SUPERIOR COURT OF JUSTICE – ONTARIO

7755 Hurontario Street, Brampton ON L6W 4T6

RE: Derenzis, Lucia, **plaintiff**
Da Silva, Joshua, **plaintiff**

AND:

HIS Majesty THE KING In Right of Ontario, **defendant**

Gore Mutual Insurance Company, **defendant**
Sevcik, Heidi, **defendant**
Ferrito, Joseph, **defendant**
Beecraft, Sarah, **defendant**
Bethune, Jennifer, **defendant**
Jones, Ken, BY HIS LITIGATION ADMINISTRATOR, CHRISTOPHER RAYMOND JONES, **defendant**

Whitehall Bureau of Canada Limited, **defendant**
Wright, Michael, **defendant**
Mascarenhas, David, **defendant**

Ambleside Investigation Management Inc., **defendant**

Rapid Interactive Disability Management Inc., **defendant**

Heeraman Singh, Ranu, **defendant**

Peel Region Police Service Board, **defendant**
Perone, Andrea, **defendant**
Mullings, Carl, **defendant**

BEFORE: Justice Mandhane

COUNSEL: ISMAIL, Ashu (ashu@campisilaw.ca), **for the plaintiffs**

PADRAIC, Ryan & PRISCILA, Atkinson (padraic.ryan@ontario.ca / priscila.atkinson@ontario.ca), **for the defendant (HIS Majesty THE KING In Right of Ontario)**

CAMPORESE, Arthur (acamporese@csdlawyers.ca), **for the defendants (GORE MUTUAL INSURANCE COMPANY, SEVCIK, Heidi, FERRITO, Joseph, BEECRAFT, Sarah, BETHUNE, Jennifer, Jones, Ken, BY HIS LITIGATION ADMINISTRATOR, CHRISTOPHER RAYMOND JONES**

KRAJDEN, Ari (akrajden@k2llp.com), **for the defendant (Rapid Interactive Disability Management Inc.)**

NO ONE PRESENT, **for the defendants (WHITEHALL BUREAU OF CANADA LIMITED, WRIGHT, Michael, MASCARENHAS, David, AMBLESIDE INVESTIGATION MANAGEMENT INC., HEERAMAN SINGH, Ranu, PEEL REGION POLICE SERVICE BOARD, PERONE, Andrea, MULLINGS, Carl)**

HEARD: September 17, 2024, by video conference

REASONS ON RULE 21 MOTION

INTRODUCTION

[1] Lucia Derenzis suffered catastrophic injuries after being run down by a pick-up truck on November 24, 2015. She claimed statutory accident benefits from her insurer, Gore Mutual Insurance Company, while also suing the driver of the truck.

[2] In this action, Derenzis seeks damages totaling over $10 million from multiple defendants on a joint and several bases. Derenzis alleges that Gore Mutual and its employees (Heidi Sevcik, Joseph Ferrito, Sarah Beecraft, Jennifer Bethune, and Ken Jones) engaged in tortious actions designed to minimize their contractual liability to her.

[3] Derenzis claims that:

a. Gore Mutual and its sub-contractor, Rapid Interactive Disability Management ("Rapid Disability"), harassed her by forcing her to attend unnecessary medical examinations. She says that she was injured during an assessment arranged by Rapid Disability and conducted by the co-defendant, Ranu Singh.

b. Gore Mutual conspired with Rapid Disability to alter medical assessment reports to understate the true nature and extent of her injuries.

c. Gore Mutual sub-contracted with Rapid Loss Control Inc. (now Ambleside Investigation Management Inc.) and Whitehall Bureau of Canada Ltd. to intimidate her through excessive surveillance.

d. Gore Mutual discriminated against her contrary to Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19, by refusing to pay her family caregivers market rates for caregiving services.

[4] Joshua DaSilva is Derenzis' son-in-law and is a co-plaintiff in the action. He seeks damages for battery and negligence exceeding $3 million from Gore Mutual, Whitehall, Ambleside, and Peel Police, along with employees of these defendants. DaSilva says that an employee of Whitehall, Michael Wright, injured him while conducting surveillance on Derenzis. He alleges that Wright and others then conspired with Peel Regional Police Service and its officers to alter records about the incident.

