

Case Name:

Mader v. Hunter

Between

**Helen-Marie Mader, appellant, and
Warren W. Hunter and Motors Insurance Corporation, respondents**

[2004] O.J. No. 748

183 O.A.C. 294

7 C.C.L.I. (4th) 167

44 C.P.C. (5th) 83

129 A.C.W.S. (3d) 279

Docket No. C39871

Ontario Court of Appeal
Toronto, Ontario

Borins, Feldman and Gillese JJ.A.

Heard: February 25, 2004.

Oral judgment: February 25, 2004. Released: March 1, 2004.

(7 paras.)

Practice -- Dismissal of action -- Grounds, general and want of prosecution -- Prejudice to defendant -- Failure to fulfill undertakings -- Application or motion for dismissal -- Evidence -- Appeals.

Appeal by Mader for dismissal of her action for statutory accident benefits from a motor vehicle collision. Mader was self-represented through most of the proceedings. The defendants successfully moved to have her action dismissed on the ground that she had not fulfilled undertakings relating to evidence of her medical condition. Mader appealed.

HELD: Appeal allowed. The motions judge failed to balance Mader's interests with those of the defendants in exercising her discretion to dismiss the claim. There was no evidence of any prejudice to the defendants if the action were permitted to go to trial. Denying Mader a further adjournment in the absence of any evidence of prejudice to the defendants and in the absence of a consideration of the potential merits of the claim was contrary to the interests of justice.

Appeal From:

On appeal from the order of Justice Bonnie J. Wein of the Superior Court of Justice dated January 31,

2003.

Counsel:

David G. Lavkulik and Jennifer Hetherington, for the appellant.
Susannah M. Travers, for the respondent, Warren W. Hunter
J. Claude Blouin and George Kanellakos, for the respondent, Motors Insurance Corporation.

The following judgment was delivered by

1 THE COURT (oral endorsement):-- This is an appeal by Helen-Marie Mader from the order of Wein J. giving effect to an order by Mossip J. dismissing her claim against the respondents Hunter and Motors Insurance Corporation. This claim arises from a motor vehicle accident in which Hunter collided with the rear of the appellant's vehicle. Motors Insurance Corporation is the appellant's insurer and is joined in this action in respect to a claim for statutory accident benefits.

2 When the claim was issued the appellant was represented by counsel. Subsequently, however, she represented herself on several interlocutory motions and when she was examined for discovery. Ultimately, the motion judge dismissed this action on the ground that the appellant had not fulfilled the undertakings which she had given on her examination for discovery. The majority of the undertakings related to evidence concerning her medical condition. Because of the appellant's failure to make reasonable efforts to fulfill the undertakings and given "the long history" of the case, the motion judge dismissed the appellant's motion to set aside an earlier order of Mossip J. dismissing the appellant's claim. The respondents provided no evidence before the motion judge that they would be prejudiced were the appellant to be permitted to proceed to trial.

3 In our view, in the exercise of her discretion the motion judge failed to balance the interests of the appellant in respect to the prejudice that she would sustain if the action were dismissed against any prejudice to the defendants were the action to be permitted to go to trial.

4 The court is always reluctant to dismiss a potentially meritorious claim on grounds that do not address its merits. Unless the defendant can demonstrate prejudice in the sense that to grant the plaintiff the indulgence he or she seeks will prejudice the defendant's ability to defend the claim, the indulgence will usually be granted on appropriate terms. Applying what this court said in *Byers (Litigation Guardian of) v. Pentex Print Masters Industries Inc.* (2003), 62 O.R. (3d) 647, in our view, the justice of the case requires that the order of the motion judge be set aside and that an order be substituted setting aside the order of Mossip J. dismissing the appellant's claim. In the circumstances of this case, denying the appellant a further adjournment in the absence of any prejudice to the respondents and in the absence of a consideration of the potential merits of the plaintiff's claim, in our view, was contrary to the interests of justice.

5 With respect to the plaintiff's motion for the admission of fresh evidence, in our view most of the proposed fresh evidence was available, or with reasonable diligence could have been available, before the motion judge. Therefore, on that basis we decline to admit the evidence. However, we have taken into account the proposed evidence that since the dismissal of her claim, appellant's counsel, as the respondents concede, has fulfilled the majority of the undertakings.

6 Therefore, the appeal is allowed and the order of the motion judge is set aside. There will be an order substituted setting aside the order of Mossip J. dismissing the appellant's claim.

7 We award no costs of the motion to introduce fresh evidence, and award costs of the appeal to the appellant on a partial indemnity basis fixed at \$7,5000 and GST.

BORINS J.A.
FELDMAN J.A.
GILLESE J.A.

cp/e/nc/qw/qlrme

drs/e/qlppl/qljal