

SUPERIOR COURT OF JUSTICE

B E T W E E N :

GRACE JOUBARNE

Plaintiff

- A N D -

THE CORPORATION OF THE CITY OF BELLEVILLE,  
KEVIN MURPHY, TED MARECAK, the Chief Building  
Official of the City of Belleville, and  
SPENCER HUTCHISON

Defendants

**E X C E R P T O F  
C O N F E R E N C E C A L L**

BEFORE THE HONOURABLE JUSTICE S. KERSHMAN,  
on January 31, 2020, at BELLEVILLE, Ontario

APPEARANCES:

Michael Lesage

Counsel for the plaintiff

Kevin Cooke

Counsel for the defendants

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and is not a transcription error.

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|    | Transcript Ordered:      | February 3, 2020 |
| 15 | Transcript Completed:    | February 4, 2020 |
|    | Ordering Party Notified: | February 7, 2020 |

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THE COURT: This is Justice Kershman here.

MR. LESAGE: Hello, Your Honour.

MR. COOKE: Good afternoon, Your Honour.

THE COURT: So we have the court reporter on the line?

REPORTER: Yes, Your Honour, I am here and I have it on the record.

THE COURT: Okay. So can we just wait like three minutes please.

REPORTER: Yes, absolutely. I can pause the record and I will wait for you to give me the go ahead to go back on.

THE COURT: All right. Are we waiting for anybody else?

MR. COOKE: No, Your Honour.

THE COURT: Okay, so just give me three minutes, okay?

MR. LESAGE: Yes, I can.

MR. COOKE: I can as well, Your Honour.

**R E C E S S**

**U P O N R E S U M I N G :**

THE COURT: Can the court reporter hear me?

REPORTER: Yes, Your Honour, and ....

THE COURT: Okay.

REPORTER: .... if I may clarify for the record, without the benefit of having all parties in front of me, I may not be able to identify who is speaking, so depending on how accurate of a record you would like at a later time, you may need to state your name before you speak. I apologize.

THE COURT: Okay. This is Justice Kershman

speaking. What I plan to do is I plan to read my decision and then I will ask for submissions in relation to costs and see if you have any questions about the mechanics of my decision, and then we could proceed from there. Any questions? Thank you.

MR. LESAGE: No, Your Honour.

THE COURT: Sorry, was there a question, Mr. Lesage?

MR. LESAGE: No, Your Honour.

THE COURT: Okay. So here are the reasons for the decision.

REASONS FOR RULING: (Orally)

This motion originally began as a motion for various relief, including that the trial of the action be bifurcated such that the trial of the declarations in Paragraph 1.C.(1) and (2) of the amended statement of claim proceed during the week of April 14th, 2020, with the trial being peremptory to the plaintiff, and the balance of the claims proceeding to trial, following a determination of the declaration sought above. That second date would be scheduled by the trial co-ordinator in consultation with the parties. That motion was opposed by plaintiff's counsel. Other relief sought by the defendants included a motion for partial judgment based on a purported settlement. That relief was withdrawn by the defendants. In addition, a motion for intervenor status, brought by the plaintiff's

former counsel, was also withdrawn.

Factual Background:

This action arises out of the enforcement proceedings under the *Building Code*, that was taken by the City of Belleville Building Office and Building Department against the plaintiff, when the plaintiff commenced work on a house that she had purchased at 49-49½ Catharine Street, Belleville, Ontario, in 2011.

The plaintiff commenced the action against the City of Belleville and several of its employees by way of statement of claim issued on June 26, 2013. The plaintiff's claim against three defendants, including the City, Ted Marecak and Kevin Murphy were for damages based on malicious prosecution, negligence, negligent misrepresentation, public misfeasance, abuse of process and tortious interference arising out of the enforcement of the provisions of the *Building Code*. The plaintiff also claimed damage against the City of Belleville and Spencer Hutchison, the former manager of Approvals of the City, for public misfeasance, abuse of process, negligent misrepresentation, negligence tortious interference arising out of an application the plaintiff had made to the City's Committee of Adjustment for minor variances that would bring the property into compliance with the

City's zoning bylaws. The Committee of Adjustments turned down the plaintiff's application. This decision was upheld by the Ontario Municipal Board.

