CITATION: Thomas v. Aviva, 2022 ONSC 1728
COURT FILE NO.: CV-18-595830
DATE: 20220512

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
YVONNE ASLYN THOMAS and MARCIA JENNIFER THOMAS	)	*Dharshika Pathmanathan*, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	*Brian Yung*, for the Defendants
	)	
SECURITY NATIONAL INSURANCE COMPANY, TD INSURANCE MELOCHE MONNEX, RBC GENERAL INSURANCE COMPANY, AVIVA GENERAL INSURANCE COMPANY and JOHN DOE	)	
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** September 20, 2021, Conference March 18, 2022

A. P. RAMSAY J.

I. *Overview*

[1] These reasons are supplementary to my endorsement dated September 20, 2021, granting the plaintiff's motion, on consent, to amend the statement of claim to reduce the claim for damages to $200,000, and dismissing the balance of the plaintiff's motion to, effectively, have the action governed by the amendments to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"), which came in force on January 1, 2020, eliminating jury trials for actions proceeding under Rule 76, and the associated amendments to Rule 76 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, ushered in by O. Reg. 344/19, which came into force on the same date.

[2] The plaintiffs, Marcia Thomas and Yvonne Thomas, were occupants in a motor vehicle which was rear ended by an unidentified motorist in April 2016. Both joined as co-plaintiffs in commencing this action under the ordinary procedure against their respective automobile liability

insurer for unidentified motorist coverage. The original statement of claim sought damages for each plaintiff in the amount of one million dollars.

[3] In September 2018, the defendants RBC General Insurance and Aviva Canada delivered a statement of defence and jury notice. Multiple proceedings ensued thereafter including cross claims, counterclaims and a third-party claim, the last mentioned brought against the plaintiff, Marcia Thomas. Yet a separate action was commenced by a third occupant, a party under disability, but no motion was before me in that action. The complexity of the proceedings was attenuated somewhat by the dismissal of the third-party claim against Marcia Thomas in 2019, the settlement of her claims in April 2020, and the discontinuance of the action against the defendants Security National and TD Insurance Meloche Monnex in March 2021.

[4] The parties agree that the defendants' available policy limits for unidentified motorist coverage is $200,000 which is, coincidentally, the monetary limit for actions proceeding under Rule 76.

[5] Mandatory mediation was completed on March 1, 2020. At the time of the motion, the plaintiff had not yet set the matter down for trial.

II. *Nature of the Plaintiff's Motion*

[6] The sole remaining plaintiff, Yvonne Thomas, moved to amend the statement of claim to reduce her claim for damages to $200,000, and sought to have the action transferred to and continue under Rule 76 and governed by the 2020 procedural amendments. The plaintiff also sought to strike the jury notice delivered by the remaining defendants.

III. *Position of the Parties*

a. The Plaintiff

[7] The plaintiff contends that as the damages claimed are now within the monetary jurisdiction for a simplified procedure action, the recent Rule 76 procedural amendments mandate an automatic transfer of the action to continue under that rule. In tandem with that argument, the plaintiff submits that the onus is now on the defendants to prove non-compensable prejudice, and in the absence of non-compensable prejudice demonstrated by the defendants, the striking of the defendants' jury notice should be automatic in light of the amendments. The plaintiff further contends that striking the defendants' jury notice is desirable in the interest of justice. In her factum, the plaintiff indicated that "*given the impact that the COVID pandemic has had on the judiciary system and the resultant repeated postponements of jury trials and resultant backlog, it would be just in the circumstances to proceed to trial with judge alone*".

b. The Defendants

[8] The defendants consented to the amendment but opposed the transfer of the action to be governed by the simplified procedure and the striking of the jury notice. The defendants rely upon

the transition provision in Rule 76.14, which deals with a jury notice delivered prior to January 1, 2020. They submit that the defendants' right to a civil jury trial is a statutory right, governed by s. 108 of the CJA, as well as a substantive right. They argue that the onus is on the plaintiff to prove prejudice justifying striking the defendants' jury notice. They submit that the plaintiff's motion is premature as the action has not yet been set down for trial, and they distinguish the decisions relied upon by the plaintiff with fixed trial dates or delay in proceeding to trial caused by the COVID-19 pandemic.

IV. ***The Issues***

[9] The issues raised on this motion are as follows:

i. Should an amendment of a claim to limit damages to the Rule 76 limits result in a mandatory transfer of the action to continue under Rule 76?

ii. Should a party's jury notice, delivered before January 1, 2020, be struck where a statement of claim is amended to comply with the monetary limits under Rule 76?

