standard of review on an appeal of a summary judgment decision made by a Court of Queen's Bench Justice *de novo* from a Master's Order is correctness on questions of law and palpable and overriding error on questions of fact. On a summary judgment decision, which is discretionary, great deference is given.

[10] The appellants also argue that they presented a good case for dismissal on a summary judgment application. However, the chambers judge stated and applied proper principles on the summary judgment application. He held that summary judgment ought not be granted if there is a genuine issue to be tried, or opposing affidavits clash on relevant facts. He was aware that the appellants made a "bald assertion of good faith" but found competing evidence that tends to show that the appellants took steps towards a single purpose in reckless disregard of specific warnings. There was evidence before the chambers judge to support this and other findings he made and inferences he drew. We cannot say that any of his conclusions were unreasonable.

[11] Finally, the appellants appeal the cost award. Costs are discretionary. The standard of review of clear, palpable and overriding error precludes us from interfering with this award.

[12] The appeal is dismissed in its entirety.

APPEAL HEARD on February 25, 2003

MEMORANDUM FILED at EDMONTON, Alberta,
this 7th day of April, 2003

RITTER J.A.