

Season's Greetings



Our entire team at Foster & Company extends our best wishes to you and your families for a safe and happy holiday season.



Foster & Company's dynamic team providing clients with responsive, high quality services while maintaining the highest level of professional integrity and ethics.

Recent Caselaw

1st Case

The first case this month is a New Brunswick Court of Appeal decision which discusses the inadvertent disclosure of privileged documentation to opposing counsel.

2nd Case

Our second case this month deals with an insurer's motion for summary judgment against an insured who pursued the insurer over the course of 17 years with litigation including allegations of breach of fiduciary duty and negligent misrepresentation.



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Euclide Cormier Plumbing and Heating Inc. et al. v. Canada Post Corporation et al., 2008 NBCA 54

1st Case

Canada Post Corporation ("Canada Post") commenced an action against Euclide Cormier Plumbing and Heating Inc. ("Cormier Plumbing") for an oil spill that occurred at the post office in Bouctouche, NB. As Cormier Plumbing failed to defend the action, it was noted in default and its insurer, Economical Mutual Insurance Company ("Economical"), was added as a third party under the Insurance Act. On May 5, 2006, the noting in default of Cormier Plumbing was set aside, and Economical was granted leave to file and serve a Fourth Party Claim against Irving Oil Limited, the furnace oil supplier.

During the course of the proceedings, counsel for Economical prepared a draft Affidavit of Documents on behalf of Economical in which it mistakenly listed certain documents under Schedule "A" that were part of an adjuster's report. The adjuster's report itself was listed in Schedule "B". Although the documents in question were protected by solicitor-client privileged, copies were provided to counsel for Canada Post and Irving Oil Ltd.

Upon discovering the disclosure, counsel for Economical requested that the documents be destroyed and that no use be made of them. Canada Post refused to waive its right to the benefit of the use of the documents, namely witness statements, in cross-examination. As a result, Economical brought a motion for the destruction of the documents, the prohibition of any use being made of these documents, and for Canada Post's counsel to be removed as the solicitors of record.

The Court agreed that counsel for Canada Post had received confidential information which could potentially be used to the prejudice of Economical, but held that the removal of counsel for Canada Post as solicitors of record was unwarranted. In coming to this conclusion, the motions judge emphasized the argument that, in such a case, the documents in question may be subject to privilege, but the facts themselves are not if they are otherwise discoverable and relevant. As such, the motions judge granted the motion with respect to the destruction of the documents and the prohibition of their use, but dismissed the motion to remove counsel for Canada Post as the solicitors of record.

The Court of Appeal dismissed the appeal brought by Economical on the basis that the factual information in the documents, including the witness statements, had to be disclosed if relevant and otherwise discoverable. Further, the Court of Appeal indicated that no prejudice was caused to the insurer in that the privileged documents contained information which Canada Post would have eventually acquired in the normal course of the litigation.

Through this decision, the Court of Appeal established that Rule 32 of the New Brunswick Rules of Court requires the disclosure of any factual information contained in privileged documents. As such information is discoverable under the rule, the risk that it might be used by opposing counsel is an expected by-product of litigation and cannot provide a principled basis for the removal of counsel.

Schneider v. State Farm Mutual Automobile Insurance Company 2010 ONSC 4734

2nd Case

Schneider ("the Plaintiff") was involved in a motor vehicle accident on March 5, 1992. He commenced an action against his insurer, the Defendant State Farm ("State Farm"), and against the driver of another car (Teresa Jokic) on July 13, 2009, i.e. 17 years after the accident. The Plaintiff alleged that State Farm misled him in believing he could not pursue a tort action against the responsible driver. State Farm brought a motion for summary judgment pleading the limitation period.

State Farm's first argument was that the Plaintiff discovered the material facts for his claim for negligent misrepresentation by at the latest 1996, in which case the limitation expired in 2002, and the action would be statute barred.

The Plaintiff submitted his claim to State Farm for accident benefits some ten months after the accident, i.e. on January 7, 1993. State Farm sought the opinion of an orthopaedic surgeon, and then denied the Plaintiff's claims for loss of business, rehabilitation and care. The Plaintiff, who was unrepresented at the time, appealed to a mediator. The mediation took place in June 1993, and was largely unsuccessful for the Plaintiff.

The Plaintiff then hired legal counsel who organized an assessment by a neurologist in early 1994. The neurologist concluded that the Plaintiff's impairment had resolved and expected no long term disability.

The Plaintiff brought the matter to an arbitrator who heard the case in August 1995. The Plaintiff had retained a new lawyer by then.

The arbitrator rendered a decision unfavorable to the Plaintiff in January 1996, outlining that State Farm had properly denied the Plaintiff's various claims. The Plaintiff, again without a lawyer, appealed to the Ontario Insurance Commission in January or February 1996. This appeal was later dismissed in June 1997.

The action against State Farm was commenced on July 13, 2009, after "someone" told the Plaintiff "sometime" in April 2008 that he had the "right to sue" the other driver.

The first issue the Court determined was the application of the limitation period in favour of State Farm. The Court found that the Plaintiff was aware, as early as 1996, of his right to pursue a tort action against the other driver. The Court referred to documentation drafted by the Plaintiff himself for one of his many appeals where he mentioned he did not believe State Farm was telling him the truth when State Farm told him he could not sue the other driver. This was evidence that the Plaintiff had the required knowledge to make a claim for negligent misrepresentation at that time.

State Farm also contended there was no fiduciary duty owed to the Plaintiff. In the alternative, if it was determined that there was a breach of such duty, State Farm argued the defence of laches would apply. Laches means "standing by and watching, knowing of the Defendant's wrongful action, and doing nothing"

The Court found that the relationship between the Plaintiff and State Farm was not fiduciary. The Plaintiff was a reasonably sophisticated middle-aged professional who owned and operated his own business. He retained two different solicitors to help with his claim for statutory benefits. The Court did not believe that he was heavily dependent on State Farm regarding his potential tort claim against the other driver. The Court also pointed to the fact that the Plaintiff was in a highly adversarial relationship with State Farm over many years and the suggestion that he was vulnerable and dependent was just not credible in the circumstances.

Finally, the Court found that the defence of laches applied in favour of State Farm as the Plaintiff did nothing for 12 years to pursue this matter.

The Court also found there was no genuine issue requiring a trial in regards to the claim for breach of fiduciary duty, and in regards to the limitations defence pleaded by State Farm. Having found State Farm successful, the Court ordered costs payable by the Plaintiff in the amount of \$15,000.

Our newsletter is not intended to give legal advice, however, to discuss legal matters or obtain the full text of cases readers are welcome to contact Foster & Company.