COURT FILE NO.: 00-CV-189420

DATE: 20060411

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nathan Anthony Resch, Robert Higham, Ashley Higham, Ashley Crayden, Shannon Crayden, minors under the age of 18 years by their Litigation Guardian, Annette Crayden v. Canadian Tire Corporation Limited., Mills-Roy Enterprises Ltd, Gestion R.A.D. Inc., Procycle Group Inc.

BEFORE: Justice Spies

COUNSEL: Craig Brown & Darcy Merkur, for the Plaintiffs
Mark Edwards & Aaron Murray, for the Defendants Canadian Tire Corporation Limited, Gestion R.A.D. Inc., and Procycle Group Inc
Peter Trebuss, for the Defendant Mills-Roy Enterprises Ltd.

HEARD: February 23, 2006

RULING ON MOTION FOR MISTRIAL

Background

[1] On Thursday, February 23, 2006, Mr. Edwards, counsel for the Procycle defendants, brought a second motion for a mistrial based on a question that was asked by Mr. Trebuss, counsel for Mills-Roy, during his cross-examination of Ephrem Busque the previous afternoon. I reserved my decision and advised counsel on February 24, 2006, that the motion for mistrial was dismissed with reasons to follow. These are my reasons for doing so.

[2] Mr. Busque gave evidence on behalf of the Procycle defendants and was cross-examined at length by counsel for the plaintiffs, about the testing that Procycle did on the JSF fork before a decision was made to use it in the manufacture of the CCM Heat bicycle and the tests that were done on the fork after the Juteau accident was reported to Procyle, including questions on the documents produced concerning those tests.

[3] Mr. Busque was then cross-examined by Mr. Trebuss who put the following question to him:

> I put it to you, sir, all this testing that you had produced here in this big volume of tests done in April, May I take it even beyond that, the purpose of all this testing has nothing to do with knowing that the forks were defective. The purpose of all this paper was for you to go back to the fork manufacturer, Shing, to be reimbursed for what this cost Procycle; is that right?

[4] Mr. Edwards objected to the question and Mr. Busque did not answer it. Submissions were made in the absence of the jury. Mr. Edwards advised that he would have to consider his position. He submitted that the impression that the jury was left with was that all of the testing had nothing to do with all the issues that they had heard about but rather with Procycle getting reimbursed some money, that I had ruled that that issue was not relevant when I ruled that a proposed discovery read-in of the Procycle defendants was irrelevant and that it was grossly unfair for the jury to be left with this impression. I had ruled earlier in the trial that a read-in concerning a financial settlement between the Procycle defendants and JSF concerning recovery by Procycle of expenses related to the recall was not relevant and would not be admitted.

[5] Mr. Trebuss was unaware of the earlier ruling that I had given because he personally had not been in court at the time although another member of his firm was present. He advised that he did not intend to get into the settlement but that he wanted to point out that all of the records had nothing to do with the recall given the dates of the tests.

[6] Mr. Brown drew my attention to the fact that the Defendants' Document brief contains lists of hours prepared in order to be submitted for reimbursement to JSF and that that is why those hours were collected, but made it clear that he was not pursuing this issue.

[7] My concern with the question asked by Mr. Trebuss of Mr. Busque was the possible inference that the tests were not bona fide but were done for some other purpose and so I asked Mr. Trebuss and Mr. Brown if they were prepared to have me advise the jury that they both accepted that there was no issue that the purpose of the tests performed by Procycle was to get to the bottom of whether or not there was a problem with the JSF fork and to the extent that there was any question of reimbursement that related to possible recovery of time spent in terms of the costs of the tests and that that was not relevant to this case. I added the latter comment to ensure there could be no possible inference drawn from the question asked of any reimbursement or settlement of the types of claim asserted by the plaintiffs in this case, although that was not really an inference I thought the jury might draw from the question.