[5] In addition to the civil claim, Derenzis challenges the validity of the statutory accident benefits scheme as it relates to medical assessments and caregiver compensation: ss. 19(3), 55(2), *Statutory Accident Benefits Schedule,* O. Reg. 34/10 (SABS). She also asks the court declare s. 280 of the *Insurance Act*, R.S.O. 1990, c. I.8 invalid because it violates their rights under the *Canadian Charter of Rights and Freedoms* by creating a statutory bar on damage claims related to the administration of statutory accident benefits. Ontario is named as a defendant to respond to the *Charter* and *Code* issues.

[6] Gore Mutual has already brought a r. 2.1 motion that was dismissed by then-Regional Senior Justice Ricchetti. Afterwards, I he assigned me to case manage this action pursuant to Rule 77.06(1).

THE RULE 21 MOTION

[7] Gore Mutual and its employees, and Rapid Disability bring Rule 21 motions to have the claims against them struck or dismissed without leave to amend. Relying on Rule 21.01(3)(a), they submit that the License Appeal Tribunal (LAT) has exclusive jurisdiction over the proceedings. Relying on Rule 21.01(b), the say that the Second Fresh as Amended Statement of Claim ("the Claim") does not disclose a reasonable cause of action.

[8] Ontario brings a motion pursuant to Rule 21.03(c) and (d) asking me to strike out Derenzis' challenge to the validity of the SABS. Ontario says that these claims are an abuse of process because they were or could have been raised in proceedings before the LAT or in ongoing proceedings before the Divisional Court. Ontario does not seek to strike Derenzis' challenge to s. 280 of the *Insurance Act*.

[9] The Plaintiffs oppose striking or dismissing any aspect of their claim. They ask me not to dismiss the action without first determining the constitutionality of s. 280 of the *Insurance Act*, which goes to the heart of whether this Court has the jurisdiction to hear their substantive claims.

[10] The questions I must answer are as follows:

a. Should the action against the moving defendants be dismissed because this Court does not have substantive jurisdiction?

b. Should the action against the moving defendants be dismissed because it has no reasonable prospect of success?

c. Should the challenges to the SABS be struck because they are an abuse of process?

[11] Based on the applicable law:

a. At this stage, I would not dismiss the action against the moving defendants because of a lack of substantive jurisdiction. The Plaintiff's Constitutional challenge to s. 180 of the *Insurance Act* can proceed.

b. Save for Derenzis' claim for damages for intentional inflectional of emotional distress, I dismiss the remaining causes of action as against the moving defendants. I dismiss DaSilva's entire claim against the moving defendants.

c. I dismiss Derenzis' challenge to the SABS as an abuse of process.

ANALYSIS

a. Should the action against moving defendants be dismissed because this Court does not substantive jurisdiction?

[12] A defendant may bring a pre-trial motion to strike out a pleading because it discloses no reasonable cause of action (r. 21.01(b)). A defendant may also move to stay or dismiss an action because the court lacks jurisdiction, because it is duplicative of another matter pending, or is an abuse of process: r. 21.01(3)(a), (d).

[13] To succeed on a motion to strike under Rule 21, the defendant must establish that it is "plain and obvious" and "beyond doubt" that the plaintiffs' claim could not succeed. The motion proceeds based on pleadings alone, and I must generally take the facts plead as true and capable of proof: r. 21.01(2). That is because a successful Rule 21 motion deprives the plaintiff of the opportunity to prove their claim in court. Because Rule 21 is meant to dispose of cases at an early state, I should not strike a claim simply because it raises novel issues or appears hopeless, nor should I do so simply because the defendant has a strong defence: *Saygili v. Progressive Casualty Insurance Co.,* [1999] O.J. No. 3331, 46 O.R. (3d) 10 (S.C.J.), at para. 17, leave to appeal to Ont. Div. Ct. refused, [2000] O.J. No. 2017.

