PARTIES:	BRETT PHILIP MOORE
	v
	JAMES ERIC HEBRON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Supreme Court of the Northern Territory exercising Territory Jurisdiction
FILE NO:	116/96 9613583
DELIVERED:	9 October 1996
HEARING DATES:	1 August 1996
JUDGMENT OF:	Thomas J

REPRESENTATION:

Counsel:

Appellant:	Self represented
Respondent:	D.G. Alderman

Solicitors:

Appellant:	
Respondent:	J.P. Gerritson of De Silva Hebron

Judgment category classification:	C
Judgment ID Number:	tho96009
Number of pages:	10

(tho96009)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 116 of 1996
(9613583)

BETWEEN:

BRETT PHILIP MOORE
Plaintiff

AND:

JAMES ERIC HEBRON
Defendant

CORAM:

REASONS FOR JUDGMENT

(Delivered 9 October 1996)

This is an application by the defendant for judgment against the plaintiff pursuant to Order 23.01 of the Supreme Court Rules on the basis that the plaintiff's claim (a) does not disclose a cause of action; (b) is scandalous, frivolous or vexatious; or (c) is an abuse of the process of the Court.

Alternatively, the defendant seeks an order pursuant to Order 23.02 of the Supreme Court Rules that the plaintiff's claim be struck out.

The background to the application is as follows:

The defendant, James Hebron, is a solicitor and partner in the firm De Silva Hebron practising in Darwin. On 30 April 1996, Mr Hebron issued a writ and statement of claim in the Supreme Court of the Northern Territory at Darwin on behalf of Brian Martin as plaintiff, suit number 74 of 1996. In this action, Brian Martin claims damages against the defendant in these proceedings Brett Philip Moore trading as Surefix Aluminium. Brian Martin Claims damages for injuries he suffered as a result of the defendant's negligence on or about 10 January 1995 during the course of his employment with the defendant.

There then followed correspondence between Mr Hebron and Mr Tony Crane, solicitor for Mr Moore. On 13 June 1996 Mr Hebron filed a more detailed statement of claim on behalf of his client, Brian Martin. On 8 July 1996, following a request from Mr Crane on 19 June 1996 for further and better particulars, Mr Hebron provided answers to request for further and better particulars. On 15 July 1996, Mr Hebron provided a list of documents. On 17 July 1996, Mr Crane sought further and better particulars and further and better discovery. On 22 July 1996, Mr Crane filed a list of documents discovered by Mr Moore. Copies of correspondence between the solicitors and the other documents referred to above are annexed to affidavit of Mr Moore sworn 31 July 1996 and filed in these proceedings.

On 21 June 1996, Mr Moore issued a writ in the Supreme Court of the Northern Territory, No. 116 of 1996, against Mr Hebron. On 12 July 1996, Mr

Moore filed a statement of claim against Mr Hebron in Suit No. 116 of 1996 in which he made the following claims:

"1. That James Hebron did file Northern Territory Supreme Court Writ number 74 of 1996 ('the Writ') on behalf of Brian Martin without care and without taking proper instructions and without properly or any way satisfying himself that the Writ was not an abuse of process or a wrongful attempt by the Plaintiff in that Writ to obtain money from Brett Philip Moore.

2. The Writ is poorly conceived and a bad application of the law.

3. That James Hebron did without care and without taking proper instructions file a Statement of Claim in violation of court rules. That Statement of Claim was and is incomplete. It could not possibly be defended.

4. That James Hebron did without due care and without taking proper instructions file a Statement of Claim with insufficient particularity in order to hold Brett Moore to ransom with a claim which was not properly particularised or substantiated.

5. That James Hebron continued to fail to provide particulars of the purported claim of Brian Martin in circumstances where even particulars required by the Rules of Court were not provided as required.

6. That James Hebron is acting speculatively and accordingly has caused Northern Territory Supreme Court proceeding number 74 of 1996 to be intrinsically unfair in that James Hebron has put Brett Moore to costs prejudice with the knowledge that Brian Martin has no money and no assets with which to pay costs or any amount to Brett Moore in the event that Brett Moore should become entitled to such costs or another amount. Brett Moore says that James Hebron should tell the court and Brett Moore about James Hebron arrangements with Brian martin which have resulted in James Hebron issuing the Writ for someone with no money or assets to pay costs.

7. That James Hebron is using his own resources to prosecute the Writ against Brett Moore in circumstances where because the plaintiff Brian Martin has no money and no assets with which to pay Mr Hebron's proper costs or any judgment debt which might become due

to Brett Moore, Brett Moore has no recourse for recovery of any said judgment debt or cost except against James Hebron.