Statements of claim were served on all defendants. In addition to seeking general, special and exemplary damages, the plaintiff also sought declarations stipulating *inter alia* as follows:

1) that the property owned by the plaintiff at 49 and 49½ Catharine Street, Belleville, Ontario enjoys a municipal non-conforming use as a semi-detached property, with each half of the property containing two residential living units, for a total of four residential units, and being pursuant to section 76(1) of the *Planning Act*, and section 2 of *Ontario Reg. 384/94 Apartments and Houses* on November 16th, 1995. The property was used or occupied as a semi-detached property with each "half" of the property containing two separate residential living units, for a total of four separate residential living units, and that the semi-detached property had not been created through the alteration of a single detached property; and 2) that these declarations were sought by the plaintiff, pursuant to sections 34(9) and 76 of the *Planning Act*.

Initial discoveries of the parties took place in June 2016 and were completed by August

2016. A first pre-trial was held on November 16, 2017, the matter being placed on the November 2018 list for the trial sittings.

... NOISE OVER TELEPHONE.

THE COURT: We can't do this. Sorry, Mr. Lesage, you may have to step out.

MR. LESAGE: Okay, I do apologize, Your Honour. I just a whole big group of people step through, so give me a second.

THE COURT: No problem.

MR. LESAGE: I'd found a quiet place until then.

THE COURT: Okay. Sounds good.

A pre-trial was held for the first time on November 16th, 2017, and the matter was placed on the November 2018 trial sittings. On or about October 26, 2018, then-counsel for the plaintiff advised the defendants that the plaintiff intended to call Bob Clarke, a land-use planning expert at trial. As of October 26, 2018, Mr. Clarke advised the defendants of the plaintiff's intentions to call Mr. Clarke as an expert witness. The plaintiff had not delivered an expert report setting out evidence. Counsel for the plaintiff sought an amendment to the statement of claim.

A trial management conference was held on November 13th, 2018, at which time the November 18, 2018 trial date was vacated. The trial management conference judge ordered a timetable, on the consent of all parties,

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setting out the timetable that would be required to allow the parties to proceed to trial in April 2019. The plaintiff issued an amended statement of claim to seek certain declaratory relief pertaining to the original construction of the property, as well as the declaration for the use as four separate dwelling units qualifying as a legal non-conforming use.

The amended statement of claim was issued on November 23, 2018. The defendants issued an amended statement of defence.

Subject to the service of Mr. Clarke's report, which occurred on February 5, 2019, the defendants requested an adjournment of the April 1, 2019 trial date, for the purposes of retaining their own expert to address the issues raised in Mr. Clarke's report. The plaintiff did not consent to the request for the adjournment of the April 1 date, and a motion was required to be brought by the plaintiff, seeking an adjournment. It was agreed that the matter would be adjourned to the September 2019 trial sittings.

The motions judge on March 14th, ordered the defendants to serve a responding report by April 30th, 2019, which was done. A pre-trial conference was held before Kershman, J., on August 29, 2019, during the week before the

trial sittings, which lasted for several hours. The matter was set for the September 3, 2019 sittings but did not proceed because of an anticipated provisional settlement. A provisional settlement was entered into; however, the matter did not resolve.

On September 4, 2019, the plaintiff wrote directly to her former counsel, attaching a letter to the trial co-ordinator seeking an adjournment of the September 9th, 2019 trial, as she was now an unrepresented party and that she was seeking new counsel. A Notice of Intention to Act in Person was executed by the plaintiff on September 4, 2019. The effect of this was to leave her without counsel on the eve of trial, having been represented by Mr. Caza since 2012. The defendants consented to the plaintiff's request for an adjournment of the September 2019 trial and the matter was transferred to the April 14, 2020 trial sittings. The total time for trial was agreed between the plaintiff's former counsel and the defendants' counsel, both of whom are very experienced, at two weeks for both the declaratory relief and the tort claims. The defendants seek now to have the trial bifurcated to allow for the trial of the declaratory relief being dealt with during the first trial. In the event the plaintiff is not successful in the first trial, the defendants argue that part of the

trial dealing with the tort claims would not have to proceed. The defendants also request that the trial proceedings be peremptory to the plaintiff because the matters have been outstanding for a lengthy period of time, the statement of claim being issued approximately seven years ago, and the fact that two of the defendants have now retired from the City of Belleville. This relief is opposed by the plaintiff.

Dealing with the defendant's position, the defendant argues that there's no absolute right to have all issues dealt with in a single trial. Bifurcation of issues may be necessary in the interest of justice in exceptional cases, and the court has inherent jurisdiction to bifurcate non-jury trials without the consent of all parties. They argue that this is an exceptional matter that warrants bifurcation between the declaratory issues and the damages claims. They argue that there are some factors that a court may use to determine whether there should be bifurcation; they are as follows, and they come from the case of *Unwin v. Crothers*, 2005 CanLII 23337 (ON SC), at paragraphs 79 and 81:

- 1) Are the issues to be tried simple?
- 2) Are the issues to be tried clearly separate?
- 3) Will the trial judge be able to better appreciate the second issue by reason of

having dealt with the first?