V. ***Analysis***

Issue 1 - Should an amendment to limit damages to the Rule 76 limits result in a mandatory transfer of the action to continue under Rule 76?

[10] In her factum, the plaintiff submits that by virtue of rr. 26.01 (amendments to pleadings) and 76.02(7)(b) (claim amended to comply with the monetary limit) it is mandatory that the action continue under Rule 76.

[11] The plaintiff also relies on the decision of Mew J. in *Crawford* v. *Standard Building Contractors Limited*, 2020 ONSC 5767 ["*Crawford*"]. The action in that case was commenced in December 2019 under Rule 76, though the damages claimed was $137,000, therefore, in excess of the $100,000 limit which existed at the time. The defendant objected to the action continuing under Rule 76. The amendments to the rules increasing the monetary jurisdiction under Rule 76 to $200,000 came into force a few weeks after the claim was issued. The plaintiff brought a motion to continue the action under Rule 76, and in granting the motion Mew J. ordered that the new procedural amendments should apply to the action.

[12] The plaintiff urges the court to adhere to the general principles underlying the *Rules of Civil Procedure* to secure the "just, most expeditious and least expensive determination of every civil proceeding on its merits": r. 1.04(1). On this issue, the plaintiff relies on the comments of Mew J. in *Crawford*, at para. 21, wherein he observed that: "*Rule 1.04 (1.1) requires courts, in the application of the Rules of Civil Procedure, to make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in a proceeding. The simplified procedure is a practical manifestation of this overarching principle*."

[13] I agree with Mew J.'s comments. However, *Crawford* is distinguishable. In *Crawford*, the action was commenced under Rule 76, and the motion to amend the statement of claim occurred at the pleadings stage. The action was commenced only a few weeks before the amendments to rule 76. *Crawford* did not involve a jury notice. In the present case, the motion to transfer the action is taking place after all steps in the litigation, save for setting the action down for trial, have been completed. Unlike *Crawford*, this action (unless the jury notice is struck) involves the adverse party delivering a jury notice. Additionally, in the present case, multiple parties have come and gone from the action. Based on the pleadings alone, filed on this motion, complexity and increased costs would have been a natural consequence given the multiple parties and proceedings. Proportionality should be front end loaded. This is reflected in the fact that the amendments to Rule 76 also ushered in a limit on costs ($50,000), and a limit on disbursements ($25,000). The plaintiff's position that the procedural amendments are mandatory would suggest that the limits on costs and disbursements would apply. However, r. 76.12.1 (2), a transition provision, expressly states that the limits on costs and disbursements do not apply to an action commenced before January 1, 2020.

[14] I therefore disagree with the plaintiff that as damages are now reduced to the limits for simplified procedure actions, a transfer to Rule 76 is mandatory. In my view, given the existence of the defendants' jury notice any consideration of whether the action may be transferred to continue under Rule 76 is, by necessity, tethered to the existence of the defendants' jury notice.

[15] Rule 76.14, the transition provision, refers to two clauses which are applicable to the situation, specifically, rr. 76.02(7)(c) and 76.02.1.

[16] Rule 76.02(7)(c) provides as follows:

> (7) An action that was not commenced under this Rule, or that was commenced under this Rule but continued under the ordinary procedure, is continued under this Rule if,
>
> (a) the consent of all the parties is filed;
>
> (b) no consent is filed but,
>
> (i) the plaintiff's pleading is amended under Rule 26 to comply with subrule (1), and
>
> (ii) all other claims, counterclaims, crossclaims and third party claims comply with this Rule; or
>
> (c) a jury notice delivered in accordance with subrule 76.02.1 (2) is struck out.
>
> [Emphasis added.]

[17] Rule 76.02.1 states as follows:

> 76.02.1 (1) An action that is proceeding under this Rule shall not be tried with a jury and, subject to subrule (2), no party to the action may deliver a jury notice under rule 47.01.

Subrule (2) deals with the exceptions for five intentional torts, but even where a jury notice is delivered with respect to actions for those enumerated torts, the action may no longer continue under Rule 76.

Issue 2 - Should a party's jury notice, delivered before January 1, 2020, be struck where a statement of claim is amended to comply with the monetary limits under Rule 76?

