Shuchuk v. Wolfert, 2001 ABQB 937

Date: 20011207
Action No. 9703 21890

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

THOMAS SHUCHUK

Plaintiff

- and -

RANDY WOLFERT, THE WORKERS' COMPENSATION BOARD, GENE MUDRY, DR. PAUL GREEN AND DR. GORDON KING

Defendants

MEMORANDUM OF DECISION
of the
HONOURABLE MR. JUSTICE R. P. MARCEAU

APPEARANCES:

J. R. Nickerson and
Craig Patterson, Student-at-Law,
(Nickerson Roberts)
For the Plaintiff

W. P. Ostapek
For the Workers' Compensation Board, Randy Wolfert and Gene Mudry

Donald R. Cranston, Q.C.
and Tara S. Mah,
(Bennett Jones)
For Dr. Gordon King

Stephen English,
(Prowse & Chowne)
For Dr. Paul Green

THE DECISION UNDER APPEAL

[1] This is an appeal of a Master's decision striking out the Plaintiff's Statement of Claim.

[2] On the 13th day of June, 2001 Master Funduk granted an application by the Defendants Workers' Compensation Board (WCB), Gene Mudry and Randy Wolfert striking out the Plaintiff's claim.

[3] In brief written reasons the learned Master characterized the action as framed by the Statement of Claim as an attempt to have the Court reassess the actions of the WCB in regard to his claim for disability - be it temporary, permanent or not at all.

[4] It appears that the Master acceded to the Defendants' application pursuant to rule 129. In ruling that "the Plaintiff essentially wants to be classified as having a permanent disability and he should never be reassessed notwithstanding the fact that section 33 gives the Workers' Compensation Board the jurisdiction to assess", the Master in effect stated that the pleadings disclosed only an attempt to have his application reheard in Court of Queen's Bench where that right was barred by statute.

[5] With respect I do not agree that the claim as framed seeks only to appeal the findings of the WCB from which there is only a limited statutory right of appeal to the Court of Appeal, not the trial level of this Court.

LEGAL ANALYSIS

[6] The application before the Master was brought pursuant to Rules 129 and 159 of the *Alberta Rules of Court*:

> **Rule 129.**(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
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> > (a) it discloses no cause of action or defence, as the case may be, or
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> > (b) it is scandalous, frivolous or vexatious, or
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> > (c) it may prejudice, embarrass or delay the fair trial of the action, or
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> > (d) it is otherwise an abuse of the process of the court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly.
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> (2) No evidence shall be admissible on an application under clause (a) of subrule (1).
>
> (3) This Rule, so far as applicable, applies to an originating notice and a petition.
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> **Rule 159.**(1) In any action in which a defence has been filed, the plaintiff may, on the ground that there is no defence to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for judgment on an affidavit made by him or some other person who can swear positively to the facts, verifying the claim or part of the claim, and stating that in the deponent's belief there is no genuine issue to be tried or that the only genuine issue is as to amount.
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> (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.
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> (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...

Rule 129

[7] To satisfy rule 129, the Defendants in this case must show a fatal flaw in the pleadings such that they cannot found a cause of action even assuming the veracity of the allegations, or something so clearly frivolous and vexatious or scandalous that it amounts to an abuse of the process of the Court. W.A. Stevenson and J.E. Côté, *Alberta Civil Procedure Handbook, 1999* (Edmonton: Juriliber, 1999), point out that it is rare that the Plaintiff cannot plead something arguably relevant and avoid a dismissal under rule 129. They add that almost any fatal flaw in an opponent's pleading will also give ground for summary judgment under rule 159.

[8] The Statement of Claim alleges that the Defendant Wolfert was at all material times an employee of the WCB and worked as a claims adjudicator. The Defendant Mudry was the supervisor of the Defendant Wolfert.