[8] Mr. Brown readily agreed and although Mr. Trebuss had suggested the issue raised by the question was relevant he was also in agreement that I could so advise the jury and advised that he withdrew his question.

[9] Counsel had no suggestions about the direction that I intended to give to the jury and so the jury was brought back in and I provided the following instructions to the jury:

> There was an objection with respect to that last question, and we have dealt with that. I don't want to be unfair to Mr. Trebuss, but I think that question was worded badly, and I want to make clear to you at this stage that there is absolutely no issue amongst counsel here that the purpose of the tests that you heard Mr. Busque testify about that he did-that Procycle did on the JSF fork, that that was for the purpose of what Procycle thought was necessary to investigate the incident that they had heard about at the relevant time. It will ultimately be an issue for you to decide if what they did was sufficient, but there is no question that that was the purpose of those tests. And the question of the costs of tests that Mr. Trebuss' question touched on, is that you can imagine in a situation like this as a manufacturer, Procyle, they could keep track of the hours spent in testing the product, and they might be able to recover some of the costs of the testing from the ultimate manufacturer in terms of the hours spent, but that's not an issue in this case, and so it is not a question that we need to pursue, whether or not they could or could not recover some of the time the employees spent. But there is no question that the purpose of the test was to, as you've heard from Mr. Busque, with respect to the incidents.

[10] Following my direction to the jury, Mr. Edwards conducted his re-examination of Mr. Busque.

[11] I was advised by Mr. Edwards of his intention to bring a motion for mistrial on the morning of February 24th but it was agreed that it would be heard at the end of the day after the evidence was completed.

[12] In support of his motion for a mistrial, Mr. Edwards argued that implicit in the ruling that I had made earlier in the trial, at which time I disallowed a read-in from the discovery of the Procycle defendants which spoke to the settlement between Procycle and JSF, the manufacturer, that any reference to any potential settlement or efforts by the Procycle defendants to seek recovery from JSF was irrelevant. He submitted that the impression left with the jury from the question asked was that the testing by Procycle had nothing to do with their due diligence but rather was aimed at recovering money from JSF and that that impression was egregious and prejudicial in an area that was crucial to the defence and in particular the adequacy of the recall.

[13] Mr. Edwards did not suggest that Mr. Trebuss had acted intentionally in light of my earlier ruling and accepted Mr. Trebuss' submission that he was not aware of it, as he had not participated fully in the trial.

[14] Mr. Edwards suggested that the prejudice was real and was worse in light of the earlier motion for mistrial, which I already dealt with and dismissed in that the jury may be left with an impression that there was true mala fides on the part of Procycle. Specifically he argued that if the jury was of the belief, from the impression that they were left with, notwithstanding my

direction, that Procycle was doing this testing for nothing more than trying to pad their own pocket, that that together with the submission made earlier with respect to the evidence of Martha Binstock and the failure of the defendants to fund the treatment of Nathan, resulted in true prejudice and was grossly unfair to the Procycle defendants.

[15] Mr. Edwards also argued that unlike the original motion for mistrial, where I found that part of the problem was as a result of Mr. Edward's failure to object to an answer given by Mrs. Crayden, that in this case objection had been taken earlier and my ruling had been made and notwithstanding my ruling the issue was squarely before the jury. He submitted that this occurred at a critical point in this case when Mr. Busque was being cross-examined for a day or more, where a large part of his cross-examination was on issues of testing and then the very last question in issue that was put to him.

[16] Mr. Trebuss argued that there had been a change since the time I ruled that the read-in in question was not admissible, as that ruling came before the evidence of Mr. Busque and that in cross-examination Mr. Busque stated on a number of occasions to Mr. Brown that Procycle had no responsibility for the fork before this incident, in terms of the torque on the bolts, and that that is why he took the direction that he did with what he conceded was a badly worded question. As I understand it, the line of questioning that he wanted to pursue when the question in issue was asked, was to suggest to Mr. Busque that when Procycle tested incoming JSF forks and rejected them on April 27th because they did not meet the torque specifications, that the nature of the defect was known and there was no point in continuing to test. In his submission my direction to the jury took care of any issues arising from the question that he put to Mr. Busque.