[18] The plaintiff also relies on the decision of Muszynski J. in *Lightfoo*t v. *Hodgins et al*., 2021 ONSC 1950, 65 C.P.C. (8th) 371 [*Lightfoot*], in support of her position that amending a statement of claim to bring an action within the monetary limits for the simplified procedure affects a jury notice delivered before January 1, 2020. The plaintiff argues that based on *Lightfoot,* the amendment rules are mandatory unless the opposing party can demonstrate non-compensable prejudice. Relying on *Lightfoot,* the plaintiff submits that the onus is on the defendants to provide evidence of non-compensable prejudice to avoid the jury notice being struck. In *Lightfoot,* Muszynski J. allowed an amendment to the statement of claim and struck the defendant's jury notice.

[19] In my view, *Lightfoot* is distinguishable. Muszynski J. considered the impact of the COVID-19 pandemic on the administration of justice as a whole, and certain admissions made by the parties in determining that it would be in the interests of justice to dispense with the defendant's jury notice. And, while she touched on the changes to s. 108, she did not consider the principles of statutory interpretation, nor does it appear that that was necessary given the pandemic considerations.

[20] In my view, the starting point is to determine what was intended by the legislature in interpreting the statutory and regulatory amendments, which work in concert to govern a litigant's right to a civil jury trial. The common law principles of statutory interpretation in respect of amendments to statutes and regulations may be impacted, admittedly, by the directives with respect to interpreting them urged by the *Legislation Act, 2006,* S.O. 2006, c. 21, Sched. F.

[21] I agree with the defendants that the right to a civil jury trial is therefore a statutory right. The right to a jury trial in a civil action is provided for by s. 108 of the CJA.

[22] I also agree with the defendants' contention that the right to a civil jury trial is a substantive right; a right supported by a robust body of jurisprudence and recognized by Canada's highest court. In *King* v. *Colonial Homes Ltd*., [1956] S.C.R. 528, at p. 533, the Supreme Court of Canada stated: "the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons". The jurisprudence is now well established that the right to a civil jury trial is a substantive one which should not be interfered with without just cause: *King*; *Graham* v. *Rourke* (1990), 75 O.R. (2d) 622 (C.A.), at p. 625; *Cowles* v. *Balac* (2006), 83 O.R. (3d) 660 (C.A.), at para. 36, leave to appeal refused, [2006] S.C.C.A. No. 596; and *Kempf* v. *Nguyen*, 2015 ONCA 114, 124 O.R. (3d) 241.

[23] The starting point, however, is the statutory framework for a right to a jury trial. The statutory right to a civil jury trial in Ontario is found in s. 108 of the CJA, which is the enabling legislation for Rule 76. Amendments to the CJA were made through Bill 100, *Protecting What Matters Most Act (Budget Measures), 2019* (assented to 29 May 2019), S.O. 2019, c. 7. Schedule 15 of Bill 100 amends the CJA to provide that the issues of fact and the assessment of damages in actions proceeding under Rule 76 shall be tried without a jury.

[24] The relevant (redacted) portion of the Bill 100 states:

SCHEDULE 15
COURTS OF JUSTICE ACT

2 Subsection 108 (2) of the Act is repealed and the following substituted:

Trials without jury
(2) The issues of fact and the assessment of damages in an action shall be tried without a jury in the following circumstances:

1. The action involves a claim for any of the following kinds of relief:
   i. Injunction or mandatory order.

   ii. Partition or sale of real property
   …
2. The action is proceeding under Rule 76 of the Rules of Civil Procedure.

Same
(2.1) Paragraph 2 of subsection (2) does not apply to an action in respect of which a jury notice has been delivered in accordance with the Rules of Civil Procedure before January 1, 2020.

Commencement
3 (1) Subject to subsection (2), this Schedule comes into force on the day the *Protecting What Matters Most Act (Budget Measures), 2019* receives Royal Assent.

(2) Section 2 comes into force on January 1, 2020.

[Emphasis added.]

[25] Prior to the amendments to the CJA, the relevant portion of s. 108 read as follows:

Jury Trials
108 (1) In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.

> **Trials without jury**
> (2) The issues of fact and the assessment of damages in an action shall be tried without a jury in respect of a claim for any of the following kinds of relief:
>
> 1. Injunction or mandatory order.
> 2. Partition or sale of real property.
>
> …
>
> (3) On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury.