[9] Paragraph 14 claims an assault by the Defendants by forcing the Plaintiff to accede to a psychological assessment against all treating medical and psychological advice. This allegation, coupled with the allegation of resulting psychological injury to the Plaintiff, might not be a sufficient pleading absent an allegation of bad faith or at least reckless indifference because no action can be founded upon an allegation that a person acting as an adjudicator, as Wolfert was, acted negligently.

[10] However, there is more. Paragraph 24 states:

> **24.** The conduct of the Defendants was vindictive, malicious, biased, made without any medical indication or basis, deliberately disregarded the Plaintiff's rights and the express opinions of his treating physician and psychologists that the conduct was medically contraindicated, was a breach of the Defendants' duty of good faith, and constituted an assault upon the Plaintiff as well as a defamation upon his character, all of which resulted in the worsening of his medical and psychological health.

[11] The words "vindictive, malicious, biased and in breach of a duty of good faith", generously interpreted, might be construed as claiming the tort of abuse of public office or misfeasance in public office. That tort has been recognized in Canada starting with the case of ***Roncarelli* v. *Duplessis***, [1959] S.C.R. 121. This was a case of blatant overt misuse of public authority wherein Duplessis, Premier and Attorney-General of Quebec, caused the cancellation of a restaurateur's liquor licence because the restaurateur supported the cause of the Jehovah's Witness against whom Duplessis was waging a vendetta. The cancellation was intended to punish Roncarelli and had nothing to do with the legitimate exercise of the licensing power under the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255.

[12] The Supreme Court of Canada held that Duplessis had acted illegally. In separate reasons Rand J. wrote at p. 141:

> The act of [Duplessis] through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish [Roncarelli] for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the Province.

[13] At p. 143 Rand J. commented on the meaning of good faith:

> "Good faith" in this context, applicable both to the respondent and the General Manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

[14] Rand J. also defined "malice" in the context of abuse of public office at p. 141:

> Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.

[15] Several Canadian cases have considered ***Roncarelli***. In ***Gershman* v. *Manitoba Vegetable Producer's Marketing Board*** (1976), 69 D.L.R. (3d) 114 the Manitoba Court of Appeal commented on the ***Roncarelli*** case at p. 123:

> The principle that public bodies must not use their powers for purposes incompatible with the purposes envisaged by the statutes under which they derive such powers cannot be in doubt in Canada since the landmark case of ***Roncarelli* v. *Duplessis*** ... Since that case, it is clear that a citizen who suffers damages as a result of flagrant abuse of public power aimed at him has the right to an award of damages in a civil action in tort.

[16] The tort has evolved both in England and in Canada. The House of Lords considered the ingredients of the tort of misfeasance in public office in ***Three Rivers D.C.* v. *Bank of England (No. 3)***, [2000] 2 W.L.R. 1220 (***Three Rivers***). This case was extensively reviewed by the Ontario Court of Appeal in ***Odhavji Estate* v. *Woodhouse*** (2000), 52 O.R. (3d) 181 (leave to appeal to the S.C.C. granted on September 6, 2001).

[17] Borins J.A. (with whom Catzman J.A. concurred) considered the following passage of Lord Millett in the ***Three Rivers*** case at p. 1273 W.L.R.(Lords Steyn, Hutton and Hobhouse of Woodborough concurring):

> The tort is an intentional tort which can be committed only by a public official. From this two things follow. First, the tort cannot be committed negligently or inadvertently. Secondly, the core concept is abuse of power. This in turn involves other concepts, such as dishonesty, bad faith, and improper purpose. These expressions are often used interchangeably; in some contexts one will be more appropriate, in other contexts another. They are all subjective states of mind.