[14] Here, the moving defendants rely on Ontario's insurance scheme to argue that I do not have jurisdiction to award the damages sought by the Plaintiffs. In this regard, s. 280 of the *Insurance Act* states that an insured person may apply to the LAT in respect of a dispute about their entitlement to or the amount paid under statutory accident benefits, but that they may not initiate a proceeding before this court unless it is to appeal a decision of the LAT.

[15] Gore Mutual made the same argument in a Rule 2.1 motion that Justice Ricchetti dismissed: *Derenzis v. Gore Mutual Insurance Company,* 2021 ONSC 6575, 18 C.C.L.I. (6th) 278. While this is the first time Gore Mutual has challenged the Second Fresh as Amended Statement of Claim, I am mindful of Ricchetti J.'s findings and analysis to the extent that the issues raised by Gore Mutual on this Rule 21 motion are duplicative.

[16] Justice Ricchetti noted that the substance of Derenzis' action falls within the exclusive jurisdiction of the LAT because it was premised entirely on her assertion that Gore Mutual denied or prejudiced her entitlement to statutory accident benefits: *Derenzis (2021)*, paras. 36-38. However, Justice Ricchetti refused to dismiss the action because of Derenzis' outstanding constitutional challenge to the validity of Ontario's insurance scheme: *Derenzis (2021)*, para. 39.

[17] Justice Ricchetti noted that Gore Mutual did not address the constitutional challenge in its responding materials, that the court had not yet addressed Derenzis' standing to seek a declaration of constitutional invalidity, and that other parties (i.e. Ontario) may have an interest in the constitutional question: *Derenzis (2021)*, paras. 43-44. Justice Ricchetti dismissed Gore Mutual's motion on this basis, and his decision was not appealed.

[18] In my view, Justice Ricchetti identified the fundamental problem with Gore Mutual's motions under Rule 2.1 *and* now under Rule 21. Before me, none of the moving defendants, including Ontario, have attacked Derenzis' standing to seek a *Charter* declaration of invalidity. The Rule 21 motion is premature because it is not plain

and obvious that the Plaintiffs' constitutional challenge will fail, even in the face of a presumption of constitutional validity. This is largely because a Rule 21 motion is not the appropriate forum to decide a constitutional question. I refuse to dispose of a claim related to individual *Charter* rights in the absence of a proper evidentiary record, including in relation to any justification under s. 1 of the *Charter*. This is why, in the usual course, *Charter* challenges are brought by way of application and not based on bare facts pleaded in a statement of claim.

[19] It would be premature to dismiss the action for lack of jurisdiction. While there is strong case law from the Court of Appeal supporting Gore Mutual's position on jurisdiction, in the face of the Plaintiff's novel constitutional claim, and in the absence of a proper evidentiary foundation, I find that it is not "plain and obvious" that the claim would fail: see, e.g., *Stegenga v. Economical Mutual Insurance Company*, 2019 ONCA 615, 147 O.R. (3d) 65; *Yang v. Cooperators General Insurance Company,* 2022 ONCA 178, 21 C.C.L.I. (6th) 1, leave to appeal to S.C.C. refused, [2022] S.C.C.A. No. 141.

b. Should the action against the moving defendants be dismissed because it is plain and obvious that it would fail?

[20] The moving defendants say that there is no merit to the substantive claims against them such that it is plain and obvious that they would fail.

[21] The Claim makes for difficult reading because the Plaintiffs make no attempt to particularize the claim to recognized causes of action or specific defendants. The Claim is also colored by the Derenzis' allegations that the defendants conspired against her, even though she does not make any corresponding claim for damages based on conspiracy.

[22] Despite the convoluted Claim, I am mindful that pleadings are to be given a generous reading at this stage because striking a pleading or dismissing claim deprives a plaintiff of their day in court. On that basis, at the outset of hearing the motion, I offered Plaintiffs' counsel the opportunity to clarify her position on the

record. She advised that Derenzis' claim against Gore Mutual and its employees is grounded in battery, harassment and intimidation, breach of privacy, breach of good faith in application of the *SABS*, and abuse of legal process. She advised that Derenzis' claim against Rapid Disability is grounded in battery, harassment intimidation, and breach of privacy. The DaSilva claim is grounded in battery and negligence.