[26] The relevant portion of s. 108, as amended, provides as follows:

> **Jury trials**
> 108 (1) In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.
>
> **Trials without jury**
> (2) The issues of fact and the assessment of damages in an action shall be tried without a jury in the following circumstances:
>
> 1. The action involves a claim for any of the following kinds of relief:
>   i. Injunction or mandatory order.
>   ii. Partition or sale of real property.
>
> …
>
> 2. The action is proceeding under Rule 76 of the Rules of Civil Procedure.
>
> **Same**
> (2.1) Paragraph 2 of subsection (2) does not apply to an action in respect of which a jury notice **has been delivered in accordance with the Rules of Civil Procedure before January 1, 2020**.
>
> **Same**
> (3) On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury. [Emphasis added.]

[27] At common law, there is strong a presumption that legislation does not have retrospective application: *Gustavson Drilling (1964) Ltd*. v. *M.N.R.*, [1977] 1 S.C.R. 271 [*Gustavson Drilling*], at p. 279; Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at p. 512. It is presumed that the legislature does not intend to interfere with vested rights: *Dikrainian* v. *Québec (Procureur général)*, 2005 SCC 73, [2005] 3 S.C.R. 530, at paras. 32-33 and 37-40.

[28] In *Tran* v. *Canada (Public Safety and Emergency Preparedness*), 2017 SCC 50, [2017] 2 S.C.R. 289, at para. 43, Justice Côté, speaking on behalf of the full court provided the rationale for the presumption as follows:

> *The purpose of this presumption is to protect acquired rights and to prevent a change in the law from "look[ing] to the past and attach[ing] new prejudicial consequences to a completed transaction" (Driedger (1983), at p. 186). The presumption works such that "statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act*. [Citations omitted.]

[29] As noted above, the amendments to s. 108 came into force on January 1, 2020. The amendments were tethered to a transition provision at s. 108(2.1), which expressly stated that the amendments did not apply to an action where a jury notice had been delivered in accordance with the *Rules of Civil Procedure* before the amendments came into force, that is, January 1, 2020.

[30] Rule 47.01, as it then was, provided as follows:

> Actions to be Tried with a Jury
>
> 47.01 *A party to an action may require that the issues of fact be tried or the damages be assessed, or both, by a jury, by delivering a jury notice (Form 47A) at any time before the close of pleadings, unless section 108 of the Courts of Justice Act or another statute requires that the action be tried without a jury*. [Emphasis added.]

[31] When the defendants delivered their jury notice in September 2018, there was no prohibition under the CJA against them doing so. Accordingly, in this case, the defendants delivered their jury notice together with their statement of defence in accordance with s. 108, as it then was, and rule 47.01 of the *Rules of Civil Procedure*.

[32] The defendants therefore had an acquired or vested substantive legal right to a civil jury trial. There is a common law principle of statutory interpretation which suggest a strong presumption against interpreting the amendments to s. 108 of the CJA so as to eliminate jury trials for actions under Rule 76, if delivered prior to January 1, 2020.

[33] As a matter of construction, a statute should not be given a construction that impairs existing rights unless its language clearly indicates such an intention: *Gustavson Drilling,* at p. 282. Since a retrospective application of legislation may affect settled expectations, not surprisingly, such application may result in unfairness. It has therefore been said by Canada's highest court, that the presumption against retrospectivity also protects fairness: *R.* v. *K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 25; *Tran*, at para. 45.

[34] The presumption against retrospectivity also involves the engagement of the rule of law. In *Tran*, at para. 44, Justice Côté cited the following comments made by Lord Diplock stating that

the rule of law "*requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it*".

Amendments to the regulation

[35] The statutory amendments to the CJA, ushered in by the *Protecting What Matters Most Act (Budget Measures), 2019* in May 2019, were soon followed by amendments to the *Rules of Civil Procedure* brought in by O. Reg. 344/19, filed on October 23, 2019, five months later. Both the amendments to the CJA and the regulatory amendments to the *Rules of Civil Procedure* came into force however on January 1, 2020.

[36] Prior to January 1, 2020, litigants were able to deliver a jury notice for an action governed by the procedure under rule 76. The prohibition against the delivery of a jury notice for actions governed by rule 76 is contained in r. 76.02.1(1), which was added by O. Reg. 344/19. Rule 76.02.1(1), stipulates that a proceeding under the simplified procedure shall not be tried with a jury, except in the cases of the intentional torts enumerated in r. 76.02.1(2), namely slander, libel, malicious arrest, malicious prosecution and false imprisonment. But even that latter exception has a twist. The text of r. 76.02.1(1) is as follows:

> 76.02.1 (1) "*An action that is proceeding under this Rule shall not be tried with a jury and, subject to subrule (2), no party to the action may deliver a jury notice under rule 47.01*."