[18] Borins J.A. also considered the following passage at p. 1274 W.L.R. of Lord Millett's judgment:

> It is important to bear in mind that *excess* of power is not the same as *abuse* of power... The two must be kept distinct if the tort is to be kept separate from breach of statutory duty, which does not necessarily found a cause of action. Even a deliberate excess of power is not necessarily an abuse of power. Just as a deliberate breach of trust is not dishonest if it is committed by the trustee in good faith and in the honest belief that it is for the benefit of those in whose interests he is bound to act, so a conscious excess of official power is not necessarily dishonest. The analogy is closer than may appear because many of the old cases emphasise that the tort is concerned with the abuse of a power granted for the benefit of and therefore held in trust for the general public.
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> The tort is generally regarded as having two limbs. The first limb, traditionally described as "targeted malice," covers the case where the official acts with intent to harm the plaintiff or a class of which the plaintiff is a member. The second is said to cover the case where the official acts without such intention but in the knowledge that his conduct will harm the plaintiff or such a class. I do not agree with this formulation. In my view the two limbs are merely different ways in which the necessary element of intention is established. In the first limb it is established by evidence; in the second by inference.
>
> The rationale underlying the first limb is straightforward. Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge, or merely self-advancement, is an abuse of the power. It is immaterial in such a case whether the official exceeds his powers or acts according to the letter of the power: see ***Jones* v. *Swansea City Council***, [1990] 1 W.L.R. 1453. His deliberate use of the power of his office to injure the plaintiff takes his conduct outside the power, constitutes an abuse of the power, and satisfies any possible requirements of proximity and causation.

[19] Borins J.A. also made it clear that the foundation of the tort of misfeasance in public office is not negligence of a public official as was addressed in ***Kamloops (City)* v. *Nielsen***, [1984] 2 S.C.R. 2.

[20] In ***Alberta*** (***Minister of Public Works, Supply & Services)*** **v.** ***Nilsson*** (1999), 70 Alta. L.R. (3d) 267 at pp. 306, 307 (leave to appeal granted 74 Alta. L.R. (3d) 205), I set out the elements of the tort of abuse of public office in Canada :

1. an intentional illegal act, which is either:

   (I) an intentional use of statutory authority for an improper purpose; or

   (ii) actual knowledge that the act (or omission) is beyond statutory authority; or

   (iii) reckless indifference, or willful blindness to the lack of statutory authority for the act;

2. intent to harm an individual or a class of individuals, which is satisfied by either:

   (I) an actual intention of harm; or

   (ii) actual knowledge that harm will result; or

   (iii) reckless indifference or wilful blindness to the harm that can be foreseen to result.

[21] The above test was applied by Sanderman J. in ***Cool Spring Dairy Farms Ltd.*** **v.** ***Alberta (Minister of Environmental Protection)***, [2000] A.J. No. 1611; 2000 ABQB 724. The Court of Appeal upheld this decision ([2001] A.J. No. 1276; 2001 ABCA 256), stating at para. 1:

> The respondents' pleadings mirror the requirements as stated in the test for targeted malice constituting an abuse of public office outlined by Marceau J. in ***Alberta (Minister of Public Works, Supply and Services)*** **v.** ***Nilsson*** (1999), 246 A.R. 201 (Q.B.). In assessing the pleadings, the chamber's judge considered the above test. His decision contains no apparent error of law. Nor does his decision appear unreasonable in any way.

[22] Wolfert argues that he enjoys immunity as an adjudicator similar to that enjoyed by superior and inferior court judges. In ***Butler*** **v.** ***Newfoundland (Workers' Compensation Commission)*** (1998), 165 Nfld. & P.E.I.R. 84 (Nfld.S.C.T.D.) Russell J. heard an action for abuse of public office and intentional infliction of mental suffering. While an action for negligence by itself would not be sustainable in Alberta against the Workers' Compensation

Board or its officers, the Workers' Compensation Board and its officers are not necessarily immune from an action for abuse of power or intentional infliction of mental suffering.