[17] Mr. Brown also suggested that the situation had changed since my ruling concerning the read-in, in that Mr. Busque had stated on a number of occasions that the fork manufacturer was responsible for the failure. Mr. Brown submitted that the jury might be wondering why JSF was not a party before the court and that in fact rather than prejudice to Procycle, that could result in prejudice to the plaintiffs if this issue was left hanging. Although he did not reargue the admissibility of the read-in per se, he suggested that this information was now relevant to explain why JSF was not in the litigation, in that it demonstrated that JSF accepted some responsibility for the defect. Specifically he submitted that the Procyle defendants brought the responsibility of JSF and the relationship between them prior to the accident into evidence by Mr. Busque's evidence and production of the time dockets of the testing that was done, which Mr. Brown submitted were there for no other reason than to advance a claim against JSF. He did not suggest that this evidence be admitted but rather submitted that the fact JSF was not a party to the litigation could be dealt with in my charge and that this would address any prejudice to the plaintiffs. He submitted that there was no prejudice to the Procycle defendants.

Analysis

[18] In deciding this motion, I followed the same approach that I applied on the first motion for mistrial. In particular, I considered, whether in all of the circumstances, I was able to say with confidence that having heard the question asked of Mr. Busque by Mr. Trebuss, the members of the jury would follow my direction and disregard any impressions or inferences that may have

been left by the question, in performing their duty in coming to a verdict at the end of the case. I concluded that the jury would be able to do so and that any prejudice to the Procycle defendants that could have arisen by the asking of the question in this form, by Mr. Trebuss, had been adequately remedied by my direction to the jury.

[19] When I gave my direction to the jury concerning the question asked by Mr. Trebuss following the submissions made by counsel, I intended to address two aspects to his question, firstly that the tests done by Procycle were not done for the purpose of investigating the defect but rather to recover costs from JSF and secondly to ensure that there was no possibility that the jury might speculate that Procycle had sought to settle the plaintiffs' claim with JSF. The question in my view did not suggest that directly, in that Mr. Trebuss was focusing at the time on the tests and by inference the costs of the tests, but I certainly wanted to reinforce that in my direction to the jury. In my view the direction that I gave to the jury, particularly in light of the further instructions to the jury during my charge, completely addressed all of the concerns raised by Mr. Edwards that might have arisen from the fact the question was asked.

[20] In deciding to dismiss this motion for a mistrial, I relied on the fact that the jury heard considerable evidence from Mr. Busque concerning the tests that had been done and the fact that there was never any suggestion in the detailed and lengthy cross-examination of Mr. Busque, by Mr. Brown, counsel for the plaintiffs, that the tests had been done for any purpose other than the investigation of the incident. Certainly Mr. Brown suggested that some of the tests may not have in fact occurred, given the absence of documentation, and he also suggested that the tests were not designed for mountain bikes, but there was never a suggestion that the tests were done for the purpose of seeking compensation of JSF. Furthermore, apart from the question asked by Mr. Trebuss, there was never any suggestion by anyone at any other point in this lengthy trial, that the tests done by Procycle were not done for the purpose of investigating the problem with the JSF fork.

[21] I also considered the fact that Mr. Trebuss, unlike Mr. Brown, had taken a very limited role in this case and that therefore, with no disrespect to him, the jury would pay less attention to what he might say as compared to counsel for the plaintiffs, especially given the fact that the jury knew that the interests of his client, Mills-Roy, were aligned with the plaintiffs, given the terms of the Partial Settlement Agreement. In addition I advised the jury that Mr. Trebuss had worded his question badly, again clearly suggesting that what he had said should be disregarded.