[23] I deal with each aspect of Derenzis' claim before turning to the DaSilva claim.

Battery

[24] In relation to battery, the Claim states at paragraphs 113 and 114:

> 113. Lucia claims against the defendants, to the extent any are found responsible, for the hernia, hernia surgeries, pain, suffering, rehabilitation, medication ingestion, out of pock expenses, housekeeping and/or attendant care arising from her September 7, 2016 hernia injury and multiple of operations that were subsequently required.
>
> 114. Lucia claims against the defendants, to the extent that any are found responsible for Lucia being unnecessarily touched by assessors that were the result of the coercive impact of s. 55 of the *Statutory Accident Benefits Schedule.*

[25] The factual basis for Derenzis' battery claim as set out in the pleading is that:

> 39. On September 7, 2016, during an assessment, Lucia advised Ms. Singh that she had not lifted more than 5 pounds since the accident. During the physical examination, Ms. Singh handed Lucia 8 lb weights and told her they were 5 lb weights. Lucia accepted the weights and in attempting the tasks required by Gore / Ms. Singh, Lucia popped her hernia and required multiple surgeries.
>
> 40. Between February 17, 2015 and September 21, 2016, contrary to her obligations as an occupational therapist, Singh made changes to her reports, changed report dates, and destroyed her draft reports and other records, misrepresenting that this was consistent with her professional obligations. The plaintiffs allege that the changes were requested by Bethune, Beecraft and/or Ferrito, RIDM and Gore to downplay Lucia's accident-related injuries, to reduce her entitlement to benefits and to cover-up the Ms. Singh's negligence and/or battery of Lucia, which caused injury.

[26] Battery requires the plaintiff to prove that the defendant directly interfered with a person, that the interference be harmful, offensive, or non-trivial, and that it was done without the person's consent: *Barker v. Barker*, 2022 ONCA 567, 162 O.R. (3d) 337, paras. 141-156, leave to appeal to S.C.C. refused, [2022] S.C.C.A. No. 368. The Court of Appeal reiterated that "direct interference" will only be found where the harm is the "immediate consequence of a force set in motion by the act of the defendant": *Barker*, para. 141. The Court applied the immediacy requirement to find that the plaintiffs could only claim battery against those doctors that provided them with hands-on care and not those who may have simply owed them a fiduciary duty: *Barker*, para. 155. At the same time, the Court clarified that it is possible to hold an employer vicariously liable for the battery of their employees: *Barker*, at para. 155.

[27] The Claim before me does not articulate how Gore Mutual or its employees could possibly be held liable for a battery by Singh. Singh was an occupational therapist sub-contracted by Rapid Disability. Gore Mutual and its employees never touched Derenzis, and Derenzis has not pleaded sufficient facts to establish that the hernia was the immediate consequence of a force set in motion by Gore Mutual or its employees. Second, Ranu Singh was not an employee of Gore Mutual, she was a subcontractor hired by Rapid Disability. Therefore, Gore Mutual cannot be held vicariously liable for her actions. Derenzis' claim of battery against Gore Mutual and its employees shall be struck without leave to amend because it is plain and obvious that it cannot succeed.

[28] In relation to Rapid Disability, Derenzis says that it can be held vicariously liable for the battery perpetrated by Singh because she was a sub-contractor acting under its direct instruction. However, I agree with Rapid Disability that Derenzis' claim is time-barred because she did not bring her claim against Singh and Rapid Disability within two years of the alleged incident and discoverability is not an issue: *Limitations Act, 2002,* S.O. 2002, c. 25, Sched. B, s. 4. Moreover, s. 16(1)(h.2)(ii) of the *Limitations Act* does not apply on these facts. That provision creates an

exception to the usual two-year limitations period where the person claiming battery is “financially, emotionally, physically or otherwise dependent on the other person.” This exception is meant to apply to situations of intimate partner violence and there is no case law to support it applying to a plaintiff’s contractual relationship with a corporation. The battery claim against Rapid Disability is struck without leave to amend because it is plain and obvious it will fail.