[23] Immunity of quasi-judicial tribunals was discussed in ***Dechant* v. *Stevens***, [2001] A.J. No. 172; 2001 ABCA 39 (discontinuance of application for leave to appeal to the S.C.C. filed November 14, 2001). Conrad J.A. for the majority observed that absolute immunity does not appear to be available to quasi-judicial tribunals at common law. As for statutory immunity, Conrad J.A. examined the relevant statutory provisions and concluded that the Legislature did not intend that absolute immunity would apply, because that would remove the very safeguard of good faith provided in s. 112 of the *Legal Profession Act*, S.A. 1990, c. L-9.1.

[24] The *Workers' Compensation Act*, S.A. 1981, c. W-16 provides:

> s.12 (2) No proceedings by or before the Board shall be restrained by injunction, prohibition or other process or proceedings in any court or are removable by certiorari or otherwise into any court, nor shall any action be maintained or brought against the Board or any member of the Board in respect of any act or decision done or made in the honest belief that it was within the jurisdiction of the Board.

[25] Borins J.A. in ***Odhavji Estate* v. *Woodhouse***, *supra*, wrote that dishonesty, bad faith and improper purpose are terms that can be used interchangeably in characterizing the tort of abuse of public office. The *Workers' Compensation Act* in s. 12(2) grants immunity to the Board for acts done in "the honest belief that it was within the jurisdiction of the Board". I conclude that if the tort of abuse of public office is made out, so also has it been proved that the acts of the Board are not acts done with such an "honest belief" with the result that the *Act* does not grant immunity to the Board's actions.

[26] Whether the honest belief referred to in s. 12(2) exists in any given case is a matter of fact. In this case, as is discussed below, the affidavits conflict on this issue.

[27] Reviewing the Statement of Claim and in particular paragraphs 14 and 24 solely from the point of view of whether it sets out a cause of action, it is clear that the following is alleged:

1. Wolfert and Mudry are public officers.

2. They exercised a power.

3. It is alleged that they did so in a way that was vindictive, biased, without any medical indication or basis, deliberately disregarding the Plaintiff's rights and the opinions of the treating physicians and psychologists. The allegations go on to characterize these actions as being in breach of the duty of good faith. Lord Millett certainly used similar terms: spite, malice, revenge, self-advancement.

4. There must be an intent to injure and injury must follow. The Statement of Claim, by alleging in effect bad faith in the exercise of the power, satisfies the intent to injure. The Statement of Claim clearly alleges that the very result cautioned against by the caregivers, the worsening of the Plaintiff's condition, is exactly what was foreseen by the alleged abuse of power.

[28] In the result, the Defendants Wolfert, Mudry and the WCB have failed to meet the rule 129 test.

Rule 159

[29] In the rule 159 application I must look at the affidavits and decide whether there is an arguable case or a genuine issue for trial made out by the Plaintiff. As against the Defendant Wolfert (and vicariously the WCB), the affidavit of Chartered Psychologist Terry Peacock is not insubstantial evidence.

[30] The rules with respect to affidavits are set out in the *Alberta Civil Procedure Handbook, 1999* at p. 115:

> The affidavit required by R. 159(1) or R. 159(2) is vital; without it, the motion cannot get off the ground. If there is clearly no sufficient affidavit for the motion, the party resisting judgment will probably not want to file any evidence, lest he or she plug some hole. One moving for summary judgment could of course also file other affidavits or other evidence. If the affidavit for summary judgment is proper, the party resisting summary judgment must file admissible evidence showing some legally arguable defence (if defendant), or some legally arguable cause of action (if plaintiff). Contents of pleadings will not do; evidence is necessary to resist the motion. That affidavit resisting judgment can probably rely on information and belief. The defence (or the cause of action, if the defendant moves for summary judgment) need only be arguable to resist summary judgment. The defence or claim need not be certain, and need not even have a 50% chance of success.
>
> If the opposing affidavits clash on relevant facts, the master or chambers judge can rarely prefer one over the other. Unless the relevant parts of one affidavit are destroyed on cross-examination on affidavit, there must be a trial. The affidavit would be destroyed if the deponent admitted that the key facts in it were wrong, or if the deponent of the affidavit <u>for</u> summary judgment was not the party moving, and admitted he had no personal knowledge.