[22] It is also important to note that the arguments raised by Mr. Edwards flow from a question that was asked and objected to and not evidence given by Mr. Busque. During the course of a trial, it is not uncommon for counsel to put a proposition to a witness which may not be ultimately proven and which may or may not require an immediate direction, in the case of a jury trial, by the trial judge at the time that the question is asked.

[23] Furthermore, although I chose not to refer to this particular question again in my closing charge to the jury, I did deal generally with the role of JSF in my charge. All counsel had an opportunity to review my charge in advance and make submissions as to what I should say to the

jury and there were no submissions made in connection with the issues raised by this motion for mistrial nor, for that matter, the first motion for mistrial.

[24] In my view, although I do not accept that as events unfolded the evidence of the details of any settlement between Procycle and JSF was relevant, there was merit in the submission of Mr. Brown that given the repeated reference in the evidence of Mr. Busque to the responsibility of JSF as the manufacturer, that the jury might speculate whether or not the plaintiffs ought to have sued JSF. Accordingly, to address this concern and the concerns expressed by Mr. Edwards, I advised the jury that although they may have wondered why none of the parties had brought JSF into this action, that if they had wondered about that, that they put that out of their minds and not consider it in any way in reaching their verdict. I advised them that the fact that JSF was not a party in the action was not a relevant consideration in anyway to the questions that they had to answer.

[25] Furthermore, the issues raised on this motion have to be considered in the context of the evidence at the trial as a whole, and the positions taken by the parties. In the course of my charge to the jury I reviewed the evidence of Mr. Busque concerning the various tests that were done by Procycle in detail and summarized the position of the plaintiffs, namely that there was some question as to whether or not the tests had been done because of the lack of documentation and the argument of Mr. Brown that the tests done were inadequate, in that they were not designed for mountain bikes. There was no inference that was ever suggested or could even remotely be drawn by the jury based on all of the other evidence and submissions heard over the course of this lengthy trial, that was in any way supportive of the impression Mr. Edwards suggests that the jury was left with as a result of the question asked by Mr. Trebuss.

[26] I considered Mr. Edwards argument that I should consider the cumulative impact of the issues raised in this motion for mistrial along with the issues that he raised in the first motion. I do not accept that that is a relevant consideration in this case. For the reasons that I gave in dismissing the first motion for mistrial, I was completely satisfied that the members of the jury would follow my direction and disregard any impressions or inferences that may have been left by the evidence of Ms. Binstock, in performing their duty in coming to a verdict at the end of the case. There is absolutely no connection between the issues raised on the first motion for mistrial and those raised on this motion. I do not accept that the cumulative effect of the evidence of Ms. Binstock and any impression left as a result of the question asked by Mr. Trebuss was that there was any mala fides on the part of the Procycle defendants.

[27] This issue arose on the third last day of evidence of a six-week trial. Clearly the prejudice to all parties in declaring a mistrial at that stage would have been significant, as there did not appear to be agreement that I should then take the case from the jury, continue the trial and decide the case. However, the cost and delay resulting from aborting this trial and forcing a new trial was not something that I considered in reaching my decision, because the fairness of the trial to all parties is paramount. If I had accepted Mr. Edwards' submission that there was reasl prejudice to the Procycle defendants and that the jury could not impartially perform its duty to reach a fair and reasonable verdict on the evidence heard, I would have granted the motion given

that the issue concerned a key aspect of the defence, notwithstanding the resulting prejudice in terms of costs and delay to all parties.

[28] I concluded that there was no reason to believe that the Procycle defendants would not receive a fair trial and that they were not prejudiced by the question posed to the Procycle witness. I was confident that the members of the jury would follow my direction and disregard any impressions or inferences that may have been left by the question, in performing their duty in coming to a verdict at the end of the case.

[29] Accordingly, for these reasons, the motion for mistrial was dismissed.

_____

Spies J.

Released April 11, 2006