

Court of Appeal File No. _____
Superior Court of Justice Court File No. 00-CV-187168CM4

COURT OF APPEAL FOR ONTARIO

BETWEEN:

NANCY OLIVIERI

Plaintiff/ Moving Party
(Respondent in Appeal)

- and -

BARRY SHERMAN, JACK M. KAY and APOTEX INC.

Defendants / Responding Parties
(Appellants in Appeal)

NOTICE OF APPEAL

THE DEFENDANTS APPEAL to the Court of Appeal for Ontario from the Order of the Honourable G.R. Strathy (the "Motions Judge") dated November 28, 2008 made at Toronto.

THE APPELLANTS ASK that the Order be set aside and judgment be granted as follows:

1. An order dismissing the motion by the Plaintiff, Nancy Olivieri ("Olivieri");
2. In the alternative, an order that the issues raised in the motion by Olivieri be determined by way of a trial of issues and consolidated with the action in

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Court File No. CV-08-00365567;

3. In the further alternative, an order that the sum payable by Apotex pursuant to the Order of the Motions Judge be paid into Court to be held, pending the final determination of the action in Court File No. CV-08-0036556, the consent of the parties or further order of the Court;

4. The costs of this appeal and the motion below to the Appellants; and

5. Such further and other relief as this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

History of the Proceeding

1. In 2000, Olivieri commenced three actions against Apotex and certain of its officers and certain media entities in respect of media publications that appeared in late 1999 and early 2000. All three of the actions were founded in defamation, and stemmed from a scientific disagreement between Olivieri and Apotex regarding deferiprone, a drug manufactured by Apotex. The actions were subsequently consolidated in the within action (the "Olivieri Defamation Action");

2. Apotex filed a counterclaim in the Olivieri Defamation Action seeking damages for defamatory statements that Olivieri had made (and continued to make throughout the litigation) about Apotex and a drug being developed by it,

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deferiprone. In its Consolidated Statement of Defence and Counterclaim, Apotex specifically asserted claims in respect of Olivieri's public statements;

3. On November 3, 2004, the parties agreed to certain terms of a settlement at a mediation (the "Settlement"). As part of the Settlement, the parties agreed to a non-disparagement provision, and in particular, Olivieri agreed she would not "disparage Apotex, deferiprone, and clinicians [and] researchers who use deferiprone";

4. Apotex has consistently taken the position that the non-disparagement provision was a fundamental term of the Settlement. A resolution of the lawsuits was of no interest to Apotex without a complete cessation of Olivieri's public disparagement of Apotex and deferiprone. From and after the mediation, however, Olivieri continued to disparage Apotex and deferiprone, in breach of the Settlement;

5. Consequently, when, a year after the mediation, Olivieri sought to conclude the Settlement, Apotex took the position that Olivieri had no intention of being bound by its terms or refraining from disparaging Apotex, and had therefore by her conduct repudiated any settlement reached at the mediation;

6. Another nine months later, in August 2006, Olivieri brought a motion pursuant to Rule 49.09 of the *Rules of Civil Procedure* to enforce the Settlement. In response, Apotex asserted that either there was no settlement because there was

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no meeting of the minds on at least one essential term, being the non-disparagement provision, or in the alternative, Olivieri had, through her conduct, repudiated the Settlement;

7. The judge hearing that motion (Justice Campbell) held that there was no meeting of the minds in respect of the non-disparagement provision, and therefore there was no settlement. As a result, he did not address Apotex's alternate position that Olivieri had repudiated any settlement. Olivieri appealed, and in July 2007 her appeal was allowed. On the appeal, Apotex asserted that either there was no settlement, or Olivieri had by her conduct repudiated it.

8. In its reasons, the Court of Appeal held:

- (a) [t]he appellant is entitled to a declaration that the parties entered into an enforceable settlement agreement on November 5, 2004;
- (b) the motions judge did not decide the issue of whether the settlement agreement was repudiated or breached;
- (c) there was insufficient evidence before the Court of Appeal to determine the question of repudiation or breach; and
- (d) the judgment was "made without prejudice to the respondents' right to take such steps as they deem appropriate to

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pursue their allegations that Dr. Olivieri has breached or repudiated the settlement agreement.”