Intentional infliction of emotional distress

[29] Derenzis makes a claim for “harassment and intimidation” which her counsel conceded in oral argument is properly framed under the tort of intentional infliction of emotional distress: *Merrifield v. Canada (Attorney General),* 2019 ONCA 205, 145 O.R. (3d) 494, at para. 53, leave to appeal to S.C.C. refused, [2019] S.C.C.A. No. 174.

[30] At paragraph 115, the Claim states:

> 115. The plaintiffs claim against the defendants, to the extent any are found responsible, for damages arising from the ongoing harassment, non-covert, unlawful surveillance, tailgating, car chases, all of which was conducted in breach of Gore's and its employee's good faith obligations to reasonably adjust Lucia's benefit claim.

[31] Regarding this tort claim, at various points, the Claim states that:

> 46. On, or about November 8, 2016, an adjuster, under the direct supervision of Beecraft and Ferrito, prepared a memorandum to Gore's group committee advising that Lucia was at risk of being catastrophically impaired as a result of her accident-related mental, behavioural, and physical injuries.
>
> 47. In response to the memorandum, Gore raised their litigation reserves and Beecraft and/or Ferrito directed the adjuster to conduct more insurer examinations through RIDM. These instructions were provided verbally, through email or other forms, but not otherwise documented in the file.
>
> 48. The additional insurer examinations were unreasonable, unnecessary and designed to obstruct Lucia's access to benefits and/or to inflict mental harm on Lucia in an effort to force Lucia to settle her claim for less than what would otherwise have been owed under the peace of mind contract for benefits. In no instance did Gore comply with their regulatory requirements or written policies.

> 49. Between March 13, 2017 and March 31, 2017, Gore asked Lucia to attend at 5 examinations including one with Ms. Singh.
>
> 50. Gore shortly thereafter, through its actions and representations, admitted that the examinations were not required.
>
> 51. On or about June 27, 2017, Gore, Beecraft and/or Ferrito requested further surveillance from RLC of Lucia. The requested surveillance was also non-compliance with Gore policy and governing legislation.
>
> …
>
> 53. Ferrito, Beecraft and/or other Gore employees, and agents, instructed RLC, Whitehall and other agencies to ensure Lucia knew she was being surveilled. The purpose, in part, was to intimidate and distress Lucia. Lucia was intimidated and did suffer mentally as a result of the continual surveillance.
>
> …
>
> 55. On July 14, 15, 17 and 18, 2017, and other dates that are not known RLC and Whitehall surveilled Lucia, a fact which became known to her and her family. After, it was reported to Ferrito and/or Beecraft that Lucia was upset and felt unsafe while being watched, Ferrito and Beecraft directed RLC and Whitehall to continue and to intensify the surveillance.
>
> …
>
> 85. On July 13, 2018, Jones notified Lucia that Gore required her to attend 12 separate insurer examination, failing which her benefits would stop; an act which Lucia alleges was designed to further harass and intimate her into abandoning her claim.

[32] To succeed on a claim for intentional infliction of emotional distress, the plaintiff must show that: (a) the defendant engaged in flagrant or outrageous conduct; (b) the conduct was calculated to produce harm; and (c) the conduct resulted in mental or psychological injury: *Prinzo v. Baycrest Centre for Geriatric Care*, 60 O.R. (3d) 474, [2002] O.J. No. 2712 (Ont. C.A.), para. 48.

[33] Taking the facts pleaded in the Claim as true and capable of proof, I find that it is possible that the moving defendants could be held liable for intentional infliction of emotional distress, either directly or vicariously. It is not plain and obvious that an insurance company and its sub-contractors could not be held liable for intentional infliction of emotional distress if they abused the powers conferred by statute to

intimidate or harass a claimant into abandoning a legitimate claim, and the claimant suffered harm as a result. It is also possible that employees could be held personally liable for their actions, for example, if they acted alone or went outside the scope of their employment. I would not dismiss this claim for damages based on intentional infliction of emotional distress since it is not plain and obvious that it is doomed to fail.