[31] As a clinical psychologist counselling the Plaintiff since 1992, Mr. Peacock was of the view that the assessment by Dr. Green being pressed for by Wolfert was contraindicated.

Wolfert then sought the opinion of Dr. Truscott, a psychological consultant with the Workers' Compensation Board. Dr. Truscott wrote:

> To answer your question regarding the reasonableness of your plan to have Mr. Shuchuk assessed by someone other than Dr. Brodie, in my opinion it is certainly reasonable from a Case Management perspective. As to whether it would unduly subject Mr. Shuchuk to excessive mental stress, which may in turn jeopardize his or others' safety, all of the information on file indicates that yes, it most likely would.

[32] After receiving that advice, Wolfert caused a private investigation firm to conduct surveillance on Mr. Shuchuk. After receiving the surveillance report, Wolfert obtained advice not from Dr. Truscott but from a different doctor, a Dr. M. H. Lussier, medical advisor of the Workers' Compensation Board. Although Dr. Brodie (who once assessed the Plaintiff), Terry Peacock and Dr. Truscott all specialize in psychological or psychiatric matters, Dr. Lussier's only qualification seems to be that of a medical doctor.

[33] It is arguable that going to Dr. Lussier with this new information instead of back to Dr. Truscott is suspicious. It may be evidence upon which the trier of fact would find that Wolfert had a single-minded purpose: to have Dr. Green assess Mr. Shuchuk and find some evidence to justify doing so regardless of Mr. Shuchuk's rights and health. This evidence suggests abuse of power.

[34] The affidavit of Wolfert deposes that all of his actions were done in the honest belief that this was the best course of action, and that he was acting strictly within his role not only as a case manager but also as an adjudicator. The Defendants WCB, Wolfert and Mudry made the following submission:

> It is submitted that the recklessness can only be considered to exist in cases of abuse of public office where there is an element of subjective dishonest belief or "blind eye" knowledge ... That is so because abuse of public office is, by its very nature, an intentional tort.

[35] In support of that proposition these Defendants cite the following passage from Lord Hobhouse's decision in ***Three Rivers District Council* v. *Bank of England***, [2001] H.L.J. No. 17; [2001] UKHL 16 at para. 164:

> The tort is exceptional in that it is necessary to prove the requisite subjective state of mind of the defendant in relation not only to his own conduct but also its effect on others. That state of mind is one equivalent to dishonesty or bad faith and knowledge includes both direct knowledge and what is sometimes called 'blind eye' knowledge. ('Blind eye' knowledge has since been discussed in different contexts by your Lordships in ***Manifest Shipping* v. *Uni-Polaris Shipping*** [2001] 2 WLR 170 and ***White* v. *White*** [2001] UKHL/9.)

[36] They further cite ***Manifest Shipping* v. *Uni-Polaris Shipping***, *supra* which defines "blind eye" knowledge as follows at pp. 207, 208:

> "Blind eye" knowledge approximates to knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground – and if it is not, it should be – that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence. Lord Blackburn in ***Jones* v. *Gordon*** (1877) 2 App Cas 616, 629 distinguished a person who was "honestly blundering and careless" from a person who
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> > "refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind – I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover".
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> Lord Blackburn added "I think that is dishonesty".

[37] I agree with these Defendants' submissions as to the required state of mind to prove recklessness so flagrant that blind-eye knowledge will be imputed to the public officer. I also agree that the test is a subjective one. However, here there is evidence which tends to show steps taken toward a singular purpose (proving that the Plaintiff was not disabled) in reckless disregard of specific warnings (Terry Peacock, Dr. Truscott), which is completely refuted by a bald assertion of good faith. In such circumstances, it would not be fair to deny the Plaintiff the right to a trial of his allegations. Whether the requisite state of mind existed is for the trier of fact to determine.