8. That James Hebron did act with the intention of causing such a distraction to Brett Moore that James Hebron could then extract money from Brett Moore for Brian martin and to pay himself upon a claim without merit in order to make the distraction go away.

9. The actions of James Hebron have caused damage to Brett Moore.

Mr Hebron has filed a defence to the writ and statement of claim. Mr Moore's essential submission is that Mr Hebron is aware that Mr Martin was not a P.A.Y.E. taxpayer and is not a worker under the provisions of the *Work Health Act*. Accordingly, it is Mr Moore's contention that Mr Hebron is improperly proceeding with an action on behalf of Mr Martin in circumstances where it has been made clear that Mr Martin was not an employee of Mr Moore and has no claim against Mr Moore.

I am satisfied on the balance of probabilities that Mr Moore has no cause of action against Mr Hebron.

On 1 August 1996, this application came before the Court and was adjourned at the request of Mr Moore to enable both parties to complete further and better discovery in action number 74 of 1996. The application was adjourned to 27 August 1996 and orders made in respect of dates for filing any further affidavit material.

When the matter resumed on 27 August 1996, Mr Moore advised the Court that he had obtained further and better discovery and was ready for this application to proceed. He opposed the defendants application for judgment or an order that his statement of claim be struck out. Mr Moore was not represented at the hearing. He advised that he wished to represent himself.

The parties filed further affidavit material in these proceedings. Mr Moore filed an affidavit sworn 19 August 1996, together with certain annexures. Mr Hebron filed an affirmation dated 23 August 1996. I accept the matters set out in each of these affidavits and based on the affidavit material make the following findings:

On 1 February 1995, Mr Martin and Mr Moore completed a claim form for worker's compensation in respect of an injury suffered by Mr Martin on 10 January 1995. The inference is that at the time they completed this form both Mr Martin and Mr Moore believed Mr Moore to be a worker in accordance with the provisions of the *Work Health Act*. A copy of the claim form is annexed to the affirmation of Mr Hebron affirmed 23 August 1996. Also annexed to this affirmation is a copy of a letter from the Territory Insurance Office dated 15 November 1995 which, omitting formal parts, states as follows:

"Re: YOUR WORK HEALTH CLAIM -
DATE OF INJURY - 10 JANUARY 1995
EMPLOYER - SUREFIX ALUMINIUM

With reference to your Work Health Claim, we wish to advise that payment of your compensation benefits will cease immediately.

The reason for our decision is due to misrepresentation by yourself and your employer, payments commenced by unlawful means with the claim form indicating that you are a P.A.Y.E. taxpayer.

From our investigations, it has been revealed that you are not a P.A.Y.E. taxpayer and therefore not a worker under the Work Health Act.

We have this day advised your employer of our decision.

Should you wish to discuss any aspect of this matter, please contact this Office."

Also annexed to the affirmation of Mr Hebron is copy of a statutory declaration signed by Brian Martin dated 10 November 1995 in which Mr Martin states the reasons why he believed himself to be an employee of Mr Moore trading as Surefix Aluminium at the time Mr Martin sustained his injury on 10 January 1995.

On 15 August 1996 the Master of the Supreme Court delivered a decision in respect of an application by Mr Moore against Mr Martin in suit number 74 of 1996 in which Mr Moore sought summary judgment against Mr Martin pursuant to Order 23.03 of the Supreme Court Rules. Mr Moore alleged a complete defence by reasons of s52 of the *Work Health Act*. The Master dismissed the application and stated it was not possible to be satisfied with sufficient certainty that the plaintiff could not succeed (see *Wilson v Union Insurance Co Ltd* (1992) 112 FLR 166, 181).

A copy of the Master's reasons for decision is annexed to the affidavit of Mr Moore sworn 19 August 1996.

I accept the evidence of Mr Hebron contained in his affirmation dated 30 July 1996 that Mr Martin is funded in action number 74 of 1996 by the Northern Territory Legal Aid Commission.

In suit number 74 of 1996 Mr Martin claims damages against Mr Moore as a result of injuries he sustained on or about 10 January 1995 during the course of his employment with Mr Moore. A copy of the statement of claim dated 13 June 1996 is annexed to the affidavit of Mr Moore sworn 31 July 1996.