9. More than a year after the appeal was granted, on or about July 10, 2008, Olivieri's counsel wrote for the first time seeking to “enforce” the Settlement. In response, Apotex's counsel reiterated Apotex's position that Olivieri had repudiated the Settlement and therefore Apotex had no further obligations under it. Olivieri then brought the motion decided by the Motions Judge seeking either “directions on the settlement” or an order enforcing the settlement;

10. Although not obligated to do so as a matter of law, Apotex commenced a separate action against Olivieri (in Court File No. CV-08-00365567) for relief arising from Olivieri's repudiation and/or breach of the Settlement and seeks in that action, among other things: (i) a declaration that Olivieri has repudiated the Settlement; (ii) damages; and (iii) in the alternative, damages for breach of the Settlement and a declaration that Apotex is entitled to set off its damages against any sum alleged to be owing to Olivieri under the Settlement (the “Repudiation Action”);

11. Olivieri's motion was heard by the Motions Judge on November 28, 2008. The Motions Judge granted Olivieri's motion and ordered the parties to comply with the Settlement;

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Errors of the Motions Judge

12. The Motions Judge erred in law by ignoring that the Court of Appeal's finding that there was a valid settlement was made without prejudice to Apotex's rights regarding Olivieri's breach or repudiation. The relief granted by the Motions Judge ignores the Court of Appeal's specific cautionary note that Apotex is permitted to take such steps as it deems appropriate to claim repudiation and/or breach;

13. The Motions Judge erred in law by failing to recognize that the result of the Court of Appeal's decision was a finding of a contract in the form of the Settlement. Olivieri claims that Apotex breached that contract by failing to pay the amount specified in the contract, while Apotex claims (and has always claimed) that, by her conduct, Olivieri has repudiated or breached the contract which was found by the Court of Appeal to exist. The determination of the competing claims of breach of contract are not claims to be resolved in a "motion for directions" or on motion for "enforcement" brought in the prior action; the prior action is concluded with a finding of a contract, and subsequent claims regarding the breach of that contract are for the new action. It was an error of law for the Motions Judge to disregard that legal issue;

14. The Motions Judge erred in law in failing to dismiss the Plaintiff's motion for lack of jurisdiction in that the prior action was concluded following the ruling

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of the Court of Appeal;

15. The Motions Judge erred in law in failing to recognize that a repudiatory breach by Olivieri allows Apotex, the non-repudiating party, the remedy of electing to put an end to all unperformed obligations of the parties;

16. The Motions Judge erred in law by granting judgment on the Settlement despite Apotex's claims of repudiation and/or set off in the Repudiation Action, thereby effectively granting judgment before trial in the Repudiation Action and depriving Apotex of substantially the whole benefit of its legal positions therein;

17. The Motions Judge erred in law in ordering the parties to comply with the Settlement, where there are factual issues in dispute as to Olivieri's repudiation of the Settlement which would require a trial of the issues;

18. The Motions Judge erred in law in failing to order a trial of the issues on the Motion to be determined together with the Repudiation Action;

19. The Motions Judge erred in law in failing to recognize that there are material facts and issues of credibility with respect to Olivieri's post-mediation conduct which are in dispute and could not be resolved by way of a motion and on a paper record; and

20. Such further and other grounds as counsel may advise and this Honourable Court permit.

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THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. The Appellant has an appeal as of right pursuant to section 6.1(b) of the *Courts of Justice Act* on the basis that the Order appealed from is a final order of the Superior Court of Justice;
2. Leave is not required; and
3. Such other bases of jurisdiction as counsel may advise and this Honourable Court may allow.

December 22, 2008

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- and -

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APPELLANTS' CERTIFICATE

The appellants certify that the following evidence is required for the appeal, in the appellants' opinion:

1. All the documents filed by the parties on the Motion before Mr. Justice Strathy, including:
 - (a) The Motion Record of the Plaintiff;
 - (b) The Responding Motion Record of the Defendants;
 - (c) The Supplementary Motion Record of the Plaintiff;
 - (d) The Supplementary Motion Record of the Defendant;

- (e) The transcript of the cross examination of Nancy Olivieri; and
- (f) The transcript of the cross examination of Michael Spino.

December 22, 2008

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