Breach of privacy

[34] Derenzis claims “breach of privacy” which the Plaintiffs conceded in oral argument is properly framed under the tort of intrusion upon seclusion. The factual basis for the alleged breach of privacy is opaque and requires a holistic reading of the Claim. With the benefit of a generous reading, the Claim appears to be that:

a. Gore Mutual contracted with Rapid Disability for the express purpose of controlling the contents of its assessment reports (para. 30)

b. Rapid Disability provided Singh with selective documents and medical records, instructed her to write her report so as to limit recovery, and subsequently altered her report for the express purpose of denying benefits (paras. 31-32)

c. Rapid Disability, Gore Mutual and/or its employees directed Dr. Kilian Walsh and Dr. Anna Czok to make substantive changes to their reports so as to downplay Derenzis’ accident-related injuries (paras. 36-37)

d. Rapid Disability, Gore Mutual and its employees refused to provide Derenzis with draft reports and copies of the private medical information given to Singh prior to her assessment (para. 54).

[35] The tort of intrusion upon seclusion requires the plaintiff to prove that the defendant's conduct was intentional or reckless; that the defendant invaded, without lawful justification, the plaintiff's private affairs or concerns; and that a reasonable person would regard the invasion as highly offensive, causing distress,

humiliation or anguish: *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, para. 71.

[36] The tort of intrusion on seclusion requires that the defendant invade the plaintiff's private affairs or concerns *without legal justification*. Nowhere in the Claim does Derenzis plead facts sufficient to find that Gore Mutual or Rapid Disability accessed her personal information without legal justification. My understanding is that she was required to sign a consent to disclosure of her medical records when she applied for accident benefits. Indeed, the substance of Derenzis' privacy claim is about how her private information was handled *after* it was lawfully accessed, which goes beyond the scope of the tort as articulated in *Jones*. The proper recourse in such situations is to make a complaint to the federal privacy commissioner: *Yang v. Co-operators General Insurance Company*, 2021 ONSC 1540, 12 C.C.L.I. (6th) 210, at para. 93, aff'd 2022 ONCA 178.

[37] The claim for breach of privacy is dismissed without leave to amend as against Gore Mutual, its employees, and Rapid Disability because is plain and obvious that it cannot succeed.

Breach of good faith

[38] Under the heading "breach of good faith," the Plaintiffs claim damages for breach of the SABS by Gore Mutual and its employees. Breach of good faith is not a freestanding cause of action; it is a principle of the law of contracts that gives rise to a claim for punitive damages in a contract dispute: *Oz Optics Limited v. Timbercon Inc.*, 2011 ONCA 714, 107 O.R. (3d) 51, para. 62. Since Derenzis does not claim damages for breach of contract her claim for breach of good faith Is free-standing and untethered and must fail. The SABS do not comprise part of the contract of insurance: *Yang (2021),* para. 111. Moreover, there was no contractual relationship between Derenzis and the Gore employees. I would dismiss the claim for breach of good faith without leave to amend because it is plain and obvious it will fail.

Abuse of legal process

[39] The alleged abuse of legal process is articulated as follows at paragraph 125 of the Claim:

> 125. Lucia claims that she has suffered psychological harm and incurred costs as a result of the insurers false claim advanced in front of the LAT that Lucia failed to attend at cancelled examinations and at examinations where agreements were made that she did not need to attend.

[40] The tort of abuse of legal process has four elements: the defendant must initiate a process where the plaintiff is a party; the defendant must initiate the legal process for the predominant purpose of furthering some indirect, collateral and improper objective; the defendant must have taken or made a definite act or threat in furtherance of the improper purpose; and some measure of special damage must result: *Konstan v. Berkovits,* 2023 ONSC 497, [2023] O.J. No. 382, at para. 240.

[41] Here, Derenzis has not pleaded that Gore Mutual or its employees, initiated a legal process before the LAT. Indeed, it was Derenzis herself who initiated the two ongoing processes, which Gore Mutual defendant (as is its right). I find that Derenzis' claim for abuse of process is destined to fail, and it shall be dismissed without leave to amend.