[37] As for the enumerated exceptions in respect of the intentional torts in r. 76.02.1(2), where a jury notice has been delivered in the enumerated actions, the action must continue under the ordinary procedure (r. 76.02.1(3)).

[38] In the case before me, the defendants delivered a jury notice in September 2018. Rule 76 contains a "simplified procedure" (r. 76.01(1)), and the application of that "simplified procedure" is set out at the outset. Procedural provisions are an exception to the presumption against retrospectivity. Procedural provisions are intended to have immediate effect, but there may be exceptions. The Supreme Court of Canada has indicated that "procedural legislation designed to govern only the manner in which rights are asserted or enforced" applies immediately to both pending and future cases because such legislation does not affect the "substance" of the relevant rights: *R.* v. *Dineley*, 2012 SCC 58, [2012] 3 S.C.R. 272, at para. 10 [*Dineley*]. However, the Supreme Court also indicated that this presumption does not apply to procedural legislation if the legislation affects substantive rights: *Dineley*, at para. 11.

[39] The Ontario Court of Appeal describes substantive law as creating rights and obligations. In *Somers* v. *Fournier* (2002), 60 O.R. (3d) 225 (C.A.), at para. 14, the court described the difference between a substantive law and procedural law as follows:

> *[S]ubstantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. It regulates the conduct of*

> *Courts and litigants in respect of the litigation itself whereas substantive law determines their conduct and relations in respect of the matters litigated*.

[40] In addition, while procedural amendments are presumed to apply immediately, except where substantive rights are affected, as noted above, the language in the transition provision, rule 76.14, carves out certain exceptions, where a jury notice was delivered before January 1, 2020. The text of the rule states:

> Transition — Jury Trials
>
> 76.14 *Clauses 76.01 (1) (d), 76.02 (5) (e) and 76.02 (7) (c) and rule 76.02.1 do not apply to an action in respect of which a jury notice has been delivered before January 1, 2020.*

[41] In interpreting the intention of the legislature with respect to the elimination of jury notices for rule 76 actions, and jury notices delivered before January 1, 2020, recourse may also be made to the *Legislation Act*. Pursuant to s. 17 of the *Legislation Act*, a regulation is defined thusly:

> "*regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include*,
>
> *(a) a by-law of a municipality or local board as defined in the Municipal Affairs Act, or*
>
> *(b) an order of the Ontario Land Tribunal*

[42] Part VI of the *Legislation Act* governs the interpretation of statutes and regulations. Pursuant to s. 46 of the *Legislation Act*, there is a presumption that every provision of Part VI applies to every Act and regulation. However, s. 47 provides for the rebuttal of its application where a contrary intention is indicated, or the context requires otherwise. The section reads:

> 47 Section 46 applies unless,
>
> (a) a contrary intention appears; or
>
> (b) its application would give to a term or provision a meaning that is inconsistent with the context.

[43] Under Part VI, ss. 52(1), (3) and (4) are relevant, and provide as follows:

> Effect of amendment and replacement
>
> Application

52 (1) *This section applies,*

(a) if an Act is repealed and replaced;

(b) if a regulation is revoked and replaced;

(c) if an Act or regulation is amended.

…

Proceedings continued

(3) *Proceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended one as much as possible*.

New procedure

(4) *The procedure established by the new or amended Act or regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment*.

[44] Since the interpretation tools under Part VI of the *Legislation Act* are rebutted by reading the transition provision in context, the court must resort back to the common law principles of statutory interpretation. At common law, the court has held that regulations may be useful interpretative tools where the regulations are closely intertwined with a statute or were enacted contemporaneously with a statute under review by the court: *Monsanto Canada Inc*. v. *Ontario (Superintendent of Financial Services)* (2002), 62 O.R. (3d) 305 (C.A.), at paras. 62-64, aff'd 2004 SCC 54, [2004] 3 S.C.R. 152; *Greater Toronto Airports Authority* v. *International Lease Finance Corp*. (2004), 69 O.R. (3d) 1 (C.A.), at para. 104.

[45] In this respect, Professor Sullivan observes at p. 246 in *Driedger*, "*Where the provision to be interpreted appears in a regulation, it is read in the context of both the regulation and the enabling Act as a whole*". Professor Sullivan goes on to note: "*Because regulations are a subordinate form of legislation, usually made after the enabling Act has been passed, they have limited value in interpreting provisions of the Act*".

[46] Professor Sullivan also states, at p. 246:

> *In appropriate circumstances, however, where the Act and the regulations are closely meshed so as to form an integrated scheme, provisions from both are interpreted in the light of that overall scheme*.