Mr Martin's claim is a common law claim for damages and he does not assert in the statement of claim that he was a worker in accordance with the provisions of the *Work Health Act*. Mr Alderman, counsel for Mr Hebron, stresses the distinction between a common law claim for damages arising from the injuries and an application under the provisions of the *Work Health Act* (*Pursell v Newberry* (1968-69) 42 ALJR 148). Whether or not Mr Martin is ultimately successful in any claim against Mr Moore is not to the point. He has a claim which he is entitled to pursue.

Mr Hebron does not owe a duty of care to Mr Moore.

> "A solicitor acting for a party who is engaged in 'hostile' litigation owes a duty to his client and to the court, but he does not normally owe any duty to his client's opponent: *Business Computers International Ltd. v. Registrar of Companies* [1987] 3 W.L.R. 1134. This is not to say that, if the solicitor is guilty of professional misconduct and someone other than his client is damnified thereby, that person is without a remedy, for the court exercises a supervisory jurisdiction over solicitors as officers of the court and, in an appropriate case, will order the solicitor to pay compensation: *Myers v. Elman* [1940] A.C. 282. That said, it should be emphasised that in the present case there is no allegation and no suspicion of any misconduct upon the part of the defendant solicitors.
>
> I would go rather further and say that, in the context of 'hostile' litigation, public policy will usually require that a solicitor be protected from a claim in negligence by his client's opponent, since such claims could be used as a basis for endless re-litigation of disputes: *Rondel v. Worsley* [1969] 1 A.C. 191." *Al-Kandari v J.R. Brown & Co* [1988] 1 QB 665 Lord Donaldson of Lymington M.R. at 672.

There is no evidence that in this matter Mr Hebron has stepped outside his role as solicitor for Mr Martin and accepted responsibility toward both his client and Mr Moore.

I apply the principle expressed by Bingham LJ in *Al-Kandari v J.R. Brown & Co (C.A.)* (supra) at 675:

> "In the ordinary course of adversarial litigation a solicitor does not owe a duty of care to his client's adversary. The theory underlying such litigation is that justice is best done if each party, separately and independently advised, attempts within the limits of the law and propriety and good practice to achieve the best result for himself that he reasonably can without regard to the interests of the other party. The duty of the solicitor, within the same limits, is to assist his client in that endeavour, although the wise solicitor may often advise that the best result will involve an element of compromise or give and take or horse trading. Ordinarily, however, in contested civil litigation a solicitor's proper concern is to do what is best for his client without regard to the interests of his opponent."

Mr Moore can seek costs against Mr Hebron personally in suit number 74 of 1996 if Mr Hebron is guilty of misconduct in the preparation of his client's case (*Myers v Elman* 1940 AC 282). Misconduct includes gross negligence (*Blackwell v Barroile Pty Ltd and Others* (1994) 123 ALR 81, (1994) 51 FLR 347; *Orchard v South Eastern Electricity Board* [1987] 1 All ER 95 at 98-99; *Da Sousa & Anor v Minister of State for Immigration, Local Government and Ethnic Affairs* (1993) 114 ALR 708).

In his statement of claim, Mr Moore makes a number of allegations about the conduct of Mr Hebron in conducting the litigation on behalf of Mr Brian Martin against Mr Moore, suit number 74 of 1996. Mr Moore has not provided any evidence to support these allegations. Mr Moore has already failed in a hearing before the Master to obtain summary judgment against Mr Martin in suit number 74 of 1996.

Mr Martin is claiming damages in common law against Mr Moore and not under the provision of the *Work Health Act*. Whether or not Mr Martin succeeds against Mr Moore in his claim will be determined at the completion of the hearing of suit number 74 of 1996. If at the hearing of suit number 74 of 1996, a judge were to determine there had been misconduct on the part of Mr Hebron in the conduct of the litigation and such misconduct includes negligence, then Mr Moore may have a claim for costs personally against Mr Hebron. In this action between himself and Mr Hebron, Mr Moore has not put forward any evidence to support a finding of misconduct by Mr Hebron.

In an application for summary judgment under Order 23 of the Supreme Court Rules, the burden of proof lies on the applicant. The applicant bears a heavy burden (*Wilson v Union Insurance Co* (1992-93) 112 FLR 166).

I am satisfied that in these proceedings there is no real question to be tried and the plaintiff has no cause of action (*Australia and New Zealand Banking Group Ltd v David* (1991) 105 FLR 403).

In my opinion, the applicant/defendant has satisfied the Court the plaintiff has no cause of action and that this is an appropriate matter in which to order summary judgment in favour of the defendant.

I make an order for judgment in favour of the defendant.

The parties are at liberty to apply on the question of costs.

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