4) Is there clear advantage to all the parties to have one issue tried first?

5) Will there be substantial savings of costs?

6) Will splitting the case save time or lead to unnecessary delay?

7) Is it likely that the trial in the first issue will put an end to the action?

8) Is there an obvious advantage to all parties to have one issue tried first?

The defendant argues that bifurcation is a just, expeditious and the least expensive route to go for the following reasons:

1) The claims for the declaratory relief were advanced by the plaintiff well into the litigation when she amended her statement of claim following the adjournment of the first trial.

The case has been litigated to that point without the benefit of those issues.

2) The claims for declaratory relief relate to historical use and configuration of the property, and in order to establish a legal non-confirming use, the plaintiff must convince the trial judge that the property was used for four separate dwelling units prior to April 4, 1997, without interruption, to the present date. They argue that the plaintiff will have to show that the subject property was originally constructed as a semi-detached house, and the evidence to establish these facts is distinct from the evidence that the

plaintiff will need to introduce to establish the elements of the torts in her claims for damages.

They also argue that there will be fewer witnesses on the trial for the declaratory issues, that the evidence from the declaratory relief will already be part of the record. They also argue that a determination of the declaratory relief is necessary to determine if the use of the subject property for four separate dwelling uses was permitted under the City's zoning bylaw.

Next, they argue that the declaratory relief does not seek damages and is not dependent on the damages claim.

Lastly, they say that bifurcation has the potential to streamline the trial for damages claimed in that it will 1) assist in determining if "construction" took place and 2) if the plaintiff is not successful in establishing the declaratory relief, it will potentially limit the damages related to the plaintiff's claims that she purchased the four plex property.

The plaintiff's position - the plaintiff argues the plaintiff has a basic right to have all issues resolved in a single trial and a bifurcated trial should only be ordered in the

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clearest of circumstances. Moreover, there is jurisprudence which suggests that a court will be slow to exercise its jurisdiction and bifurcate issues for trial when only one party objects and severance may cause problems. And the reference is *Blanchette v. Squires*, 2009 CanLII 43101 (ON SC), at paragraph 23.

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The plaintiff also argues that Rule 6.1.01, which came into effect in 2010, provides that there must be consent to bifurcation. The plaintiff says that on its face, the rule is clear that consent is required and consent is lacking here.

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Then they go on to set out five issues:

- 1) Is there a clear advantage to all plaintiffs to have the liability tried first?  
2) Will there be substantial savings to costs?  
20 3) Will the splitting of the case save time or lead to unnecessary delay?  
4) Is it likely that the trial on liability would put an end to the action?  
5) Is the action so extraordinarily excep-  
25 tional that there are good reasons to depart from normal practice requiring that liability and damages be tried together?

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They argue that the first factor's at best neutral. Whether the property is a single-family home or a legally non-conforming property with four units, will in no way

address the various questions as to whether the plaintiff was charged with violating the Building Act without just cause, or whether the defendants made negligent misrepresentations to the plaintiff. It's essentially a hiving off of the plaintiff's claim, they say, forcing her to retry her remaining claims at a later date. They also argue that bifurcation will lead to increased costs and require more judicial resources, as it will force the plaintiff to put a significant portion of her case in twice, including calling expert witnesses twice.

The anticipated witnesses in the proceeding include the plaintiff, Bob Clarke, Kevin (indiscernible), Andrew Walker, Aaron McMurdo, Angela Hannah, Dawn Stafford, and one or more of the defendants, Ted Marecak, Kevin Murphy, Spencer Hutchison, and another person named Greg Pinchin, in addition to all the witnesses called by the City. With respect to each portion of the claim, the plaintiff argues that it will be putting the City on trial, challenging among other things the manner in which it performed its statutory duties, its record-keeping, along with its training and supervision of employees. As such, it argues that it is not anticipated that bifurcation will result in anything other than increased cost and increased time.

I'm just going to take a minute and give everybody time to catch their breath.