[47] There does not appear to be any incoherence or conflict between the CJA and rule 76. In *Friends of the Oldman River Society* v. *Canada (Minister of Transport*), [1992] 1 S.C.R. 3, at p. 38, Justice La Forest, writing on behalf of the Supreme Court of Canada, indicated that a regulation, which is a subordinate legislation, cannot conflict with its enabling parent legislation. He urged courts, where possible, to prefer an interpretation that reconciles the two.

[48] However, where there is a conflict between the two, the statutory provision prevails: *Driedger*, at p. 185. In this case, the transition provision in the CJA would prevail over the transition provision in Rule 76, as amended.

[49] In my view, the amendments to the CJA and to the *Rules of Civil Procedure* were closely meshed on the one issue: jury notices would not be available for actions under Rule 76 if delivered after January 1, 2020. The transition provision is explicit in s. 108(2.1) of the CJA which excludes actions in which a jury notice was delivered before January 1, 2020 and picked up in the transition provision in O. Reg. 344/19, amending rule 76.

[50] In this case, the court can assume that the legislature did not intend that the provisions set out above apply to any jury notice delivered by a party before January 1, 2020, as the transition provision expressly excluded them, and for actions commenced under the ordinary procedure, by implication, they could only be transferred to continue under the simplified procedure, after January 1, 2020, if the jury notice were struck.

[51] The test to be applied by the Court on a motion to strike a jury notice is articulated by the Court of Appeal in *Cowles* v. *Balac*, 2006 CanLII 34916 (ONCA), at para. 30:

> *A party moving to strike a jury bears the onus of showing that there are features in the legal or factual issues to be resolved, in the evidence, or in the conduct of the trial which merit the discharge of the jury. In the end, a court must decide whether the moving party has shown that justice to the parties will be better served by the discharge of the jury*.

[52] In *Hunt (litigation Guardian of)* v. *Sutton Group Incentive Realty* (2002), 2002 CanLII 45019 (ON CA), 162 O.A.C. 186, Austin J.A. stated that the onus on the moving party is "substantial", since the right to a civil jury trial is substantive.

[53] In seeking to strike the jury notice, the plaintiff did not discharge the onus of proving that the interest of justice favoured a striking of the jury notice. Only general statements were made by counsel for the plaintiff about the impact of the COVID pandemic. There was no evidence before me from the plaintiff on the issue of prejudice or delay in getting to trial. In fact, the only affidavit filed was from the plaintiff's lawyer. The record before me was perhaps hampered by the fact that the action was not yet set down for trial and therefore, no trial date was on the horizon. Since the action was not set down for trial at the time of the motion, the decisions relied upon by the plaintiff to strike the jury notice in the context of trial delay due to the COVID-19 pandemic have no applicability to the facts before me.

VI. *Conclusion*

[54] In summary, I would conclude that the amendments did not take away the defendants' substantive law right to a jury trial where the jury notice was delivered before January 1, 2020, even if the claim is amended to claim damages within the monetary limits under rule 76. Read in concert, the transition provision in s. 108(2.1) of the CJA and rule 76.14 of the *Rules of Civil Procedure*, make it clear that the amendments with respect to eliminating jury trials under Rule 76

were not to have retrospective (retroactive) effect, but rather, were to operate prospectively, for any jury notice delivered after January 1, 2020. That being the case, the plaintiff's motion to strike the defendants' jury notice before trial fails. In the result, though the damages claimed by the plaintiff have been amended to comply with the monetary jurisdiction of actions proceeding under Rule 76, the existence of a jury notice forecloses the matter being transferred to continue under Rule 76.

[55] The parties may treat these supplementary Reasons as the date of the order, for appeal purposes only.

[56] If there are any outstanding matters to be dealt with, that the parties were not able to resolve, including the form of the order, counsel may contact my assistant to schedule a further case conference.

A. Ramsay J.

Released: May 12, 2022

CITATION: Thomas v. Aviva, 2022 ONSC 1728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

YVONNE ASLYN THOMAS and MARCIA JENNIFER THOMAS

Plaintiffs

– and –

SECURITY NATIONAL INSURANCE COMPANY, TD INSURANCE MELOCHE MONNEX, RBC GENERAL INSURANCE COMPANY, AVIVA GENERAL INSURANCE COMPANY and JOHN DOE

Defendants

REASONS FOR JUDGMENT

A. Ramsay J.

Released: May 12, 2022