[38] As stated in the *Alberta Civil Procedure Handbook, 1999,* if the opposing affidavits clash, the Master or chambers judge can rarely prefer one over the other. There must be a trial. Further, deep questions of the limits of tort law should not be settled on a motion for summary judgment, especially where there are conflicting relevant factual allegations: ***Winnipeg Condominium Corporation No. 36* v. *Bird Construction Co.***, [1995] 1 S.C.R. 85.

[39] Certainly the Plaintiff has produced evidence demonstrating that the Plaintiff's case on abuse of process is arguable. Therefore it cannot be said that the Plaintiff has no reasonable chance of success against Wolfert and the WCB. There is evidence to support the allegation that Wolfert ordered the Plaintiff to submit to testing by Dr. Green upon threat of having his benefits cut off and that the result of the assessment damaged the Plaintiff's mental health.

[40] The Defendants raised other grounds in a supplementary brief. I see nothing in those additional grounds which would justify precluding the Plaintiff from arguing the foregoing

issues at trial. In particular, the Defendants claim the Plaintiff is seeking double recovery. The similarities between the heads of damage relied on in various contexts and referred to by the Defendants may be significant, but any significance cannot be determined at this stage. At a minimum, it is clear that the Plaintiff would not receive damages for pain and suffering from the WCB. The Defendants also ask that I infer lack of *bona fides* as a result of timing of various events in the course of the proceedings under this claim. In the absence of evidence on this point, I decline to draw this inference.

[41] Therefore, with respect to that portion of the Plaintiff's claim which can be construed as a claim of abuse of public office against Wolfert and the WCB, the appeal against the Master's decision is allowed.

[42] The only allegation against Mudry is that he acted as Wolfert's supervisor. That does not make Mudry vicariously liable for the actions of Wolfert. There is no evidence adduced that Mudry committed the tort of misfeasance in public office. Therefore, the decision of the learned Master to dismiss the claim against Mudry is upheld and that portion of the appeal is dismissed.

[43] The appeal with respect to other claims contained in the Statement of Claim is dismissed. Paragraph 19 of the Statement of Claim claims that the Plaintiff was defamed through a threat of criminal charges published to the Plaintiff and (according to the affidavits) only to persons at the WCB who had a duty to receive the information. I am of the view that there was no publication to persons who should not have received the information in the course of their duties and therefore that portion of the action is doomed to fail. The allegation of defamation against Mr. Wolfert in paragraph 19 of the Statement of Claim is struck.

[44] Dr. Paul Green and Dr. Gordon King were not parties to the application before Master Funduk. However the formal Order agreed to as the Order given by all counsel, including counsel for Dr. Paul Green and counsel for Dr. Gordon King, stated in paragraph 1:

> The Statement of Claim is struck in its entirety.

[45] Dr. Gordon King filed a brief on the appearance before me indicating that counsel for the Plaintiff had advised the Master that Drs. Green and King did not have notice of the application but the Court's decision with respect to the claims against the WCB, Wolfert and Mudry would apply to both Drs. Green and King. Dr. King's brief went on to say that the written argument was provided in opposition to the Plaintiff's appeal of Master Funduk's Order on jurisdictional grounds only. Specifically, Dr. King reserved the right to bring a summary judgment application on his own accord and on other grounds should the Plaintiff be successful in this appeal.

[46] Dr. Paul Green was represented at the appeal before me but filed no brief.

[47] Mr. English, counsel for Dr. Green, wrote a letter October 12th, 2001 to the Court stating that all counsel had agreed that:

> If the WCB is ultimately successful in its attempts to have this action struck or dismissed then the action will also be considered struck or dismissed as against the remaining Defendants, including Drs. Green and King.

[48] I decline to set aside the Master's order insofar as it relates to Drs. Green and King.

[49] Costs may be spoken to within 30 days.

HEARD on the 26th day of October, 2001.
DATED at Edmonton, Alberta this 7th day of December, 2001.

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J.C.Q.B.A.