[42] Before proceeding to the DaSilva claims I reiterate that the DaSilva claims are being struck without leave to amend. While I appreciate that leave to amend the pleading is usually given, it may be denied when it is plain and obvious that there is no tenable cause of action possible on the facts alleged and where there is no reason to suppose that he party can improve her case with any amendment: *Fernandez Leon v. Bayer Inc*., 2023 ONCA 629; *Burns v. RBC Life Insurance Company*, 2020 ONCA 347; *Klassen v. Beausoleil*, 2019 ONCA 407; *McHale v. Lewis*, 2018 ONCA 1048. Here, the Plaintiffs have already filed amended their pleadings and have still failed to plead materials facts necessary to ground the various causes of action pleaded. There is no reason to suppose that amending the pleadings again with improve her case.

The DaSilva Claims

[43] At paragraphs. 66 through 70 of the Claim, the Plaintiffs allege that they were aggressively following by the defendant Wright; that Wright was an investigator employed by Whitehall; that DaSilva approached Wright's parked vehicle in order to ask him to identify himself; that Wright fled and struck DaSilva with his car; and that DaSilva was injured. DaSilva alleges that Wright, Whitehall, Gore, and Gore's employees were negligent or high-handed such that they can be held liable.

[44] Paragraphs 118 through 120 of the Claim state:

> 118. Joshua claims that the October 31, 2017 vehicle-pedestrian collision caused by Wright, resulted in permanent and serious impairments of important physical and psychological functions as a result of injuries sustained therein, including but not limited to: fractured tibia and fibula requiring surgery; chest pain, back pain, right knee pain / buckling, right lower leg pain, right ankle pain, right foot loss of sensation, immobility of the right 5th toe; dizziness, depression, sleep difficulty the full details of which are not known but will be provided prior to trial ..
>
> 119. Joshua claims the acts of Wright were an intentional act of battery or were negligence and were the cumulation of a common interest to harm Lucia through intimidation of Lucia and her family among various defendants utilizing lawful and unlawful means. Alternatively, the acts of Wright were a culmination of negligence of his employer and Gore and its employees in failing to set in place proper safeguards and enforce the same to assure that criminal conduct did not arise.
>
> 120. As a result of his sustained impairments, Joshua has experienced pain, suffering, a loss of enjoyment, loss of earning capacity, a loss of housekeeping / home maintenance capacity, out of pocket expenses, past and ongoing rehabilitation and attendant care expenses.

[45] While DaSilva may have a claim for battery or negligence against Wright and Whitehall, it is plain and obvious that his claim against the moving defendants must fail. There is no immediate connection between Gore and its employees or Rapid Disability, on the one hand, and the intentional application of force to DaSilva, on the other. Even if Wright were found to be negligent, the Plaintiffs do not plead a sufficient basis to hold Gore or Rapid Disability liable given that they are separately incorporated entities.

[46] DaSilva's claim shall be dismissed as against the moving defendants without leave to amend because it is plain and obvious that it cannot succeed, and because no possible amendment to the pleadings could resuscitate the claim against the moving defendants.

c. Should the constitutional challenge to the SABS be struck because it is an abuse of process?

[47] In the Claim, the Plaintiffs articulate their challenge to the SABS as follows:

> 131. Lucia claims that section 55(2) of the SABS has violated her person through its conscripted impact, in which she had been coerced into being touched, without knowledgeable consent, in circumstances where such touching was not needed and occurred in circumstances where the insurer failed to comply with pre-requisite requirements. Lucia claims the section as worded presumptively allows and condones a medically invasive search of person without the prerequisite requirements have been met and proven. Lucia claims that compliance/non- compliance with pre-requisite requirements is known only to the insurer, defendant Gore. Lucia claims this offends sections 7, section 8 and section 15 of the Charter. Lucia further claims that section 55 (2) disproportionately impacts on persons such as her with serious psychological impairments both in instance of compliance with the compulsion and in instances of non-compliance.
>
> …
>
> 133. Lucia claims that the intent and effect of section 19 (3) of the Statutory Accident Benefits Schedule is to prevent Lucia from contracting on equal terms with respect to family status in that inferior reimbursement will be paid to family members caring for Lucia then would be paid to independent person providing identical service. Lucia claims for damages resulting from the same including hurt feelings and loss of ability to commit contractually to make equal payment for equal service.