The following is the analysis with respect to bifurcation. The court finds that this is an exceptional case. It has two distinct components, the first component being declaratory relief, the second component being the tort claims. The trial as originally set was set for two weeks by experienced counsel. Mr. Lesage, plaintiff's new counsel on the motion, said that it will now take upwards of three weeks. Further, he was not sure whether he was going to be retained by the plaintiff to act for her at trial. He also advised the court that the plaintiff was considering obtaining a new report or an amended report. If obtained, that would require the City to consider obtaining a new report or a further amended report, depending on how the plaintiff wishes to proceed.

The matter was set to go to trial in September 2019. A last-minute settlement conference was held before Kershman, J., approximately a week before the trial was to start. Had the matter not been resolved, it would have gone to trial at that time, with no further reports or no amended reports.

This matter related to a 2011 incident and an action started in 2013. No discoveries were

held for three years. We are now approaching the ninth year anniversary and the seventh year anniversary of the commencement of the action. Two of the defendants have now retired from the City of Belleville. This matter weighs heavily on all of the parties, including the plaintiff, who has said that she has poured most of her resources into this action and that she finds herself in a challenging financial position. She's even found it challenging when it comes to obtaining a new counsel, which she has done for the motion. Again, Mr. Lesage is not on the record for everything but just for this motion. He may or may not represent the plaintiff at trial. It was confirmed that he was available the weeks of April 6th and 13th, 2020, but the plaintiff was not ready to proceed to trial. While the court understands that the plaintiff is self-represented at this time, she may or she may not be at trial. The court is also aware that had the matter not gone to the pre-trial and not been resolved, it would have been dealt with at the beginning of September 2019.

The court is aware of the bifurcation rule, and that according to the rule it's on consent. However, at the same time, the court is also aware of Rule 1.04(1), that these rules must be liberally construed to secure the just, most expeditious, and least

expensive determination of every civil proceeding on its merits. In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues and the amounts involved in these proceedings.

The court is aware of the case of *Duggan v. Durham Non-Profit Housing*, 2019 (ONSC) 3445. In that case - that is a Divisional Court decision - the court concluded at paragraph 38 and 39:

"The plaintiff has a presumptive right to have all issues dealt with in a single trial. However, this right is not absolute, and bifurcation of issues may be necessary in the interest of justice in limited and exceptional cases."

So the court does find that this is an exceptional case, and the court finds that it is not restricted from exercising its inherent jurisdiction in this case, which is a non-jury case, just because one party refuses to bifurcate. The court is satisfied that there will be a savings of time and expense by bifurcating the trial. The court is aware that there is a possibility that the expense may be increased, but through the ordering of transcripts, that may actually reduce the amount of time for the second trial, if a second trial is called for. The court also

realizes that there are many tort claims as set out in the amended statement of claim, and they are separate and distinct from the declaratory relief claims. Though the court orders that the trial be bifurcated, with the declaratory relief claims being dealt with first in April 2020, the court will not allow any further expert reports in this matter or amended expert reports; there is not enough time in accordance with the Rules of Civil Procedure.

Therefore, the court orders that the declaratory relief portion of the trial be bifurcated from the tort portion of the trial and that the matter would proceed to the April 14th, 2020 sittings, for five days. The first trial is peremptory to all parties. If a second trial is required, it would proceed on a date to be set by the trial co-ordinator in consultation with all parties.

Does anybody have any questions as to the mechanics of my decision?

MR. COOKE: This is Kevin Cooke for the defendants. No, Your Honour.

MR. LEPAGE: Michael Lepage for the plaintiff. No, Your Honour.

THE COURT: Thank you.

FORM 1

CERTIFICATE OF RECORDING (SUBSECTION 5 (1))

*Evidence Act*

I, Crystal Bailey Howell, certify that

(Name of Authorized Person(s))

Recording 1311-CR504-20200131-140904-10-  
KERSHMS is the recording of the evidence and

proceedings in the Superior Court of Justice held at

(Name of Court)

15 Bridge Street West, Belleville

(Court Address)

on 31/1/2020, and that I was in charge of the sound recording

(Day, Month, Year)

device during those proceedings.

FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

*Evidence Act*

I, Lina Beard, Certified Court Reporter, ACT ID 3906322150

(Name of Authorized Person)

certify that this document is a true and accurate transcript of the recording of

Joubarne v. City of Belleville et al in the Superior Court of Justice

(Name of Case)

(Name of Court)

held at 15 Bridge Street West, Belleville

(Court Address)

taken from Recording 1311-CR504-20200131-140904-10, which has been certified in Form 1.

~~KERSHMS~~

February 7, 2020

(Date)

(Signature of Authorized Person(s))

**Lina Beard, Certified Court Reporter, ACT ID 3906322150**

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