[48] The doctrine of abuse of process is not subject to the technical requirements of issue estoppel or *res judicata*, and Ontario submits that Derenzis' has or could have raised these issues before the LAT such that the claim before me is an abuse of process by re-litigation: *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63, 68 OR (3d) 799, paras. 37, 42, 51-52. The court can find an abuse of process where a party is raising the same issue that the party raised or could have raised in the previous proceeding: *Aba-Alkhail v. University of Ottawa,* 2013 ONCA 633, [2013] O.J. No. 4709, para. 12.

[49] Ontario submits that Derenzis has already sought a finding from the LAT that s. 19(3) of the SABS is discriminatory, which the LAT rejected: *Derenzis v. Gore Mutual Insurance Company*, 2023 CanLII 58532 (Ont. L.A.T.), para. 39. Indeed, on June 27, 2023, the LAT dismissed Derenzis' allegation that she was the subject of discriminatory treatment contrary to the *Code.* After articulating the primacy of the *Code* and the test for discrimination, the LAT Member wrote at paragraph 39 that:

> [39] …The applicant submitted that her family members were discriminated against by their family connection to her. However, the applicant failed to show that other claimants with disabilities whose family members provide attendant care were not required to prove an economic loss and, thus, were treated differently than the applicant and her family members. In other words, the applicant has failed to show she was treated in a discriminatory fashion. Accordingly, this part of her claim fails.

[50] Derenzis sought reconsideration of the LAT decision, arguing that the LAT member had applied the wrong test for discrimination. Her reconsideration request was dismissed. I understand that the matter is now before the Divisional Court. If Derenzis wishes to challenge the LAT member's finding about discrimination, she should do so before Divisional Court. It would be improper to allow the Derenzis to launch a duplicative proceeding before this Court. Derenzis' claim for relief based on breach the *Code* will be struck without leave to amend.

[51] I now turn to the Plaintiff's challenge to s. 55 of the SABS, which she says infringes ss. 7, 8, and 15 of the *Charter*. Section 55 requires insured persons who make applications to the LAT to attend their insurer's medical examinations. Derenzis concedes that in April 2023 she served a Notice of Constitutional Question on Ontario challenging s. 55 of the *SABS* based on s. 7 of the *Charter* in her LAT application 17-002762/AABS.

[52] The Supreme Court of Canada has held that I should not exercise my residual jurisdiction to hear a constitutional challenge to legislation where an applicant has attempted to circumvent the administrative process: *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16 [2005] 1 S.C.R. 257, para. 54. Here, that is precisely

what Derenzis seeks to do. Rather than following through with the notice of constitutional question that she filed with the LAT, Derenzis has launched a duplicative proceeding before me. This is an abuse of process. Derenzis' challenge to s. 55 of the SABS shall be struck without leave to amend as an abuse of process.

COSTS

[53] After considering the factors set out in Rule 57.01, I have broad discretion when it comes to ordering costs: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131(1).

[54] Based on Ontario's success and the parties' agreement on costs, the Plaintiffs shall pay Ontario $4000 in costs all inclusive.

[55] Based on Gore Mutual's partial success and the parties' agreement on costs, the Plaintiffs shall pay Gore Mutual $4000 in costs all inclusive.

[56] Rapid Disability was also partially successful on the motion. Rapid Disability did not file an agreement regarding costs nor upload a bill of costs. Costs reserved to the cause.

CONCLUSION

[57] I refuse to strike the claim for lack of jurisdiction until the constitutionality of s. 280 of the *Insurance Act* is determined.

[58] Save and except for Derenzis' claim for intentional infliction of emotional distress, the Plaintiffs' claims against Gore Mutual and its employees, and Rapid Disability shall be dismissed without leave to amend.

[59] The *Code* and constitutional challenge to the SABS shall be struck without leave to amend.

[60] In advance of that next case management meeting, the Plaintiffs and Ontario shall discuss the proper procedure for the Court to determine the challenge to s. 180 of the *Insurance Act*.

[61] A copy of these reasons shall be sent to all the parties.

[62] The parties shall attend the case management meeting on October 15, 2024, at 9:00 a.m. via zoom. I remain seized.

MANDHANE J.

Released: September 27, 2024